Article 21

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Article 21(1)

Applicable Law

General Remarks:

Article 38(1) of the Statute of the International Court of Justice ('ICJ') is often viewed as a provision that enumerates the "well-established sources of international law".[1] There treaty law, customary international law ('CIL') and general principles of law are named as the primary sources of international law, and judicial decisions and the doctrine as subsidiary means for the determination of rules of law. Early on the drafters of the ICC Statute, however, felt a need for a special provision on applicable law for the ICC.[2] The outcome was Article 21 of the ICC Statute, which includes both ICC-specific sources of law (internal sources) (Article 21(1)(a) and 21(2)) and general sources of international law (external sources) (Article 21(1)(b)-(c)).[3] The aim of the Article was to modify the applicable law to better suit the criminal law context in which the Court operates.[4] This was mainly achieved by enhancing the legal relevance of the Court's internal sources of law. As the *ad hoc* tribunals ICTY and ICTR applied the general sources of international law and the ICC has always followed its Article 21, the applicable law was a part of international criminal law where the law was fragmented. In contrast to the ICTY and ICTR statutes, which were "retrospective and [...] not themselves [substantive criminal] law" but "rather, pointers to a law existing in some form in the rarefied sphere of international

1 ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgement,14 January 2000, IT-95-16-T, para. 540 (https://www.legal-tools.org/doc/5c6a53/).

2 See further, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 513–514 (https://www.legal-tools.org/doc/b7432e/).

3 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 Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 288 and 293 (https://www.legal-tools.org/doc/3e6014/).

4 Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 933 (https://www.legal-tools.org/doc/040751/).

law",[5] the ICC Statute is a non-retroactive written instrument which aim is to function as a code of criminal law and procedure.

Article 21 focuses on enumerating and ranking the applicable legal sources, rather than on elaborating how they should be identified (especially relevant in connection to non-written sources of law) or interpreted (especially relevant in connection to written sources of law). This entails that there are many aspects of the applicable law that still requires recourse to general international law. General international law, for example, guides how CIL and general principles of law should be identified. The relationship between the sources of international law is complicated as the same evidence (most notably State practice in the form of national legislation and case law) is used to establish both CIL and general principles of law. Treaty law also has a connection to CIL, as treaty ratification is a form of State practice. The inclusion of external sources of law in Article 21 signifies that this complex relationship between the various sources of international law also is part of the ICC system of applicable law. In this regard, Cryer has noted that the "interrelationship of sources is more complex than Article 21's apparently rigid hierarchy implies" as "the overlap between the sources is too complex to reduce to simple formulae, including reference to hierarchy".[6]

It should also be observed that, Article 21 does not explicitly address the legal relevance of all types of material used in legal argumentation before the ICC. Article 21 is, for instance, quiet on the legal weight of international case law, the writings of highly qualified publicists, *travaux préparatoires*, and instruments adopted by international organizations, such as UN General Assembly resolutions. There are also ICC internal legal instruments, such as the Regulations of the Court, which legal position is not explicitly addressed in Article 21. Likewise, for example, the official actions taken by the ICC Assembly of States Parties are not mentioned in Article 21.[7]

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5 Alexander Zahar and Göran Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008, p. 80 (https://www.legal-tools.org/doc/b27edd/).

6 Robert Cryer, "Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources", in *New Criminal Law Review*, 2009, vol. 12, no. 3, pp. 393–394 (https://www.legal-tools.org/doc/f83aae/).

7 ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals against the "Decision Establishing the Principles and Procedures to Be Applied to Reparations" of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 46 (https://www.legal-tools.org/doc/c3fc9d/).

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

Article 21(1)(a)

1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

In Article 21(1)(a), the ICC Statute, the Elements of Crimes ('Elements') and the Rules of Procedure and Evidence ('RPE') are enumerated as the legal sources that the Court shall apply in the first place. Article 21(1) thus establishes a hierarchy between the various sources of law and puts the Court's own internal legal instruments at the top of the hierarchy. Article 21(1)(a) does not, however, clearly settle the internal relationship between these three sources of law. A hierarchy is instead established elsewhere. Article 51(5) provides that in the event of conflict between the Statute and the RPE, the Statute shall prevail. In an explanatory note to the RPE, it is furthermore emphasized that, in all cases, the RPE should be read in conjunction with and subject to the provisions of the Statute. Article 9, on its part, stipulates the Elements shall be consistent with the Statute, and that their function is to assist the Court in the interpretation and application of the crime definitions in the Statute.

