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ARTICLE

The New Recipe for a General Principle of Law: Premise Theory to "Fill in the Gaps"

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Abstract

This article proposes a new theory, "premise theory", to account for recent international criminal courts' practice on finding general principles of law. After analysing the traditional theory of transposition from national to international legal settings, and the modification/choice model, this article demonstrates that the focus should be shifted from arbitrariness to the determinants of results of recognizing general principles of law. Premise theory explains a mechanism that judges modify a common legal principle or choose the most appropriate national legal principle to apply to the issue at hand to reflect the premises of the legal field, the court, and, sometimes, even the individual case. This article concludes with a proposal for utilizing premise theory as an explanatory tool and as a guide for legal reasoning to increase judicial transparency and predictability. Lastly, it advocates for the application of premise theory to other areas of international law.

Keywords: general principles of law; international criminal courts; theory; sources; judicial transparency

The approach of international criminal courts differs from the prevalent theory on recognition of general principles of law. For the two *ad hoc* international criminal tribunals, the concept of general principles of law has been described as a "magic wand": a term used to express the judicial creativity of judges who attempt to fill gaps in statutes and rules of procedure.[1] Their approach has been seen as illegitimate because they have applied principles that are uncommon in major national legal systems or ignored the insights of comparative law,[2] while some studies have indicated the futility of aspiring to universally shared rules.[3]

[1] Fabian O. RAIMONDO, "General Principles of Law, Judicial Creativity, and the Development of International Criminal Law" in Shane DARCY and Joseph POWDERLY, eds., *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), 45 at 58.

[2] See, for example, Neha JAIN, "Comparative International Law at the ICTY: The General Principles Experiment" (2015) 109 American Journal of International Law 486 at 488; Raphael VAN STEENBERGHE, "Sources of International Humanitarian Law and International Criminal Law: Specific Features" in Jean D'ASPREMONT and Samantha BESSON, eds., *The Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2018), 891 at 896.

[3] See, for example, Jaye ELLIS, "General Principles and Comparative Law" (2011) 22 European Journal of International Law 950 at 971.

Moreover, recent cases have demonstrated that the general principles of law recognized by the International Criminal Court (ICC) differ not only from those in the *ad hoc* tribunals,[4] but also those from different chambers of the same court.[5]

To tackle the traditional but recurring problem of how international courts "fill in the gaps" when there is no clear answer to a question of law, this article explores a new theory to account for recent international criminal courts' practice on finding general principles of law. In other words, it highlights the variables that differentiate the results of recognizing general principles of law. This article confirms the validity of the traditional transposition theory that elucidates the mechanism how national law principles are transposed into international law. Meanwhile, it identifies a gap in this theory and suggests shifting the focus from the mechanism to the factors that determine the contents of a general principle of law. Unlike previous accounts, it argues that the practices of international criminal courts can be theoretically explained as consistent based on a new theory: "premise theory".

This article first highlights the typology problem of general principles of law as they operate in both international law and international criminal law. Second, it examines the existing transposition theory in terms of recognizing a general principle of law that transposes a domestic legal principle into the international legal sphere. Third, it develops premise theory based on analyses of relevant international criminal case law and discusses the implications. This article concludes by proposing the use of premise theory as an explanatory tool and a guide for legal reasoning to increase judicial transparency and predictability, and suggests the application of the theory to other areas of international law.

I. The Concept and Typology of General Principles of Law

A. General Principles of Law in International Law

Historically, the general principles of law have been used for inter-state arbitrations since before permanent international courts codified the concept into their statutes. An arbitration process under the Jay Treaty of 1794 and subsequent arbitrations applied domestic private law and Roman law by analogy.[6] This arbitral practice of applying laws that are not based on state consent has been criticised by legal positivists.[7] Many scholars have attempted to explain the practice of applying domestic private law principles and proposed the idea of "universal jurisprudence" which is applicable to any legal relationship.[8]

Public international law adopts the concept of such general principles as follows: "[t]he general principles of law recognized by civilized nations" under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).[9] The concept was first introduced during

[4] For example, on witness proofing: Ruben KAREMAKER, B. Don TAYLOR III and Thomas Wayde PITTMAN, "Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence" (2008) 21 Leiden Journal of International Law 683.

[5] For example, on witness proofing: John D. JACKSON and Yassin M. BRUNGER, "Witness Preparation in the ICC: An Opportunity for Principled Pragmatism" (2015) 13 Journal of International Criminal Justice 601 at 603–11.

[6] For example, the parties to the Pious Fund Arbitration of 1893 and the Fur Seal Arbitration of 1902 argued on estoppel and *res judicata*, respectively, and the arbitrators agreed to apply these principles substantially. See, for example, Arnold D. MCNAIR, "The Legality of the Occupation of the Ruhr" (1924) 5 British Yearbook of International Law 17 at 34–5.

[7] Hersch LAUTERPACHT, *Private Law Sources and Analogies on International Law* (Lawbook Exchange edition: New Jersey: The Lawbook Exchange, 2013, Originally Published: London: Longmans, Green and Co., 1927) at 3–23.

[8] *Ibid.*, at 20–31. This explains how analogically applying private law principles from national law to international relations is possible. See, for example, Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 390.

[9] *Statute of the International Court of Justice*, 26 June 1945 (entered into force 24 October 1945), online: ICJ <https://www.icj-cij.org/en/statute> [*ICJ Statute*].

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the drafting of the Statute of the Permanent Court of International Justice (PCIJ) by writing "the rules of international law as recognized by the legal conscience of civilized nations".[10] The proposal was criticised because it could be treated as an open door for judges to install particular legal values specific to their own national legal systems.[11] Eventually, its current wording was adopted, reflecting the idea that these principles should be "accepted by all nations *in foro domestico*".[12] Today, it is widely accepted that general principles of law are those that commonly underlie national legal systems.[13] However, scholars' views are split on the typology of general principles of law. The Special Rapporteur of the United Nations International Law Commission has declared the existence of the two types of general principles: general principles of law and general principles of international law.[14] Various scholars have addressed the existence and content of these branches,[15] while some take different views.[16]

[10] League of Nations Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes* (The Hague, Van Langenhuysen, 1920), 306. See TABATA Shigejiro, *International Law 1* (Tokyo: Iwanami Syoten, 1973) at 122–7 [in Japanese]. The adoption of the PCIJ statute elevated general principles to a source of rules applicable by the court. See Jean D'ASPREMONT, "What Was Not Meant to Be: General Principles of Law as a Source of International Law" in Riccardo PISILLO MAZZESCHI and Pasquale DE SENA, eds., *Global Justice, Human Rights, and the Modernization of International Law* (Switzerland: Springer, 2019), 163 at 163.

[11] League of Nations Advisory Committee of Jurists, *ibid.*, at 293, 308 and 309–10.

[12] *Ibid.*, at 335; *Statute of the Permanent Court of International Justice*, 13 December 1920, online: ICJ <https://www.icj-cij.org/en/pcij-series-d> [*PCIJ Statute*].

