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International criminal tribunals and human rights law: Adherence and contextualization

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CHAPTER 3 HUMAN RIGHTS OBLIGATIONS OF THE ICTS BASED ON THEIR INTERNAL LAW AND PRACTICE

1. Introduction

This Chapter investigates whether and how the ICTs are bound by IHRL based on their internal law and practice. The previous Chapter has shown that as legal persons (or organs thereof), the ICTs are, in principle, bound by general IHRL. At the same time, several factors have been shown to complicate the assessment of their actual human rights obligations. This Chapter therefore investigates whether, and if so, how their internal law and practice has addressed the question of IHRL's bindingness vis-à-vis the ICTs. This will result in a more complete understanding of the nature and scope of the ICTs' obligation to respect international human rights norms.

The ad hoc Tribunals are discussed in the first part of this Chapter. Although their internal legal instruments do not incorporate an obligation to respect international human rights norms, the circumstances surrounding their creation and, more importantly, their judicial practice provide strong support for the conclusion that they are bound by IHRL. The second part of this Chapter addresses the ICC. Article 21(1) of its Statute allows the Court to consult IHRL as a subsidiary source of applicable law. More importantly, Article 21(3) obliges the Court to respect 'internationally recognized human rights'. This provision creates a general duty for the Court to subject all its interpretation and application of law to a mandatory review of consistency with such human rights standards.

It is therefore clear that the ICTs are bound by IHRL. However, the actual implications of this remain difficult to determine. First, it remains unclear how the ICTs must determine which exact norms bind them. Second, the ICTs retain a certain measure of freedom to deviate from accepted interpretations of human rights norms, based on the specific context in which they operate. As a result, the scope of application of international human rights norms in the specific context of an ICT may be difficult to determine *a priori*. Such methodological obstacles must accompany a discussion of the binding nature of IHRL vis-à-vis the ICTs, because they will necessarily impact on their actual interpretation and application of human rights norms, and their use of IHRL in this process.

2. The ad hoc Tribunals

Where the ICC Statute enshrines an obligation for the Court to respect internationally recognized human rights, the legal instruments of the ad hoc Tribunals do not incorporate such a general obligation. However, it has rightly been argued that this provision in the ICC Statute was based on existing practice before the Tribunals.¹ This part shows that the law and practice of the ad hoc Tribunals indeed incorporate an obligation on their part to abide by internationally recognized human rights.

2.1. Internal law and practice

First and foremost, their Statutes and the RPEs themselves impose human rights obligations on the Tribunals. These legal instruments partly reproduce human rights norms contained in international and regional treaties, thus creating human rights obligations for the Tribunals.² Article 21 of the ICTY Statute, and 20 of the ICTR Statute enshrine accused person's right to a fair trial and are based on Article 14 of the ICCPR.³ In addition, the Statutes impose a general duty on the Tribunals' Trial Chambers to ensure that trials are fair and expeditious.⁴ However, other human rights norms that are of immediate relevance to the work of the Tribunal, such as the right to liberty, are not included in the Statute. This could be explained by the fact that the Tribunals were created in 'conditions of relative urgency', as a result of which their procedural rules were quite limited, an issue which was envisaged to be remedied by the creation of RPEs by the Judges.⁵ The RPEs remedy some of these apparent omissions, and at the same time, clarify and elaborate a number of rights that are provided by the Statute. For example, suspects' and accused persons' right to be informed of their rights and be communicated with in a language they understand is enshrined in the Rules.⁶ Similarly, the right

¹ Lorenzo Gradoni 2013, 'The Human Rights Dimension of International Criminal Procedure' in Göran Sluiter and others (eds), *International Criminal Procedure - Principles and Rules* (OUP 2013), 74-75; Sergey Vasiliev, 'International Criminal Trials – a Normative Theory' (PhD Thesis, University of Amsterdam 2014), 132: 'Article 21(3) 'purports to crystallize an interpretative technique that has been used with relative regularity by the ad hoc tribunals'.

² Wolfgang Schomburg and Matthias Schuster, 'Human Rights in Proceedings before International Criminal Proceedings' in Eboe-Osuji, Chile, *Protecting Humanity – Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff 2010), 707.

³ Gradoni (n 1), 75.