The hierarchical relationship between the Statute and the RPE has been reaffirmed in the Court's case law. For example, in a decision in the Situation in Democratic Republic of the Congo, a Pre-Trial Chamber noted that the RPE are an instrument that is subordinate to the Statute and that a provision of the RPE cannot be interpreted in such a way as to narrow the scope of an Article of the Statute.[1] Bitti has, however, argued that the initial strong stance in favour of Statute supremacy today is challenged by some new rules adopted by the Assembly of State Parties, which compatibility with the Statute can be debated. He also expresses concern over the fact that "at times, ICC Chambers have either disregarded the Rules or adopted procedures not foreseen in those Rules".[2]

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1 ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 47 (https://www.legal-tools.org/doc/2fe2fc/).

2 Gilbert Bitti, "Article 21 and the Hierarchy of Sources of Law before the ICC", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 416–420 and 443 (https://www.legal-tools.org/doc/3e6014/). See also ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on Victims' Representation and

The question to what extent the judges are obliged to follow the Elements has, however, been more controversial. Whereas Article 21(1) stipulates that the Court shall apply the Elements, Article 9 seems to give them merely an assisting role. The question has been considered in a Pre-Trial Chamber decision, where the majority held that the Elements must be applied unless a Chamber finds an irreconcilable contradiction between the Elements and the Statute.[3] The minority Judge, on the other hand, held that the wording in Article 9 of the ICC Statute clearly gives forth that the Elements are not binding for the judges.[4] The minority view has been supported by a number of scholars.[5]

The ICC's internal legal sources furthermore include some instruments, which hierarchical position is not explicitly settled in Article 21. Some of these are, however, anticipated in the ICC Statute. Article 44(3) stipulates that the Assembly of State Parties shall adopt Staff Regulations, and Article 52 that the judges shall adopt Regulations of the Court. The Regulations of the Office of the Prosecutor, the Regulations of the Registry, and the Code of Professional Conduct for Counsel, on the other hand, are foreseen by Rules 9, 14, respectively 8 of the ICC RPE. While it is clear that all these documents are subordinate to the three major internal sources of law, their internal relationship and relationship to the Court's external sources is not as evident. Schabas has, in this regard, submitted that "in the event of conflict judges will have to find solutions based on general principles of interpretation [...] and with reference to the authority of the body

Participation, 3 October 2012, ICC-01/09-01/11-460, paras. 27–29 (https://www.legal-tools.org/doc/e037cc/).

3 ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 128 ('*Al Bashir*, 4 March 2009') (https://legal-tools.org/doc/e26cf4/).

4 *Al Bashir*, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 17.

5 For example, Gudrun Hochmayr, "Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute", in *Journal of International Criminal Justice*, 2014, vol. 12, p. 658, and Otto Triffterer, "Can the "Elements of Crimes" Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 387–388 (https://www.legal-tools.org/doc/32e54f/), Herman von Hebel, "The Decision to Include Elements of Crimes in the Rome Statute", in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 7–8 (https://www.legal-tools.org/doc/e34f81/).

responsible for adopting the text".[6] All internal written sources of law furthermore appear to rank higher than the Court's external sources of law. In the *Lubanga* case, the Appeals Chamber did not find it necessary to consider whether Regulation 55 of the Court was consistent with general principles of international law. The central question was rather whether the Regulation was consistent with the Statute and the RPE.[7]

When the Court applies its internal legal instruments, the question of how the instruments should be interpreted can be disputed. Interpretation in general is not addressed in the ICC Statute. Article 21(3) only stipulates that interpretations must be consistent with internationally recognized human rights, and Article 22(2) that the definition of crimes shall be strictly construed and shall not be extended by analogy. As the ICC Statute is a treaty, the Court has held that guidance for interpretation can be found in the 1969 Vienna Convention on the Law of Treaties.[8] Article 31 of the Vienna Convention gives forth that in interpretation, the focus shall be on literal, contextual and teleological considerations. More specifically, the Appeals Chamber has held that:

> The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and

6 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 517 (https://www.legal-tools.org/doc/b7432e/).

7 ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, paras. 66–81 (https://www.legal-tools.org/doc/40d015/).

8 Vienna Convention on the Law of Treaties, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/). For example, see ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/01-04-168, para. 33 ('*Situation in the Democratic Republic of the Congo*, 13 July 2006') (https://www.legal-tools.org/doc/a60023/); see also *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 8 (https://www.legal-tools.org/doc/dd3a88/).

general tenor of the treaty (*Situation in the Democratic Republic of the Congo*, 13 July 2006, para. 33).

In line with Article 32 of the Vienna Convention, the t*ravaux préparatoires* of the Rome Statute can be used to confirm interpretations made based on literal, contextual and teleological readings.[9]

Cross-references:

Articles 9(1) and 9(3), 22(2), 44(3), 51(4)–(5) and Article 52.

Rules 8, 9, and 14.

Doctrine: For the bibliography, see the final comment on Article 21.