[13] Cheng, *supra* note 8 at 24; Daniel COSTELLOE, "The Role of Domestic Law in the Identification of General Principles of Law under Article 38(1)(c) of the Statute of the International Court of Justice" in Mads Tønnesson ANDENÆS, Malgosia FITZMAURICE, Attila TANZI, and Jan WOUTERS, eds., *General Principles and the Coherence of International Law* (Leiden/Boston: Brill/Nijhoff, 2019), 177 at 185–6. However, some take 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. Hugh THIRLWAY, "The Sources of International Law" in Malcolm D. EVANS, ed., *International Law*, 4th ed. (Oxford: Oxford University Press, 2014), 91 at 105. Others claim that general principles of law can be identified from both national laws and international law. See, for example, Mahmoud Cherif BASSIOUNI, "A Functional Approach to 'General Principles of International Law'" (1989) 11 Michigan Journal of International Law 768 at 772. Some scholars claim that national legal principles are inapplicable to inter-state relationships. See, for example, Géza HERCZEGH, *General Principles of Law and the International Legal Order* (Budapest: Akadémiai Kiadó, 1969) at 97. Although the prevalent method is sometimes called the domestic approach, the approach that includes international law as the source of general principles of law is called the hybrid approach. Michelle BIDDULPH and Dwight NEWMAN, "A Contextualized Account of General Principles of International Law" (2014) 26 Pace International Law Review 286 at 298. An opinion separate from the ICJ bench has supported the idea of the general principles of law as *la conscience juridique*, which is similar to the first proposal that emerged during the drafting of the PCIJ Statute. *Usines de pâte à papier sur le fleuve Uruguay* (Argentine v. Uruguay), Separate Opinion of Judge Cançado Trindade, [2010] I.C.J. Rep. 156, at para. 42.q

[14] See *First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/732188 (2019), at para. 188 [*First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*]; *Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/74114 (2020), at para. 14 [*Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*].

[15] See Johan G. LAMMERS, "General Principles of Law Recognized by Civilized Nations" in Frits KALSHOVEN, Pieter Jan KUYPER, and Johan G. LAMMERS, eds., *Essays on the Development of the International Legal Order* (The Hague: Sijthoff & Noordhoff, 1980), 53 at 58; Hermann MOSLER, "General Principles of Law" in Rudolf BERNHARDT, ed., *Encyclopedia of Public International Law* (Amsterdam: Elsevier Science, 1995), 511 at 513.

[16] On the distinction, see Craig EGGETT, "The Role of Principles and General Principles in the 'Constitutional Processes' of International Law" (2019) 66 Netherlands International Law Review 197 at 205. Some scholars understand that the general principles stipulated by Article 38(1)(c) of the ICJ Statute as mainly general principles specific to international law. See, for example, Dionisio ANZILOTTI, *Cours de Droit International* (Paris: R. Sirey, 1929) at 117. See also Gerald FITZMAURICE, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1958) Recueil des Cours 5 at 7; Pierre-Marie DUPUY, "Le juge et la règle générale" (1989) 93 Revue Générale de droit International Public 569 at 569; Odile DEBBASCH, "Les juridictions françaises et les principes généraux du droit international" (1991) L'Europe et

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B. The General Principles under International Criminal Law

The typology problem has been fueled by the development of sub-fields of international law. Although there are only a small number of general principles under international criminal law, all are fundamental and critical.[17] Some scholars have argued that custom has been the basic source of these general principles.[18] However, most of them have domestic counterparts and can also be characterised as general principles of law.[19] The debate is whether the general principles of law applied in international criminal jurisprudence belong in the same category as those applied in public international law.

1. The Kupreškić taxonomy

The International Criminal Tribunal for the former Yugoslavia (ICTY) 2000 judgment in the *Kupreškić* case triggered this debate. It distinguished the three types of general principles as applied by international criminal tribunals: (i) the "general principles of international criminal law"; (ii) the "general principles of criminal law common to major legal systems in the world"; and (iii) the "general principles of law consonant with the basic requirements of international justice".[20]

In a textbook co-authored by Cassese, who was the presiding judge in the *Kupreškić* judgment, it is stated that the general principles of international criminal law were defined to "include principles specific to this branch of international law".[21] The authors explained that "the application of these principles at the international level normally results from their gradual transposition over time from national legal systems on to the international order" and "general principles of international criminal law may be inferred from the whole system of international criminal law".[22] In the *Kupreškić* judgment, Cassese stated that the general principles of international criminal law "may be distilled by dint of construction, generalisation or logical inference".[23]

Conversely, the general principles of criminal law, as recognized in domestic legal systems, may be drawn from a comparative survey of the world's principal legal systems.[24]

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le Droit: Melanges Offerts a Jean Boulouis 139. On the lack of historical background of this dichotomy, see Md Tabish EQBAL, "Historicizing the Dual Categorization of the General Principles of Law by the ILC" (2020) 10 Asian Journal of International Law 187.

[17] The number of general principles in international criminal law is limited due to the diversity of sources, divergent definition of the roles of actors, and specificities of each procedural regime. Carsten STAHN, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2019) at 272. See also Douglas GUILFOYLE, *International Criminal Law* (Oxford: Oxford University Press, 2016) at 7.

[18] 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: Oxford University Press, 2002), 1051 at 1071; Ottavio QUIRICO, "General Principles of International Criminal Law and Their Relevance to Africa" (2009) 17 African Yearbook of International Law 139 at 152–3.

[19] For example, the exclusion of criminal responsibility under customary international criminal law draws "heavily on general principles of law found in the various national criminal justice traditions", and "general exculpatory principles have been transmuted into customary international law". See Roger O'KEEFE, *International Criminal Law* (Oxford: Oxford University Press, 2015) at 210.

[20] *The Prosecutor v. Kupreskić et al.*, Judgment of 14 January 2000, Trial Chamber, Case No. IT-95-16-T at para. 591 [*Kupreskić*].

[21] Antonio CASSESE and Paola GAETA, *Cassese's International Criminal Law* (Oxford: Oxford University Press, 2013) at 15.

[22] *Ibid*. It has been noted that while Cassese's position on sources of international law was inspired by a naturalist impulse to protect people, he understood the necessity of the methods of positivism. Robert CRYER, "International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon" (2012) 10 Journal of International Criminal Justice 1045 at 1048.

[23] *Kupreškić*, *supra* note 20 at para. 677.

[24] Cassese and Gaeta, *supra* note 21 at 15.

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The *Kupreškić* judgment stated that "to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world".[25]

While there is little explanation of the third type of general principles, the existence of the general principles of international criminal law or criminal law are thus presented, and the identifying methodology is provided. However, definitions of these notions, the distinctions between them on a theoretical level, and their legal nature are still unclear.[26]

2. The ICC taxonomy

Whereas the *Kupreškić* taxonomy has three categories of principles, the Statute of the ICC identifies two categories; namely, the "principles and rules of international law" (Article 21(1)(b)) and the "general principle of law derived by the Court from national laws of legal systems of the world" (Article 21(1)(c)).[27] Some scholars have noted that, whereas Article 21(1)(b) substantially embraced customary law, clause (c) is a more precise description of the general principles of law, along the lines of Article 38(1)(c) of the ICJ Statute.[28]

However, the text and drafting process suggest that the general principles of law defined in Article 21(1)(c) is unique to the ICC procedure. Article 21(1)(c) of the ICC Statute defines the concept as the "general principles of law derived *by the Court*" (emphasis added), meaning that the ICC has the discretion to derive general principles of law.[29] Furthermore, in contrast to the general principles of law before the ICJ, the ICC is required to include "the national laws of States that would normally exercise jurisdiction over the crime" wherever "appropriate". This phrase was added based on minority opinions from non-Western states – including Japan, China, Arab countries, and Israel – that the national laws of relevant countries should apply to cases brought before the ICC.[30] The majority disagreed with the application of national law of particular countries.[31] Eventually, the compromise between the two sides took the form of Norway's proposal to insert the phrase "as appropriate", with the caveat that only the "national laws of States that would normally exercise jurisdiction over the crime" would be included.[32] Verhoeven suggested that the drafters might have found it difficult to fully ignore the national law that would be applied by the court, the jurisdiction of which is established

[25] *Kupreškić*, *supra* note 20 at para. 677.