⁴ Art 20 ICTY Statute; Art 19 ICTR Statute.

⁵ Frédéric Mégret, 'The Sources of International Criminal Procedure' in Göran Sluiter and others (ed), *International Criminal Procedure - Principles and Rules* (Oxford University Press 2013), 68.

⁶ Rule 3(B) ICTY RPE and ICTR RPE provide a general right to an accused person to use his own language. In addition, a number of provisions elaborate this right: Rule 42(A) ICTY RPE and ICTR RPE protects the right to be informed of rights prior to questioning in a language the suspect understands; Rule 43(i) ICTY RPE protects

to legal assistance, including the right to have legal assistance of one's own choosing and the right to free legal assistance if one is unable to bear its costs is protected in the Rules in addition to in Article 21(4)(d) of the Statute.⁷ The right to be tried by an impartial tribunal, provided implicitly in the Statute, is protected more explicitly in the Rules.⁸ There is no provision that enshrines the right to liberty; instead, the Rules provide for certain procedural requirements for arrest and detention, which are intended to prevent arbitrary deprivations of liberty.⁹ Finally, the Rules allow for the exclusion of evidence if the means by which it has been collected violated human rights.¹⁰ The internal legal instruments of the ad hoc Tribunals thus convey an intention to ensure that the Tribunals abide by human rights norms. This has been called the 'legislative influence' of IHRL on the Tribunals.¹¹ Such persisting legislative influence is further illustrated by the fact that the Judges of the ad hoc Tribunals changed the

the right to be informed of the fact that the questioning will be recorded prior to questioning in a language the person in question understands; Rules 55(C) and (E) ICTY RPE and Rule 55(B)(iii) and (C)(iii) ICTR RPE protect the right to be informed of his rights upon being arrested in a language he understands; Rule 59(B) ICTY RPE protects the right to be informed of reasons for arrest immediately upon arrest (no parallel ICTR); Rule 62(A)(ii) ICTY RPE and ICTR RPE enshrine the right to be receive the indictment in a language he understands during his initial appearance before a judge; Rule 42(A)(ii) ICTY RPE and ICTR RPE provide the right to assistance of an interpreter during questioning; Rule 66 (A) ICTY provides the right to disclosure in a language the accused understands (no parallel ICTR RPE); Rule 98 *ter* ICTY RPE provides the right to receive a reasoned judgement in a language the accused understands (no parallel in the ICTR RPE.).

⁷ Rule 40 *bis* (D) ICTY RPE protects the right to be assisted by counsel during hearings concerning prolonging the provisional detention of the suspect (no exact replication in ICTR RPE although it requires "*inter partes* hearings", there is no explicit mention of defence counsel assistance); Rule 40 *bis* (F) ICTY RPE and Rule 40 *bis* (j) ICTR RPE provide that upon his transfer to the Tribunal, the accused, *assisted by counsel* shall be brought before a judge; Rule 62(A)(i) ICTY RPE and ICTR RPE require the Judge to confirm, during the accused's initial appearance, that his right to counsel is respected; Rule 42(A)(i) and (B) ICTY RPE and ICTR RPE protect the right to counsel during questioning during the investigative phase; Rule 63 ICTY RPE and ICTR RPE protect the right to counsel during questioning during the Trial phase; Rule 45(A) ICTY RPE protects the right to *free* legal assistance (no exact parallel in ICTR RPE, however, Rule 45 ICTR RPE *does* regulate quite detailed the *procedure* for assignment of counsel, the right thus seems protected implicitly).

⁸ Rule 15(A) ICTY RPE and ICTR RPE provide for the disqualification of a Judge if his impartiality is affected; Rule 14(A) ICTY RPE and ICTR RPE provide that Judges must take a vow of impartiality.

⁹ Rule 40 *bis* (B) ICTY RPE and ICTR RPE. See also Rule 40 *bis* (C)-(F) ICTY RPE and Rule 40 *bis* (F)-(J) ICTR RPE, which provide the requirements for a Judge to order the provisional detention of a suspect, and the right of a suspect to have his detention reviewed by a judge; Rule 40 *bis* (D) ICTY RPE and Rule 40 *bis* (H) ICTR RPE, which limit the length of provisional detention of a suspect to 90 days; Rule 64 ICTY RPE and ICTR RPE provide that an accused shall be provisionally detained once he has been transferred to the seat of the Tribunal; while Rule 65 ICTY RPE and ICTR RPE lay down the conditions for provisional release.