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[9] For example, *Situation in the Democratic Republic of the Congo*, 13 July 2006, paras. 40–41; ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgement on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I Entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, para. 50 (https://www.legal-tools.org/doc/62dbba/). See also ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgement Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 621 (https://www.legal-tools.org/doc/677866/); *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, 25 October 2013, ICC-01/09-01/11-1066, para. 11 (https://www.legal-tools.org/en/doc/575657/).

Article 21(1)(b)

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

Even though the aim of the ICC's internal legal sources is to comprehensively establish the legal framework according to which the Court shall function, situations can emerge where a legal question cannot be answered with reference to these instruments. As such, it is important that there are other sources of applicable law to which the Court may rely on in situations where the Court's internal legal sources are quiet or unclear. In this regard, Article 21(1)(b) establishes that the Court shall apply, in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

The phrase "in the second place" emphasizes that the applicable treaties and the principles and rules of international law in the ICC legal system are legal sources that hierarchically are below the legal sources mentioned in Article 21(1)(a). This has also been stressed in case law. The ICC has held that the external sources of law generally only can be resorted to when two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements and the RPE; and (ii) the lacuna cannot be filled by the application of the criteria of interpretation provided in the Vienna Convention on the Law of Treaties of 1969 and Article 21(3) of the ICC Statute.[1] In this regard, the ICC has in relation to modes of responsibility found that since the Statute in detail regulates the applicable modes of

[1] ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 44 (https://legal-tools.org/doc/e26cf4/). See also ICC, Pre-Trial Chamber I, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 289 ('*Ruto et al.*, 23 January 2012') (https://www.legal-tools.org/doc/96c3c2/); and *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, 15 January 2019, ICC-02/11-01/15-1234, paras. 14–15 (https://www.legal-tools.org/doc/bd0ffc/).

responsibility, it is not necessary to consider whether customary international law ('CIL') admits or discards some modes of responsibility.[2]

The reference to the "established framework of international law" in Article 8 on war crimes does, however, according to the Appeals Chamber entail that the "statute permits recourse to customary and conventional law regardless of whether any lacuna exists" to ensure the correct interpretation of the Article.[3]

Importantly, the fact that a question is not regulated in ICC's internal legal instruments does not necessarily mean that there is a lacuna that must be filled by applying external legal sources.[4] Article 21(1)(b) contains the criterion of "where appropriate", which emphasizes that the judges have a certain discretion in the use of the external legal sources. When deliberating on witness proofing, the *Lubanga* Trial Chamber indicated that especially in connection to procedural questions a detailed analysis must be conducted before a norm that cannot be found in the internal "ICC legislation" is recognized based on Article 21(1)(b). More specifically, the Trial Chamber held that:

> Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules

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2 ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 508 ('*Katanga and Ngudjolo*, 30 September 2008') (https://www.legal-tools.org/doc/67a9ec/).

3 ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Judgment on the Appeal of Mr Ntaganda against the "Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, 15 June 2017, ICC-01/04-02/06, para. 53 (https://www.legal-tools.org/doc/a3ec20/).

4 ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 33–39 (https://www.legal-tools.org/doc/a60023/).

> and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.[5]

Schabas has noted that Article 21(1)(b) "actually contains two distinct sources, with no suggested rank amongst them",[6] namely (1) applicable treaties; and (2) principles and rules of international law. As regards treaties, the meaning of the word "applicable" has been debated.[7] It appears that applicable treaties at least include those to which the Court itself is a party, viz. the Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 2004 and the Headquarters Agreement between the International Criminal Court and the Host State signed in 2007.[8] A more difficult question is, however, the applicability of other treaties, such as human rights and international humanitarian law treaties. As noted by Pellet, it is difficult to see how inter-governmental treaties, in general, would be applicable as treaty law before the ICC.[9] The main rule in connection to treaties is that they only are binding for those States that have ratified them.[10] The ICC has, however, in its jurisprudence, characterized, inter alia, the Vienna Convention on the Law of Treaties, the

5 ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 44 (https://www.legal-tools.org/doc/ac1329/).

6 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 519 (https://www.legal-tools.org/doc/b7432e/).

7 See further, for example, Gudrun Hochmayr, "Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute", in *Journal of International Criminal Justice*, 2014, vol. 12, p. 666, and Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 938–939 (https://www.legal-tools.org/doc/040751/).

8 Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (https://www.legal-tools.org/doc/5edc7c/); Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008 (https://www.legal-tools.org/doc/45e340/).

9 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*, 2nd. ed., Oxford University Press, 2002, pp. 1068–1069 (https://www.legal-tools.org/doc/01addc/).

10 See further, for example, Marko Milanović, "Is the Rome Statute Binding on Individuals? (And Why We Should Care)", in *Journal of International Criminal Justice*, 2011, vol. 9, pp. 25 ff. (https://www.legal-tools.org/doc/384f0e/).