[26] Sergey VASILIEV, "General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification" in Goran SLUITER and Sergey VASILIEV, eds., *International Criminal Procedure: Towards a Coherent Body of Law* (London: CMP Publishing, 2009), 19 at 28.

[27] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) [*ICC Statute*]. Although the laws defined in Article 21(1)(b) and (c) are supplementary to those defined in (a), they are authoritative interpretive aids and must be considered if they are relevant. See Leena GROVER, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2014) at 361.

[28] Pellet, *supra* note 18 at 1071; Mireille DELMAS-MARTY, "The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law" (2003) 1 Journal of International Criminal Justice 13 at 16–8. Others consider that "the Statute contains a more focused definition of 'general principles of law' than Article 38(i)(c) of the ICJ Statute". Carsten STAHN and Larissa VAN DEN HERIK, "'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?" in Carsten STAHN and Larissa VAN DEN HERIK, eds., *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012), 21 at 67.

[29] Kai AMBOS, *Treatise on International Criminal Law: Volume I, Foundations and General Part* (Oxford: Oxford University Press, 2016) at 1073.

[30] Per SALAND, "International Criminal Law Principles" in Roy S. LEE, *The International Criminal Court: The Making of The Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) at 214–5.

[31] *Ibid*.

[32] *Ibid*.

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in accordance with the usual grounds of jurisdiction, such as territoriality or personality.[33]

Many scholars have supported the position that the general principles of law defined in Article 21(1)(c) is unique to the ICC procedure.[34] Consequently, at the ICC, the accused may have the opportunity to be processed under laws that they may be familiar with, even when those laws do not belong to the world's major legal systems and include indigenous or religious features.[35] Pellet believed that the specificity of criminal law and the requirements of the *nullum crimen* principle justify the court deriving general principles of law with no detailed comparative study and prioritizing the legal systems familiar to the accused.[36] The court being required to apply different laws in each case may cause

[33] J. VERHOEVEN, "Article 21 of the Rome Statute and the Ambiguities of Applicable Law" (2002) 33 Netherlands Yearbook of International Law 3 at 10–11. Edwards suggested the following possibilities: the state of nationality of accused persons, the state or territory of which the alleged crime took place, the state where the accused person is present, the state injured by the alleged crime, and all states in the world with universal jurisdiction. See George E. EDWARDS, "International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy" (2001) 26 Yale Journal of International Law 323 at 408. deGuzman noted that the interpretation of including all states based on the universal jurisdiction argument will not be accepted. See Margaret M. DEGUZMAN, "Article 21: Applicable Law" in Kai AMBOS, ed., *Rome Statute of the International Criminal Court: Article by Article Commentary*, 4th ed. (München: Beck/Hart/Nomos, 2022), 1129 at 1143.

[34] For example, Elena CARPANELLI, "General Principles of International Law: Struggling with a Slippery Concept" in Laura PINESCHI, *General Principles of Law: The Role of the Judiciary* (Switzerland: Springer, 2015), 125 at 128. For similar views: Alan NISSEL, "Continuing Crimes in the Rome Statute" (2004) 25 Michigan Journal of International Law 652 at note 19; Benjamin PERRIN, *An Emerging International Criminal Law Tradition: Gaps in Applicable Law and Transnational Common Laws* (Allard Research Commons, Peter A. Allard School of Law, University of British Columbia, 2007) at 80. Ambos noted that it is Article 21(1)(b) the ICC Statute refers explicitly to the "principles and rules of international law" and thus to customary international law and general principle of law in the sense of Article 38 of the ICJ Statute". Ambos, *supra* note 29 at 74.

[35] Pellet, *supra* note 18 at 1075. Pellet interprets Article 21(1)(c) to mean that systematic comparison of all national legal systems is unnecessary, and comparative research will be reduced to the family of civil law, common law, and Islamic law. *Ibid.*, at 1073–4. Geōrgios claimed that "national laws of legal systems of the world" means that such national laws "must adhere to a jurisprudential pattern widespread in its application to the extent of qualifying it as a system" and "a system in this context can be contrasted to indigenous or isolated legislation, rule or custom". Pikis M. GEŌRGIOS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Leiden: Martinus Nijhoff Publisher, 2010) at 82. It must be noted that the ICC has decided that Article 21(1)(c) may be resorted when the sources of law listed in article 21 (1)(a) and (b) do not regulate the issue at hand. *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 of 14 December 2006, Appeals Chamber, Case No. ICC-01/04-01/06-772 at para. 34 [*Lubanga*]. It has also declared that Article 21(1)(c) does not oblige the court to apply general principles of law. *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigaikenyatta And Mohammed Hussein Ali*, Decision on the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)" of 1 May 2012, Appeals Chamber, Case No. ICC-01/09-02/11-421 at para. 11.

[36] Pellet, *ibid.*, at 2075. Such formulation has an antecedent. Article 24(1) of the ICTY Statute presupposes application of Yugoslavian law in determining terms of imprisonment. *The Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827 (1993) [*ICTY Statute*]. Article 23(1) of the ICTR Statute contains a similar paragraph. *Statute of the International Tribunal for Rwanda*, UN Doc. S/RES/955(1994) [*ICTR Statute*]. These provisions were provided on the basis of the *nulla poena* principle, which ensured that the accused would be sentenced according to the existing sentencing practice where the crimes took place. Silvia D'ASCOLI, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart Publishing, 2011) at 115. ICC Statute Article 21(1)(c), however, allows the court to apply only principles underlying the national law of the state that would normally exercise jurisdiction over the case and indicates that they can be applied if they are deemed appropriate and consistent with the ICC Statute. Ambos, *supra* note 29 at 79; Bruno SIMMA and Andreas PAULUS, "Le rôle relatif des différentes sources du droit international public: dont les principes généraux du droit" in Hervé ASCENSIO, Centre de Droit International de l'Université Paris

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confusion.[37] However, the text of Article 21(1)(c) clearly left the judges broad discretion in determining which national laws to consider in deriving general principles of law.[38]

C. Same Origin, Different Generation

The text and the drafting process of Article 21(1)(c) of the ICC Statute highlighted that it allows for the original recognition of general principles of law that are most appropriate for the case and its definition thus differs from that in public international law. Some scholars, including Schabas and Degan, have argued that the source of law defined in Article 21(1)(c) is distinguishable from general principles of law as defined in the Article 38 of the ICJ Statute,[39] and the general principles of law in international criminal law cannot be assimilated into a public international law source.[40]

Conversely, others, including Akande and Raimondo, have argued that general principles of law in international criminal law are the same as those in public international law because the origins of the general principles of law and those of international criminal law are both national laws.[41]

Disagreements may occur because of different foci. Schabas and Degan concentrated on the already recognized general principles of law found in international conventions and/or case law, whereas Akande and Raimondo focused on their origin as national laws.[42] Similar to that the same ingredients being cooked in different meals due to the applied cooking methods and spices, the recognition methodology converts the pile of national laws into a new source that has unprecedented features. The next section discusses the existing theory about the mechanism of recognition to examine whether we already have sufficient explanation for such a metamorphosis.