Convention on the Rights of the Child, and the Genocide Convention as "applicable".[11]

Secondly, Article 21(1)(b) refers to the "principles and rules of international law". This concept is perplexing in that it differs from the concept of customary international law that is generally used in public international law. While most scholars agree that principles and rules of international law include CIL, there are different opinions as to whether there are also other principles and rules of international law (see further for example deGuzman, 2016, pp. 939–941, and Pellet, 2002, pp. 1070–1073). It should namely be noted that general principles of law derived from national laws of legal systems of the world are covered by Article 21(1)(c). deGuzman has, in this regard, suggested that principles and rules could be based on the international legal conscience, the nature of the international community and natural law.[12] She thus suggests that there is something that could be characterized as general principles of a genuinely international origin[13] that are not created by States through their practice and will in the same way as positive international law. The existence of such international law is, however, disputed and as such the deGuzman's submission must be regarded as controversial. There are, however, also other understandings of general principles of law. Some scholars find that there are general principles of international law that generally have their origin in state practice (or the existing sources of international law), but which "have been so long and so generally accepted as to be no longer directly connected with state practice".[14] Exactly how such general principles emerge and how they should be identified is, however, unclear.

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11 ICC, *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08, para. 70 (https://www.legal-tools.org/doc/edb0cf/). See also, for example, ICC OTP, "Policy on Children", 23 January 2016, p. 10, fn. 19 (https://www.legal-tools.org/doc/c2652b/), and Zeegers, 2016, p. 68).

12 deGuzman, 2016, p. 940 (https://www.legal-tools.org/doc/040751/).

13 Cf. Birgit Schlütter, *Developments in Customary International Law – Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff, Leiden, 2010, p. 75 (https://www.legal-tools.org/doc/8a3ae5/).

14 Ian Brownlie, *Principles of Public International Law*, 2nd ed., Oxford University Press, 2008, p. 19 (https://www.legal-tools.org/doc/3b1104/). See also for example Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed., Routledge, London, 1997, pp. 48–49 (https://www.legal-tools.org/doc/bfe8e0/).

In this regard, it is interesting that the ICC sometimes has referred to the practice of other international or hybrid criminal tribunals by reference to Article 21(1)(b).[15] The case law of these tribunals has then often been put forward as evidence of a "widely accepted practice in international criminal law" regarding a certain matter.[16] The ICC has also referred to case law from other courts, such as the ICJ.[17] Such argumentation could be seen as evidence of a viewpoint that international case law can function as an autonomous source of law before the ICC. Despite some statements to this effect, it, however, appears that the prevailing approach of the ICC to international case law is that "decisions of other international courts and tribunals are not part of the directly applicable law under Article 21".[18] The case law can only be "indicative of a principle or rule of international law" (*Ruto et al.*, 23 January 2012, para. 289), but exactly how remains unclear.[19] While the case law of domestic, multinational (Nuremberg) and potentially hybrid (ECCC, SCSL, STL) criminal courts can be seen as evidence of State practice (relevant for, for example, the creation of CIL), the case law of fully international criminal courts (ICTY, ICTR) cannot readily be characterized as such. It should be noted that also the ICTY and the ICTR have been criticized for their heavy reliance on jurisprudence as evidence of ex-

15 See for example ICC, *Prosecutor v. Mudacumura*, Pre-Trial Chamber I, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 63, fn. 128 (https://www.legal-tools.org/doc/ecfae0/); and *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Red2-tENG, para. 106 (https://www.legal-tools.org/doc/182fc7/).

16 Cf. ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 33 (https://www.legal-tools.org/doc/dd3a88/).

17 See for example *Katanga and Ngudjolo*, 30 September 2008, para. 238; and *Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18, paras. 29–30 (https://www.legal-tools.org/doc/73aeb4/).

18 ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 603 ('*Lubanga*, 14 March 2012') (https://www.legal-tools.org/doc/677866/).

19 On the legal relevance of international case law, see also Volker Nerlich, "The Status of ICTY and ICTR Precedent in Proceedings before the ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden, 2009, pp. 305–325 (https://www.legal-tools.org/doc/ca6714/).

isting law.[20] In public international law, case law is generally regarded as a subsidiary means for the determination of rules of law (ICJ Statute, Article 38(1)(d)).

Even though the wording of Article 21 gives forth that external sources of law only exceptionally will be applicable in ICC proceedings, it is possible to find many references to treaty law, CIL and international case law in the jurisprudence of the Court. This may be explained with the fact that these sources often have been found relevant when interpreting the Court's internal legal sources.[21] Sometimes the phrasing of an ICC norm indicates that the drafters of the norm have been aware of a similar provision in another tribunal's statute or a convention.[22] In this regard, for example, the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions, and the 1948 Genocide Convention are of importance. Regarding war crimes, the Elements explicitly stipulate that the crime shall be "interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea". Article 8 in the ICC Statute furthermore makes some references to the 1949 Geneva Conventions. The external norms may also be directed at the same objective as the corresponding ICC provisions (*Lubanga*, 14 March 2012, para. 603), which may make them relevant when the ICC norms are interpreted teleologically. External sources of law can, however, generally only be used as interpretational aid when the interpretation has not been predetermined by a more high-level internal norm. In the *Lubanga* case, the Appeals Chamber found that it did not matter if ICTY Rule 33(B) had the same wording as the ICC Regulation 24 *bis*(1) of the Regulations of the Court, as the legal

[20] See for example Ilias Bantekas, "Reflections on Some Sources and Methods of International Criminal and Humanitarian Law", in *International Criminal Law Review*, 2006, vol. 6, pp. 128–132 (https://www.legal-tools.org/doc/a8734d/).

[21] See for example ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, paras. 97–98 and 103 (https://www.legal-tools.org/doc/0c5307/).

[22] Cf. ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 43 (https://www.legal-tools.org/doc/6ead30/).

question was exhaustively settled by explicit provisions in the ICC Statute.[23]

Cross-reference:
Article 8.

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

[23] ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the "Registrar's Submissions under Regulation 24bis of the Regulations of the Court in Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800" of 5 October 2011, 21 November 2011, ICC-01/04-01/06-2823, para. 16 (https://www.legal-tools.org/doc/e8a246/). See also Article 21(3).

Article 21(1)(c)

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

If the ICC cannot find a solution to a legal question in its own internal sources of law or in the applicable treaties and the principles and rules of international law, it may seek for the solution in general principles of law derived from national laws of legal systems of the world. The application of this legal source is always dependent on the condition that the application is not inconsistent with the Rome Statute and with international law and internationally recognized norms and standards. The low hierarchical position of general principles of law derived from national laws of legal systems of the world has meant that the ICC has not often made investigations into domestic legal practices based on Article 21(1)(c).[1] When addressing the acceptability of witness proofing, the Court, however, made such an inquiry.[2] The fact that Article 31(3) refers to "a ground for excluding criminal responsibility other than those referred to [in the Statute] where such ground is derived from applicable law as set forth in Article 21" gives forth that general principles of law derived from national laws could also be relevant when identifying factors that can exclude criminal responsibility.

The use of general principles of law derived from national laws of legal systems of the world makes it necessary to decide what domestic legal systems should be examined, as all national laws cannot be considered

1 See for example ICC, *Prosecutor v. Katanga*, Appeals Chamber, Public Redacted Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 Entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, ICC-01/04-01/07-3778-Red, para. 148 (https://www.legal-tools.org/doc/0a95b7/).

2 ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 35–42 (https://www.legal-tools.org/doc/dd3a88/). See also, regarding the right to appeal, ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 5, 32 and 39 (https://www.legal-tools.org/doc/a60023/).

and the selection of the systems may affect the result of the inquiry. Article 21(1)(c) itself stipulates that at least the national laws of States that would normally exercise jurisdiction over the crime shall be considered as appropriate. This has been found to include at least the laws of the State where the crime was committed and the laws of the State of which the accused is a national.[3] More generally, it has been submitted that the inquiry should include the principal legal systems of the world, including at least representatives from civil law countries and common law countries, and probably some Islamic law countries.[4] In connection to admissibility of evidence, the Court emphasized that it is not bound by the national law of a particular State.[5] The Court may hence, based on Article 21(1)(c) only derive general principles from several domestic legal systems.

While general principles of law derived from national laws rarely is an applicable legal source per se, practices followed in domestic legal systems can function as an interpretational aid when the Court's internal legal sources are applied. In the *Katanga and Ngudjolo* case, a Pre-Trial Chamber, for example, found that its interpretation of the Statute which incorporated the concept of perpetration through control over an organisation was supported by the fact that "[p]rior and subsequent to the drafting of the Statute, numerous national jurisdictions relied on the concept".[6] As an interpretational aid, general principles of law derived from national laws can therefore, in practice, be influential. In his separate opinion in the *Lubanga*

3 Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 944 (https://www.legal-tools.org/doc/040751/).

4 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*, 2nd. ed., Oxford University Press, 2002, pp. 1073–1074 (https://www.legal-tools.org/doc/01addc/). See also ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 41 (https://www.legal-tools.org/doc/ac1329/); and *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, ICC-01/04-01/07-322, p. 12 (https://www.legal-tools.org/doc/8b150d/).

5 ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 69 (https://www.legal-tools.org/doc/b7ac4f/). See also Article 68(9).

6 ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 502 (https://www.legal-tools.org/doc/67a9ec/).