II. Transposition theory: modification/choice model

The prevalent view on the methods of recognizing general principles of law is "first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal

Ouest-Nanterre-La Défense, Emmanuel DECAUX, and Alain PELLET, eds., *Droit International Penal*, 2e éd. (Paris: Pedone, 2012) at 66; Harmen VAN DER WILT, "National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals" (2010) 10 International Criminal Law Review 209 at 216. Pre-Trial Chamber I clarified that "national case law can only constitute a subsidiary source of law before this Court, insofar as it shows the existence of a general principle of law". *The Prosecutor v. Germain Katanga*, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui of 13 March 2008, Pre-Trial Chamber I, Case No. ICC-01/04-01/07-322 at 12.

[37] AICHI Masahiro, "Provisions Concerning the Applicable Law for the International Court in the Rome Statute" (2000) 34 Chukyo Hogaku 186 at 189 [in Japanese]; Gudrun HOCHMAYR, "Applicable Law in Practice and Theory: Interpreting Article 21of the ICC Statute" (2014) 12 Journal of International Criminal Justice 655 at 671–2.

[38] deGuzman, *supra* note 33 at 1143.

[39] William SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford: Oxford University Press, 2017) at 525.

[40] Vladimir-Djuro DEGAN, "On the Sources of International Criminal Law" (2005) 4 Chinese Journal of International Law 45 at 62.

[41] Fabian O. RAIMONDO, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff Publisher, 2008) at 170; Dapo AKANDE, "Sources of International Criminal Law" in Antonio CASSESE, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 52.

[42] Similar discourse has occurred among Japanese academics regarding general principles of law. See TAKI Hiroshi, "General Principles of Law in International Law" (2003) 109 Chuo Law Review 175 at 175 [in Japanese].

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system" (a two-step approach).[43] The process of adjusting national principles and making them applicable to international trials is called "transposition".[44] Per Ellis, the widely understood transposition methodology involves three steps: identifying a principle common to municipal laws, distilling the principle's essence, and adjusting the principle to be applicable to international legal settings.[45] In contrast to this theory, however, empirical research has revealed that "the ICJ generally asserted the existence of principles in international law irrespective of their correspondence to principles pertaining to municipal law".[46] Meanwhile, as presented below, other international courts have implied their willingness to at least perform their obedience to the theory, but transposition often takes the form of either modification or choice.

A. Transposition in Public International Law

Some scholars have suggested that although general principles of law are common to many legal relationships, some are not applicable to international law because of the international legal system's inherent specificities.[47] Lauterpacht noted that many international arbitration awards relied on the legal principles of national private laws and highlighted several cases in which this approach was deemed impossible because of the characteristics of international law.[48]

In contrast, Pellet explored cases in which national law had been transposed onto international law, regardless of the contextual and circumstantial differences, and articulated various methods followed in these cases, such as modifying national laws and choosing specific national laws.[49]

In some cases, general principles common to national laws such as the principles of non-retroactivity or succession were accepted with significant modification even when the context in which they are used is very different from their usual environment in domestic law.[50] The modification process transforms, simplifies, or adapts a widely shared national principle so that it applies to international legal issues.[51]

The second method, choice, involves selecting a national law principle that is appropriate for the given purpose.[52] For example, the PCIJ applied common law principles

[43] *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, *supra* note 14, at para. 17; See also Ellis, *supra* note 3 at 954; Raimondo, *supra* note 41 at 1; Charles T. KOTUBY, Jr. and Luke A. SOBOTA, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford: Oxford University Press, 2017) at 18.

[44] Alain PELLET, *Recherche sur les principes généraux de droit en droit international public* (Paris II, 1974) at 272–324; Raimondo, *supra* note 41 at 58; Kotuby, *ibid.*, at 27; Jain, *supra* note 2 at 493.

[45] Ellis, *supra* note 3 at 954. See also Raimondo, *supra* note 41 at 45, Jain, *supra* note 2 at 493–4.

[46] Cheng, *supra* note 8 at 392. As for the ICJ, Article 9 of its Statute, which requires the composition of the Court to represent "the main forms of civilization" and "the principal legal systems of the world" provides justification. See *First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, *supra* note 14 at note 379.

[47] For example, Cheng, *supra* note 8 at note 14.

[48] According to Lauterpacht, the factors that make an analogy impossible are not the inherent specificities of international law but, rather, "the shortcomings of international law as a system of law". For example, duress invalidates a contract but cannot invalidate a treaty. Lauterpacht argued that "analogy fails here so far as international law is an undeveloped law", and "it may safely be said that with the development of international law to a system of law... the analogy will hold with undisputed force". Lauterpacht, *supra* note 7 at 156, 161–9. Gaja pointed out that general principles that exist only in national law do not necessarily form part of international law. Giorgio GAJA, "General Principles of Law" in Rüdiger WOLFRUM, ed., *The Max Planck Encyclopedias of Public International Law* (2020), at para. 7.

[49] Pellet, *supra* note 44 at 298–318.

[50] *Ibid.*, at 302 and 310.

[51] *Ibid.*, at 308.

[52] *Ibid.*, at 312.

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such as estoppel and informal restitution, selectively, for pragmatic reasons.[53] The judges have rarely explained why they chose specific national legal principles in certain cases. The parties have sometimes claimed that factual circumstances such as the absence of a higher authority should be considered.[54] The Court of Justice of the European Communities responded to a claim that the deposit system was contrary to German national constitutional law and that respect for fundamental rights forms an integral aspect of general principles of law, even when inspired by member states' constitutional traditions.[55] Pellet claimed that a pragmatic approach was followed in other cases, presented cases in which national law principles common in only two or three countries were prioritized, and indicated that these principles were in harmony with the community's purposes.[56]

B. Transposition in International Criminal Law

Similar transposition theory is accepted by international criminal courts.[57] Judges have often explained their process of comparative research of national laws and the method of either modification or choice when deciding cases.

According to the *Furundžija* case, when referring to national laws both national legal systems as well as general concepts and legal institutions common to all major legal systems must be considered.[58] In addition, when applying national law the specificities of international criminal procedures must also be considered.[59] Gradoni called the first step in the modification "sampling".[60] The sampling process consists of collecting and comparing relevant national and international laws. It deduces an abstract core principle that appears to be common to both national and international rules through two techniques that, using a mathematical metaphor, can be defined as a "common denominator" and a "common multiplier".[61] The second step is called "falsification" and transforms a common principle obtained through sampling to make it compatible with the legal field to which the principle will be applied.[62] This process makes a highly abstract principle specific enough to be applied to concrete cases.[63]

Moreover, several relevant cases in international criminal jurisprudence have adopted the method of choice. There is a substantial gap between the two major legal systems of the world; namely, civil and common law systems, particularly in criminal procedures. This gap has made deducing a common principle for specific legal issues difficult.