Trial Judgment, Judge Fulford, in this regard, criticized the Court for an imprudent reliance on domestic practices:

> In these two instances, the judges relied heavily on the scholarship of the German academic Claus Roxin as the primary authority for the control theory of co-perpetration, and in the result, this approach was imported directly from the German legal system. While Article 21(1)(c) of the Statute permits the Court to draw upon "general principles of law" derived from national legal systems, in my view before taking this step, a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine's compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.[7]

Similarly, Judge Van den Wyngaert has cautioned for the adoption of domestic practices under the guise of treaty interpretation:

> I believe that it is not appropriate to draw upon subsidiary sources of law [...] to justify incorporating forms of criminal responsibility that go beyond the text of the Statute. Reliance on the control over the crime theory [...] would only be possible to the extent that it qualifies as a general principle of criminal law in the sense of Article 21(l)(c). However, in view of the radical fragmentation of national legal systems when it comes to defining modes of liability, it is almost impossible to identify general principles in this regard. [...] Moreover, even if general principles could be identified, reliance on such principles, even under the guise of treaty interpretation, in order to broaden the scope of certain forms of criminal responsibility would amount to an inappropriate expansion of the Court's jurisdiction.[8]

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7 ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012, ICC-01/04-01/06-2842, para. 10 (https://www.legal-tools.org/doc/677866/).

8 ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4, para. 17 (https://www.legal-tools.org/doc/7d5200/).

Hence, while the ICC at times has allowed "inspirational influences of domestic legal methods for the legal solutions to similar difficulties",[9] the imports of domestic practices and legal concepts have often been controversial.

Cross-references:
Article 31(3) and 69(8).

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

[9] ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, para. 192 (https://www.legal-tools.org/doc/6baecd/).

Article 21(2)

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

Article 21(2) provides that the Court has the right to apply principles and rules of law as interpreted in its previous decisions. The paragraph uses the noun "may", which emphasizes that the use of precedent is discretionary. It has been noted that this provision seems to state the obvious, as it seems evident that the application of the same legal provisions in different cases should result in similar outcomes.[1] The function of Article 21(2) is primarily to reject the doctrine of binding precedent or *stare decisis* that can be found in some domestic legal systems. According to Bitti, it is possible to find many examples in the ICC jurisprudence where chambers have deviated from earlier case law, which shows that the ICC judges have used the discretion granted to them by Article 21(2).[2]

Doctrine: For the bibliography, see the final comment on Article 21.

Author: Mikaela Heikkilä.

[1] 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*, 2nd. ed., Oxford University Press, 2002, p. 1066 (https://www.legal-tools.org/doc/01addc/) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 526 (https://www.legal-tools.org/doc/b7432e/).

[2] See Gilbert Bitti, "Article 21 and the Hierarchy of Sources of Law before the ICC", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 422–425 (https://www.legal-tools.org/doc/3e6014/).

Article 21(3)

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status

Article 21(3) establishes that the application and interpretation of law pursuant to Article 21 must be consistent with internationally recognized human rights including the non-discrimination principle. The provision thus creates a substantial hierarchy of law which supersedes the formal hierarchy between sources established by Article 21(1).[1] This kind of "super-legality" (Pellet, 2002, pp. 1079 and 1082) is not unique for the ICC. In many domestic legal systems (and, for example, in European Union law), fundamental rights or human rights are given a special legal position. Also in international law there are peremptory *jus cogens* norms.

Article 21(3) raises the question of what those human rights are that are "internationally recognized". Of the various human rights, Article 21(3) only explicitly mentions the principle of non-discrimination. In its case law, the Court has, however, identified some other human rights principles that it regards as "internationally recognized": for example, the *ne bis in idem* principle,[2] the *nullum crimen sine lege* principle,[3] and the right to self-determination.[4] These are examples of firmly established principles or

1 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*, 2nd. ed., Oxford University Press, 2002, p. 1077 (https://www.legal-tools.org/doc/01addc/).

2 ICC, *Prosecutor v. Saif al-Islam Gaddafi*, Appeals Chamber, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, 9 March 2020, ICC-01/11-01/11-695, para. 62 (https://www.legal-tools.org/doc/kdbwwo/).

3 ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, ICC-02/05-01/20-503 OA8, para. 83 (https://www.legal-tools.org/doc/tffwvd/).

4 ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, ICC-01/18-143, para. 122 (https://www.legal-tools.org/doc/haitp3/).

rights that can be found in many different human rights instruments. In its initial case law, the ICC has frequently referred to the ECHR and the ICCPR, but also to other human rights conventions, such as the Convention on the Rights of the Child.[5] There are, however, also more unestablished human rights norms originating in little ratified treaties and soft law instruments. In this regard, it is interesting that the Court has also found soft law instruments, such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[6] and the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa[7] as legally relevant.[8] Also human rights case law has often been referred to.[9] As such, the ICC seems to give the concept of internationally recognized human rights a broad reading. Also in connection to the non-discrimination principle, Article 21(3) enu-

5 For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 604 (https://www.legal-tools.org/doc/677866/); see also Judge Pikis' separate opinion, in which he argues that: "Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions". ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, ICC-01/04-01/06-424, para. 3 (https://www.legal-tools.org/doc/2da466/).