[53] *Ibid.*, at 317.

[54] *Factory at Chorzów*, (*Germany v. Poland*), [1928] P.C.I.J. Rep. Series A No 17 at 143.

[55] *Judgment of the Court of 17 December 1970*, [1970] C.J.E.C., European Court Rep. 1970, p. 1125, at paras. 2–4.

[56] Pellet, *supra* note 44 at 314.

[57] Raimondo claimed that general principles of law in international criminal law did not usually require prior transposition into international law because most principles are already part of international law as human rights laws. See Raimondo, *supra* note 41 at 171.

[58] *Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, Trial Chamber, Case No. IT-95-17/1-T at para. 178 [*Furundžija*].

[59] *Ibid.*, at para. 178.

[60] Lorenzo GRADONI, "L'exploitation des Principes Généraux de Droit dans la Jurisprudence des Tribunaux Internationaux Pénaux *ad hoc*" in Emanuela FRONZA and Stefano MANACORDA, *La justice penale internationale dans les decisions des tribunaux* ad hoc (Milano: Giuffrè Editore, 2003), 10 at 16.

[61] *Ibid.*, at 27. See, for example, *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, Judgment of 20 February 2001, Appeals Chamber, Case No. IT-96-21-A at paras. 625–631; *Prosecutor v. Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*, Judgment of 22 February 2001, Trial Chamber II, Case No. IT-96-23-T & IT-96-23/1-T at para. 457.

[62] Gradoni, *ibid.*, at 16.

[63] *Ibid.*, at 27–8.

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Therefore, judges occasionally must choose a national principle and apply it to the legal question before them.[64] In these situations, judges have selected the most appropriate approach that resembles specific national laws that belong to either common or civil law, and have rarely relied on other legal systems.[65] Common law principles have occupied a dominant position in international criminal jurisprudence, attracting criticism from scholars.[66] These critics have argued that this reliance on common law has occurred because international criminal courts have been clearly biased towards a liberal system of criminal justice when identifying general principles of law.[67]

Mégret explained the method followed by international criminal courts; namely, adopting national legal traditions as receptors of possible solutions that can be constructively combined, and called it a "pragmatic approach" to determine international criminal procedure.[68] This approach can undermine the claim that general principles have been deduced from all major systems globally.[69] Jain provided a more severe criticism, commenting that the ICTY judges "portray general principles as akin to principles of natural law and logic or as principles inherent in the nature of the international legal system", and claimed that "these versions of general principles pose considerable problems for the legitimacy of an international criminal law regime that purports to be sensitive to the rights of the accused".[70] Jain also evaluated jurisprudence on general principles of law in international criminal law as "chaotic" and believed that it does not satisfy the criteria of formal and material validity and fails to comply with the principle of legality.[71]

III. Premise Theory

A. Changing the Focus

An evaluation of the practice of international criminal courts in recognizing general principles of law as either pragmatic or illegitimate presents no scientific explanation of the phenomenon. While adopting transposition theory as valid, this article proposes changing the focus from arbitrariness to the determinant. While transposition theory implies the arbitrariness of the judges to transpose a domestic principle into international adjudication, it does not refer to the factors which directed that transposing decision. This article

[64] See, for example, Antonio CASSESE, "The Contribution of the International Criminal Tribunal for the former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations" in Sienho YEE and WANG Tieya, *International Law in the Post-Cold War World Essays in Memory of Li Haopei* (New York: Routledge, 2001), 43 at 47–9.

[65] Badar noted that the *Al Mahdi* case was the first opportunity for the ICC to consider an Islamic view, which was claimed to be fundamentally incompatible with ICC law. Mohamed Elewa BADAR, "Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?" in Tallyn GRAY, ed., *Islam and International Criminal Law and Justice* (Brussel: Torkel Opsahl Academic Epublisher, 2018), 201 at 213. For an earlier attempt to deduce certain commonality among national law with Islamic law elements, see, for example, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal of 24 July 2006, Appeals Chamber, Case No. ICC-01/04-168, at para. 31.

[66] Mouloud BOUMGHAR, "Quelques utilisations des principes généraux du droit international et des principes généraux de droit en droit international pénal" (2009) 17 African Yearbook of International Law 97 at 132.

[67] Frédéric MÉGRET, "The Sources of International Criminal Procedure" in Göran SLUITER, Håkan FRIMAN, Suzannah LINTON, Sergey VASILIEV and Salvatore ZAPPALÀ, eds., *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013), 68 at 72.

[68] *Ibid*.

[69] *Ibid*.

[70] Jain, *supra* note 2 at 487–8.

[71] Neha JAIN, "Judicial Lawmaking and General Principles of Law in International Criminal Law" (2016) 57 Harvard International Law Journal 111 at 112.

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proposes shifting the focus to the factors that determine the contents of general principles of law. Traditional transposition theory has only highlighted the factors as "specificities" of the "international settings". Advanced research by Biddulph and Newman emphasized that there is no single common methodology for the recognition of general principles of law because each area of international law applies a method suited to its "policy objectives and overall characteristics as a specific area of law".[72] However, the factors considered in recognizing general principles of law may also be different depending on the courts, different chambers in a court, or individual cases.

Judges consider various factors when identifying a general principle of law because they must apply law that interfaces with multiple issues, such as the institutional conditions of the court, legal restrictions, normative values that the court should embody, and practical circumstances that disable or hamper the application. A notion that embraces all these issues can be termed the "premises" of the field, the court, or sometimes even the case in question because they are either factual circumstances from which an international court cannot escape or normative values on which the specific court stands. Judges avoid conflict or undermining these premises by carefully modifying or choosing a general principle of law.

Thus, the process of recognizing general principles of law is materially affected by the premises on which it will be applied. Explaining this mechanism requires a new theory that incorporates the premise concept into traditional transposition theory. As stated previously, this article refers to this theory as "premise theory". The premise theory helps identify the premises that have played a critical role in jurisprudence that recognizes general principles of law. Some of these premises appear to be common in many international courts, regardless of inter-state or criminal adjudication. However, the case law analysis below also indicates that judges of international criminal courts have often adopted premises specific to either international substantive criminal law or procedural criminal law, the court's institutional or procedural framework, or the special circumstances of the case. Although the methods are the same in every case, the results differ because each legal field, court, and case has different premises. The premises specific to the legal field, the adjudicatory body, or the case are the variants that determine the different contents of the same general principle of law.

B. Premises of International Criminal Justice

The premise theory helps identify the premises of international criminal justice common to all international criminal courts. Many cases in the early tribunals uncovered premises inherent in international criminal justice.

1. Substantive criminal law

Case law that defined core crimes or individual responsibility considered the premises of the international humanitarian and human rights laws that constituted the normative foundation of international substantive criminal law. For example, in the *Furundžija* judgment, facing the lack of a detailed definition for rape under Article 3 of the ICTY Statute, the judges needed to "look for principles of criminal law common to the major legal systems of the world" to "arrive at an accurate definition of rape based on the criminal law principle of specificity".[73]

However, the judges noted the lack of uniformity in classifying forced oral penetration as rape in national laws.[74] The judgment did not clarify which national law criminalized

[72] Biddulph and Newman, *supra* note 13 at 286.
[73] *Furundžija, supra* note 58 at para. 177.
[74] *Ibid.*, at para. 182.

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forced oral penetration as rape, but stated that "some States treat it as sexual assault, while it is categorised as rape in other States".[75] It referred to "the very *raison d'être* of international humanitarian law and human rights law" and recognized "the general principle of respect for human dignity".[76] The judges concluded that acts of forced oral penetration "constitute a most humiliating and degrading attack upon human dignity" and such acts "should be classified as rape".[77] Thus, the judges chose domestic laws that classify forced oral penetration as rape after considering the premise of international criminal law, which is respect for human dignity.

Similarly, the majority opinion in the *Erdemović* case, which was heard before the ICTY, considered a value embedded in international humanitarian law to be a premise that directly recognizes one side of national laws as a general principle of law.[78] To find a solution to the question whether duress could be pleaded as a complete defence for a crime against humanity from general principles of law's perspective, the bench studied national laws on duress in the context of killing an innocent person and concluded that there was "no consistent concrete rule".[79] The majority of the judges then believed that it was their mandated obligation to ensure that international humanitarian law was not undermined.[80] Having considered the effective implementation of international humanitarian law as the premise of international criminal law, the majority opinion was that duress cannot afford a complete defence in cases of crimes against humanity or war crimes that involve the taking of innocent lives.[81] This conclusion was explicitly based on an approach under English law.[82]

2. Administration of justice

Because of the importance to the entire world of the mandate to end impunity, the premise of the need for proper administration of justice plays a critical role in identifying procedural principles in international criminal courts. In the *Kupreskić* judgment, the Trial Chamber of the ICTY dealt with an indictment based on an erroneous legal characterisation of facts.[83] The judges noted that "no general principle of criminal law common to all major legal systems of the world may be found".[84] Therefore, they observed, it "falls to the Trial Chamber to endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice" and applied the choice method.[85]

The chamber identified two major requirements that had acquired paramount importance because of the present status of international criminal law: (i) that the rights of the accused should be fully safeguarded and (ii) that the tribunal should be in a position to exercise all of the powers necessary for it to fulfil its mission efficiently and in the interest of justice.[86] What was described as "a careful balancing of the two aforementioned

[75] *Ibid*.

[76] *Ibid*., at para. 183.

[77] *Ibid*.

[78] See *Prosecutor v. Drazen Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah of 7 October 1997, Appeals Chamber, Case No. IT-96-22-A at para. 11.

[79] *Ibid*., at paras. 38 and 59–72.

[80] *Ibid*., at para. 72.

[81] *Ibid*.

[82] *Ibid*., at paras. 73–88. The non-existence of hierarchy among the core crimes, which is the premise specific to substantive international criminal law, was considered in *Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković*, Judgment of 12 June 2002, Appeals Chamber, Case No. IT-96-23 & IT-96-23/1-A at para. 170.

[83] *Kupreskić*, *supra* note 20, at para. 728.

[84] *Ibid*., at para. 738.

[85] *Ibid*.

[86] *Ibid*., at para. 739.

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requirements" led to the conclusion that the prosecutor must request that the Trial Chamber amend the indictment, which was similar to the rules found in the national laws of England and the United States.[87]

The need to maintain the integrity of proceedings guided the Special Tribunal for Lebanon's Appeals Panel in a contempt case to choose the principle of corporate criminal liability, which functioned in interpreting the word "person" under its Rule 60*bis*.[88] The panel claimed that "corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law".[89] It added, "States still differ in whether such liability should be civil or criminal or both".[90] However, it concluded that, "given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law".[91] The "developments outlined above" are actually that "it remains true that no post-World War II international criminal court or tribunal has previously found that it had the authority to try legal persons".[92] The only possible basis for the panel's determination to decide that international criminal law embraces corporate criminal liability was "the Tribunal's inherent power to protect the integrity of its proceedings".[93] Thus, the judges chose national laws that provided corporate criminal liability as a general principle of law applicable to the case before them, considering the premise of the integrity of proceedings.

3. Internationally recognized human rights as a written premise of the ICC

Premise theory explains the influence of ICC Statute Article 21(3), which explicitly stipulates the premise of this court on the recognition of general principles of law. The "application and interpretation of law" pursuant to Article 21(3) "must be consistent with internationally recognised human rights" is considered a clear utterance of the premise that is intended to play a critical role in determining an applicable law before the ICC.[94]

In the *Lubanga* case, a stay of proceedings was sought based on the abuse of process principle that is only applicable in England and the Commonwealth, and Roman-Dutch law countries such as South Africa.[95] After assessing relevant and varying domestic laws and cases, the judges declared that the ICC Statute and rules do not leave room for the application of a general principle of law.[96] They shifted to the discussion of human rights and Article 21(3).[97] Considering the right to fair trial to be a basic

[87] *Ibid.*, at paras. 742–8.

[88] *New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings of 2 October 2014, Appeals Panel, Case No. STL-14-05/PT/AP/AR126.1 at para. 67.

[89] *Ibid.*

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.*

[94] The ICC Chambers adopted different interpretations of the notion of "interpretation and application". See Gilbert BITTI, "Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC" in Carsten STAHN and Goran SLUITER, eds., *The Emerging Practice of The International Criminal Court* (Leiden: Martinus Nijhoff Publisher, 2009), 285 at 302.

[95] *Lubanga, supra* note 35 at para. 29.

[96] *Ibid.*, at para. 34. This approach is called the "only in case of lacuna" approach, which is claimed to be "rather an arbitrary interpretation made in some academic and scholarly works" and "was not and is not an authoritative position established in the Court's jurisprudence". See *Situation in the State of Palestine*, Judge Péter Kovács' Partly Dissenting Opinion of 5 February 2021, Pre-Trial Chamber I, Case No. ICC-01/18-143-Anx1 at para. 117.

[97] *Lubanga*, *ibid.*, at para. 36.

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human right, the judges concluded, "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed".[98] Thus, the judges chose to apply the abuse of process principle, which is specific to a limited number of states relying on the premise stipulated in Article 21(3). The approach did not directly recognize the general principles of law but, rather, was a declaration that affirmed internationally recognized human rights. However, the method applied *ex facto* was the choice method.

C. Premises and Fragmentation

Premise theory reveals the mechanism of the convergence and diversification of general principles of law between different international criminal courts. Different premises sometimes work for convergence. In the *Barayagwiza* case, the International Criminal Tribunal for Rwanda (ICTR) declared that the application of the abuse of process doctrine protects the "court's integrity" and reached the same conclusion as that in the *Lubanga* case mentioned above.[99] However, there are more cases in which different premises led the courts to recognize different contents of general principles of law.