6 For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 35 (https://www.legal-tools.org/doc/4e503b/).

7 ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Establishing the Principles and Procedures to Be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 185 (https://www.legal-tools.org/doc/a05830/).

8 See also ICC, *Prosecutor v. Ngudjolo*, Presidency, Decision on "Mr Mathieu Ngudjolo's Complaint under Regulation 221(1) of the Regulations of the Registry against the Registrar's Decision of 18 November 2008", 10 March 2009, ICC-RoR217-02/08-8, para. 27 (https://www.legal-tools.org/doc/0c30bd/).

9 For example, ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain other Issues Raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, paras. 46–47 (https://www.legal-tools.org/doc/485c2d/); and *Prosecutor v. Gbagbo and Blé Goudé*, Appeals Chamber, Second Public Redacted Judgment on the Prosecutor's Appeal against the Oral Decision of Trial Chamber I pursuant to Article 81(3)(c)(i) of the Statute, 21 February 2019, ICC-02/11-01/15, para. 50 (https://www.legal-tools.org/doc/00e8f2/).

merates many possible grounds for discrimination. It has been noted that the possible discriminatory grounds constituted the controversial part of the provision's negotiations and that the numeration is both provocative (starting with gender) and curious (placing age before the traditional grounds of discrimination, such as race and religion).[10]

The Appeals Chamber has emphasized that every article in the ICC Statute has to be interpreted and applied according to Article 21(3).[11] In practice, the judges must, however, make a decision whether a particular ICC norm has a human rights dimension or not. In relation to certain questions, it is evident that human rights law must be consulted, for example, in relation to fair trials of the accused (Article 67).[12] It is, however, not merely this type of provisions which interpretation and application must be guided by human rights. Human rights law can, for example, be relevant when crimes such as incitement to commit genocide and modes of responsibility such as instigation are addressed.[13] The ICC has also held that victim participation can be considered a human rights question,[14] even though the leading human rights instruments do not grant victims explicit procedural

[10] Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 947–948 (https://www.legal-tools.org/doc/040751/) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 533 (https://www.legal-tools.org/doc/b7432e/). See also ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quater*, 18 February 2014, ICC-01/09-01/11-1186, paras. 59–60 (https://www.legal-tools.org/doc/8b7d3e/).

[11] ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 12 July 2006, ICC-01/04-168, para. 38 (https://www.legal-tools.org/doc/a60023/).

[12] See also, for example, ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 24 (https://www.legal-tools.org/doc/fb80c6/).

[13] Cf. in this regard the 'Media case', ICTR *Prosecutor v. Nahimana et al.*, Trial Chamber, Judgement and Sentence, 3 December 2003, ICTR-99-52, paras. 983–999 (https://www.legal-tools.org/doc/45b8b6/).

[14] See for example ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine Van den Wyngaert from the Case of the Prosecutor v Germain Katanga, 18 February 2014, para. 42; and ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018, para. 88 (https://www.legal-tools.org/doc/73aeb4/).

rights.[15] In relation to victim participation, the ICC has, for example, found that based on "Article 21(3) of the Statute, read in conjunction with Article 12(1) of the Convention on the Rights of the Child, victims cannot be excluded from participation solely on the basis of their age".[16]

Finally, it should be noted that Article 21(3) refers to the interpretation and application of the law. In this regard, the Appeals Chamber has stressed that human rights friendly interpretation is not always enough. It must be ensured that human rights also are applied.[17] The application of human rights may support the identification of a lacuna in the ICC internal legal system, which filling demands the use of ICC's external legal sources. In this regard, the ICC has held that it is possible to order a stay of proceedings in the case of breach of accused's fundamental rights even though the Court's internal legal sources do not foresee such a response to a breach (*Lubanga*, 14 December 2006, paras. 37 and 39).

More controversially, Article 21(3) could entail that an ICC norm, even a Statute provision, is set aside or its application is suspended. Hochmayr has noted that this is not merely a question of "theoretical interest".[18] When three detained witnesses in 2011 applied for asylum in the Netherlands, the Court first based on Article 21(3) found that it was unable to return them to the Democratic Republic of Congo according to Article 93(7) to ensure their right to for example apply for asylum was not violated.[19] More generally, it must be therefore asked to what extent Article 21(3)

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15 See further Anne-Marie de Brouwer and Mikaela Heikkilä, "Victim Issues: Participation, Protection, Reparation, and Assistance", in Göran Sluiter et al. (eds.), *International Criminal Procedure – Principles and Rules*, Oxford University Press, 2013, pp. 1337–1341.