1. The different legal bases of the courts

Unlike the ICC, the *ad hoc* tribunals have had to adopt an appropriate form of general principles of law due to their unique way of establishment. The judgment in the *Delalić* case discussed the premise for the *ad hoc* tribunals when examining the applicability of the legality principle.[100] The court asserted that principle of legality is recognized in all of the world's major criminal justice systems,[101] and adopted the modification method. It first noted that the approach to criminalizing an act differs between national and international legal systems, and then found that the application and standards of the legality principle must differ in international trials because core crimes are prescribed in treaties and/or customary law.[102]

The factors to be considered are "the nature of international law", "the absence of international legislative policies and standard", "the *ad hoc* processes of technical drafting", and "the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States".[103] The bench modified the legality principle to mean that the exercise of the ICTY's jurisdiction is limited to offences already recognized by international humanitarian law.[104] The judgment indicated the premise of international criminal justice and modified the contents of the legality principle where they differed from what was common to national laws. Such premises are not applicable

[98] *Ibid.*, at para. 39.

[99] *Jean-Bosco Barayagwiza v. the Prosecutor,* Decision of 3 November 1999, Appeals Chamber, Case No. ICTR-97-19-1, at para. 74.

[100] *Prosecutor v. Zejnil Delalić, Zdravko Mucić (also known as "Pavo"), Hazim Delić and Esad Landžo (also known as "Zenga")*, Judgment of 16 November 1998, Trial Chamber, Case No. IT-96-21-T at paras. 402–5 [*Delalić*]. The Nuremberg judgment declared that "the maxim *nullurn crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice". This phrase can be interpreted as showing that the judges transformed the principle of legality so that it would be compatible with the characteristics of laws on wars. See Judgment in *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Vol. 1* (1947) at 219.

[101] *Delalić*, *ibid.*, at paras. 402–3.

[102] *Ibid.*

[103] *Ibid.*, at para. 405.

[104] *Ibid.*, at para. 417.

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to the ICC which only has jurisdiction over crimes that are codified in its Statute in respect of crimes that were committed after its entry into force.[105]

Similarly, the ICTY discussed the principle that courts must be established by law in the *Tadić* case and considered the premises of the *ad hoc* tribunals.[106] The defence argued that the ICTY had not been established by law and that its jurisdiction was invalid.[107] The Appeals Chamber compared the three human rights conventions (the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Inter-American Convention on Human Rights) and declared that the restriction was a general principle of law.[108] The chamber declared that this principle is applicable to judicial administration in national settings.[109] However, it adopted an "interpretation" that it can be deemed to have been "established by law" when a court grounds it in the rule of law and provides all guarantees codified in relevant international instruments.[110] The judges noted that "the legislative, executive, and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting".[111] Therefore, the judges concluded that the interpretation of the principle "established by law" was that its establishment should be in accordance with the rule of law, which "appears to be the most sensible and most likely meaning of the term in the context of international law".[112] The premises considered in this case are also inapplicable to the ICC, as its Statute is a treaty that is formally recognized as a formal source of international law.

2. Adversarial or inquisitorial procedure

The structural and normative differences between the *ad hoc* tribunals and the ICC are demonstrated through different case law on witness proofing.[113] Witness proofing is widely used in the United States but is prohibited in many civil law countries and England and Wales. In *Lubanga*, the ICC Pre-Trial Chamber found that "if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing".[114] In a similar vein, Trial Chamber I found that "whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may prove detrimental" and concluded that the preparation of witness testimony would undermine "the spontaneous nature of testimony", which "can be of paramount importance to the Court's ability to find the truth".[115]

However, the practice is widely used in the *ad hoc* tribunals. In the *Milutinović* case, the ICTY refused to follow the ICC's decision because of the difference in applicable law and

[105] *ICC Statute*, *supra* note 27 at art. 22(1).

[106] *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, Appeals Chamber, Case No. IT-94-1-AR72 at para. 41.

[107] *Ibid*.

[108] *Ibid*., at para. 42.

[109] *Ibid*.

[110] *Ibid*.

[111] *Ibid*.

[112] *Ibid*.

[113] Kai AMBOS, "'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman" (2008) 21 Leiden Journal of International Law 911 at 911.

[114] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing of 9 November 2006, Pre-Trial Chamber, Case No. ICC-01/04-01/06-679 at paras. 41–2.

[115] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witness for Giving Testimony at Trial of 30 November 2007, Trial Chamber I, Case No. ICC-01/04-01/06-1049 at paras. 47 and 52.

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practical situations, such as the number of witnesses handled daily.[116] The ICTR in *Karamera* also declared that witness proofing conforms with established practice, which is useful for the administration of justice.[117] These decisions provide little assessment of the practice's impact on the truth-finding process.[118]

Ambos claimed that because the ICC adopts a mixed adversarial-inquisitorial procedure, whereas the *ad hoc* tribunals follow a predominantly adversarial procedure, the ICC is not compatible with the adversarial origins of witness proofing.[119] The different norms rooted in distinct procedural systems may have constituted different premises that functioned to direct the courts' decisions.[120]

3. Case-specific premise

Contextual conditions may function as a case-specific premise that alters the contents of the general principle of law that had been adopted by the same court. The ICC's *Kenya* decisions overruled the *Lubanga* decision on witness proofing and set detailed rules when allowing this practice, considering that judges are granted "a significant degree of discretion concerning the procedures".[121] The numerous allegations of witness tampering in this case have generally been deemed to constitute the context behind this decision.[122] Trial Chamber V noted specifically that "in the present case, witness preparation is even more crucial as a means to protect the well-being of the witnesses, considering the specific situation in Kenya".[123] It declared that "judicious witness preparation aimed at clarifying a witness's evidence" and "carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence" and assist the "Chamber's truth finding function".[124] Thus, the premise of the ICC to establish truth influenced both the *Lubanga* and *Kenya* decisions to formulate its general principle on witness proofing, but an additional premise of the latter case, namely the need to protect the wellbeing of witnesses, modified the contents of the same general principle of law.

[116] *Prosecutor v. Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Nebojsa Pavković, Vladimir Lazarević and Sreten Lukić*, Decision on Ojdanić Motion to Prohibit Witness Proofing of 12 December 2006, Trial Chamber, Case No. IT-05-87-T at paras. 11–7.

[117] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Decision on Defence Motions to Prohibit Witness Proofing of 15 December 2006, Trial Chamber III, Case No. ICTR-98-44-T at paras. 9-24 and 52.

[118] Wayne JORDASH, "The Practice of Witness Proofing in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice" (2009) 22 Leiden Journal of International Law 501 at 503.

[119] Ambos, *supra* note 113 at 911. Vasiliev analysed the policy-related reason behind the decision to prohibit witness proofing and found that the avoidance of both the allegations and the attempts of influence evidently constitute the rationale for removing witnesses as far and as early as possible from the parties. See Sergey VASILIEV, "Proofing the Ban on 'Witness Proofing': Did the ICC Get It Right?" (2009) 20 Criminal Law Forum 193 at 242.

[120] However, such systematic argument has been challenged. See Jackson and Brunger, *supra* note 5 at 605–8.

[121] *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision of 2 January 2013, Trial Chamber V, Case No. ICC-01/09-02/11-588 at para. 31 [*Muthaura*]; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Case No. ICC-01/09-01/11-524 at para. 26 [*Ruto*]. Judge Ozaki, who was the presiding judge in the Kenya decision, dissented in the *Bemba* decision that followed the *Lubanga* decision, and claimed for the need for a careful review of each case's circumstances. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial of 24 November 2010, Trial Chamber III, Case No. ICC-01/05-01/08-1039 at para. 7.

[122] Jackson and Brunger, *supra* note 5 at 611.

[123] *Muthaura*, *supra* note 121 at para. 52; *Ruto*, *supra* note 121 at para. 50.

[124] *Muthaura*, *ibid.*, at para. 4; *Ruto, ibid.*, at para. 37.

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Later, Trial Chamber VI in *Ntaganda* clarified that decisions would vary based on "a careful review of the circumstances prevailing in each case at the court".[125] With or without such assessment, at the time of writing, Trial Chambers V and VI adopted a witness preparation protocol; Trial Chambers I, III, VII, VIII, and IX decided not to allow such a protocol; and Trial Chambers II and IV did not pronounce on this issue.[126] The circumstances that allow this practice include the "different cultural backgrounds" of witnesses[127] and "significant challenges related to meeting and interviewing witnesses in the field".[128] Thus, the diverse jurisprudence of the different ICC chambers regarding witness proofing shows that the general principle of law can differ depending on the premise of an individual case.

IV. Conclusion

This article has demonstrated that premises have played a critical role in the recognition of general principles of law. The theory focusing on the premises that were considered when recognizing different general principles of law explains why the contents of general principles of law differ depending on the legal field, court, or case. Thus, premise theory offers a new perspective on international criminal courts' practice in recognizing general principles of law. While the international criminal law has been criticized to be teleological in nature,[129] premise theory provides a partial but scientific clarity on the method that has adopted teleological law recognition. It is not merely a discretionary response but a reproducible practice that attempts to respond to premises of international criminal justice, the courts, or the cases.

Premise theory works as an explanatory tool to account for the practice of international criminal courts and may increase predictability as regards the courts' practice of recognizing new general principles of law. When clearly mentioned, the theory allows judges to articulate the premises that function as variables in recognizing a general principle of law. For legal predictability and transparency, judges should explicitly describe the premises that they considered in recognizing specific general principles of law.[130] For prosecutors or counsels, an explicit indication of the premises of the court or the case, including the cultural background, tradition, religious beliefs, or values familiar to the accused or victims will provide strong justification for their claim for applying specific general principles of law to the case at hand. Such use of general principles of law should function as an open door for flexibility that should accompany the multicultural characteristics of modern international criminal courts.

Premise theory should also be applied to explain the method of recognition of general principles of law in other fields of international law. It has been noted that the sources of public international law "reflect the peculiarities of a discipline whose fundamental premise, though evolving, is based on a consensual relationship between co-equal sovereign

[125] *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation of 16 June 2015, Trial Chamber VI, Case No. ICC-01/04-02/06-652 at para. 17 [*Ntaganda*].

[126] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Witness Preparation and Familiarisation, Case No. ICC-01/12-01/18-666, Trial Chamber X, at para. 10 (Mar. 17, 2020) [*Al Hassan*].

[127] *Ntaganda*, *supra* note 125 at para. 18.

[128] *Al Hassan*, *supra* note 126 at para. 14.

[129] See for example Darryl ROBINSON, "The Identity Crisis of International Criminal Law" (2008) 21 Leiden Journal of International Law 925 at 929.

[130] It has been argued that the process of identifying general principles of law should be more transparent and coherent. See Kotuby and Sobota, *supra* note 43 at 18. Jain also claimed that courts must pay attention to clarifying the basis for material validity and the specific features of international criminal law that reveal an underlying general principle. Jain, *supra* note 71 at 113.

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states".[131] Conversely, the liberal premises of international criminal law include juridification, criminalization, and individualization.[132] Considering other fields of international law, European Union (EU) law, for example, may be based on the premise of a single market, which is the basis of the general principles of EU law, such as the principle of integration of the market and free movement.[133] General principles, such as fair and equitable treatment, embody the *grundnorm* of international investment law.[134] The law of the international civil service is formed through the recognition of general principles such as the independence of international civil servants before international administrative courts.[135] Further research may reveal whether premise theory can explain how general principles of law are recognized in other fields or before different international courts and, conversely, what premises do or can exist in relation to different courts or even individual cases.

The main difficulty encountered in accepting premise theory is the problem of assessing the legitimacy and validity of the premises considered for the recognition of general principles of law. Identifying the premises requires logical persuasiveness and philosophical grounding. The selection of premises often involves value-oriented determination based on either realistic or cosmopolitan views of international criminal justice.[136] Whereas all international criminal justice institutions agree on a set of common goals and pursue them, disagreement regarding priorities result in different international criminal procedures.[137] Furthermore, premise theory allows judges to select different premises on a case-by-case basis, which ICC Statute Article 21(1)(c) explicitly endorses. Thus, the general principles of law as specific rules will not contribute to maintaining the coherence of international law or each field of international law.[138]

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[131] M. Cherif BASSIOUNI, *Introduction to International Criminal Law*, 2nd revised ed. (Leiden: Martinus Nijhoff Publisher, 2013) at 15.

[132] Stahn, *supra* note 17 at 9.

[133] For the general principles of EU law, see, for example, Marek RZOTKIEWICZ, "The General Principles of EU Law and Their Role in the Review of State Aid Put into Effect by Member States" (2013) 12 European State Aid Law Quarterly 464 at 465; Stefan VOGENAUER and Stephen WEATHERILL, *General Principles of Law: European and Comparative Perspectives* (Oxford: Hart Publishing, 2017); Emanuel CASTELLARIN, "General Principles of EU Law and General International Law" in Andenæs, Fitzmaurice, Tanzi, and Wouters, eds., *supra* note 13 at 131.

[134] Fulvio Maria PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles* (The Hague: T. M. C. Asser Press, 2018) at 161. A contrasting view found that "general principles of international commercial law may reflect more general legal concepts, which are relevant regardless of the contractual or commercial context". See Andrea CARLEVARIS, "General Principles of Commercial Law and International Investment Law" in Andenæs, Fitzmaurice, Tanzi, and Wouters, eds., *supra* note 13, 205 at 225.

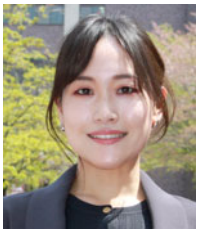
[135] Judgment No. 2232 of 16 July 2003, Administrative Tribunal of the International Labour Organization, at para. 16.

[136] See, for example, Stahn, *supra* note 17 at 8–9.

[137] Jenia I. TURNER, "Pluralism in International Criminal Procedure" in Darryl K. BROWN, Jenia Iontcheva TURNER, and Bettina WEISSER, eds., *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2018), 993 at 994.

[138] It has been suggested that there is no reason to fear the diversity of procedural law from a normative perspective. See Volker NERLICH, "Daring Diversity – Why There is Nothing Wrong with 'Fragmentation' in International Criminal Procedure" (2013) 26 Leiden Journal of International Law 777 at 781. In contrast, general principles as abstract and underlying principles may operate as a tool for convergence. See Mads Tønnesson ANDENÆS and Ludovica CHIUSSI, "Cohesion, Convergence and Coherence of International Law" in Andenæs, Fitzmaurice, Tanzi, and Wouters, eds., *supra* note 13 at 9.

Competing interests. The author declares none.



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