16 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Decision on Victims' Participation Status, 7 January 2016, ICC-02/11-01/15-379, para. 60 (https://www.legal-tools.org/doc/69c3c6/).

17 ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement 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, 14 December 2006, ICC-01/04-01/06-772, para. 37 ('*Lubanga*, 14 December 2006') (https://www.legal-tools.org/doc/1505f7/).

18 Gudrun Hochmayr, "Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute", in *Journal of International Criminal Justice*, 2014, vol. 12, p. 677.

19 ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d′asile" (Articles 68 and 93(7) of the Statute), 9 June 2011, ICC-01/04-01/07-3003-tENG, para. 73 (https://www.legal-tools.org/doc/e411d5/); and, *Prosecutor v. Katanga*, Trial Chamber II, Decision on the application for the interim release of detained Witnesses

can function as a legal basis to set aside, for example, a provision of the ICC Statute which challenges the internal legal framework of the ICC.[20] In this regard, Arsanjani has noted that: "While the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested".[21] In some domestic legal systems, constitutional law provisions requiring courts to ensure adherence to fundamental human rights have significantly affected interpretations of criminal law provisions. Before the ICC, Judge Blattman expressed concern over the fact that some judges according to him have overlooked the will of the drafters of the ICC with reference to Article 21(3):

> I am concerned by the Majority application of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. While the Majority opinion lists the Basic Principles in the relevant provisions which are taken into account by the Chamber, I caution that this is not a strongly persuasive or decisive authority which the Chamber should be using in its legal determination of victims and in particular the definition of victims and participation. I support and follow Article 21(3), which requires that decisions of the Chamber must be consistent with internationally recognized human rights. However, the particular provisions relied on in the Majority

DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting Opinion of Judge Christiane Van Den Wyngaert, 1 October 2013, ICC-01/04-01/07-3405-Anx, para. 3 (https://www.legal-tools.org/doc/5014f6/). See also ICC, *Prosecutor v. Ngudjolo*,Appeals Chamber, Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant Article 93 (7) of the Statute, 20 January 2014,ICC-01/04-02/12-158, paras. 26–30 (https://www.legal-tools.org/doc/d554f7/).

20 Gilbert Bitti, "Article 21 and the Hierarchy of Sources of Law before the ICC", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 438–439 and 442 (https://www.legal-tools.org/doc/3e6014/).

21 Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court", in *American Journal of International Law*, 1999, vol. 93, p. 29 (https://www.legal-tools.org/doc/94254d/).

decision were specifically considered and rejected during the preparatory stages of the drafting of the Rome Statute.[22]

Cross-reference:

Article 67.

Doctrine:

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2. Ilias Bantekas, "Reflections on Some Sources and Methods of International Criminal and Humanitarian Law", in *International Criminal Law Review*, 2006, vol. 6, pp. 121–136 (https://www.legal-tools.org/doc/a8734d/).
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5. Ian Brownlie, *Principles of Public International Law*, 2nd. ed., Oxford University Press, 2008 (https://www.legal-tools.org/doc/3b1104/).
6. Robert Cryer, "Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources", in *New Criminal Law Review*, 2009, vol. 12, no. 3, pp. 390–405 (https://www.legal-tools.org/doc/f83aae/).
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[22] ICC, *Prosecutor v. Lubanga*, Trial Chamber I Decision on Victims' Participation, Separate and Dissenting Opinion of Judge René Blattman, 18 January 2008, ICC-01/04-01/06-1119, para. 5 (https://www.legal-tools.org/doc/4e503b/).

8. Gudrun Hochmayr, "Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute", in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 655–79.
9. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th. ed., Routledge, London, 1997 (https://www.legal-tools.org/doc/bfe8e0/).
10. Marko Milanović, "Is the Rome Statute Binding on Individuals? (And Why We Should Care)", in *Journal of International Criminal Justice*, 2011, vol. 9, pp. 25–52 (https://www.legal-tools.org/doc/384f0e/).
11. Margaret M. deGuzman, "Article 21 – Applicable Law", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 932–948 (https://www.legal-tools.org/doc/040751/).
12. Volker Nerlich, "The Status of ICTY and ICTR Precedent in Proceedings before the ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 305–325 (https://www.legal-tools.org/doc/ca6714/).
13. 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*, 2nd. ed., Oxford University Press, 2002 (https://www.legal-tools.org/doc/01addc/).
14. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 511–536 (https://www.legal-tools.org/doc/b7432e/).
15. Birgit Schlütter, *Developments in Customary International Law – Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, Leiden, 2010 (https://www.legal-tools.org/doc/8a3ae5/).
16. Otto Triffterer, "Can the "Elements of Crimes" Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 381–400 (https://www.legal-tools.org/doc/32e54f/).

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