¹⁰ Rule 95 ICTY; the test to be applied by the judges is whether the means by which the evidence has been collected (I) casts substantial doubt on its reliability, or (II) if its admission is "antithetical to, and would seriously damage, the integrity of the proceedings (*idem* ICTR); Rule 89 (D) ICTY (NO parallel ICTR RPE), judges can choose to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

¹¹ Erik Møse, 'Impact of Human Rights Conventions on the Two ad hoc Tribunals' in Morten Bergsmo (ed), Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide (Martinus Nijhoff 2003), 207 and 184. See also Antonio Cassese, 'The Impact of the European Convention on Human Rights on the International Criminal Tribunal for the former Yugoslavia' in Paul Mahoney and others (eds), Protecting Human Rights: the European Perspective - Studies in Memory of Rolv Ryssdal (Heymanns 2000), 231-235, who notes that the Tribunal's regulation on treatment of prisoners was heavily inspired by IHRL; Vasiliev, 'International Criminal Trials' (n 1), 131.

Tribunals' provisional detention regime to bring it in line with 'customary international law as reflected in the main international human rights instruments'.¹²

The circumstances surrounding the creation of the ad hoc Tribunals, particularly that of the ICTY, clarify that the importance of respect for human rights norms by the Tribunals as such was not a matter of debate. Quite the contrary: concerning the ICTY, it was 'portrayed as an obvious fact that the new international tribunal would embrace the highest standards of fairness towards defendants.'¹³ Statements by representatives of states having a seat in the UN Security Council (UNSC) at the time of the adoption of the ICTY Statute evince an intention to ensure that human rights norms would be applicable to the Tribunal. For example, the report circulated in the UNSC by France that became the basis for negotiations on the resolution establishing the ICTY, provided that one of the foremost aims of the Tribunal would be to 'offer the utmost guarantees of impartiality in respecting the rights of the defence'.¹⁴ The report further clarified that it was '[n]aturally of the greatest importance that the defendants should benefit fully from all the guarantees provided by contemporary criminal procedure systems', in which context it referred specifically to Article 14 of the ICCPR.¹⁵ Furthermore, the draft Statute proposed by France included a provision regulating the rights of the defence, modeled after Article 14 of the ICCPR, an example that was followed by several other states in their proposals.¹⁶ Submissions by other states also emphasized the importance of respect for the rights of defendants and, in that context, often referred to IHRL, in particular to the ICCPR.¹⁷ The proposal of the USA, which was highly influential in the drafting of the Statute, emphasized that the Tribunal 'must be fair and must be seen as fair'.¹⁸

¹² ICTY, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, Dissenting Opinion of Judge Patrick Robinson, *Prosecutor v. Krajišnik and Plavšić* (IT-00-39&40-T), 8 October 2001, 2; see further on this issue, *infra* Chapter 5, section 3.2.

¹³ Yvonne McDermott, 'The Right to a Fair Trial in International Criminal Law' (PhD Thesis, National University of Ireland Galway 2013), 38.

¹⁴ UNSC, 'Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary General' (10 February 1993) UN Doc S/25266, 23.

¹⁵ *ibid.*, 116, the report further recommended that the ICTY Statute reproduce parts of Article 14 ICCPR.

¹⁶ *ibid.*, 65: Article X Rights of the Defence; similarly UNSC, 'Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General' (17 February 1993) UN Doc S/25300, 6: 'Article 11 Principles of proceedings', and 14, where the explanatory notes to the draft provisions explained that the provision had been based on Article 6 ECHR and Article 14 ICCPR; UNSC, 'Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General' (6 April 1993) UN Doc S/25537, 7: Article 17: Judicial Guarantees; UNSC, 'Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General' (12 April 1993) UN Doc S/25575, art. 20 Rights of the Accused person after Preliminary Hearing; further reference to the rights of suspects and accused persons were made in Articles 14 and 17.

¹⁷ UNSC, 'Note Verbale Dated 12 March 1993 from the Permanent Mission of Mexico to the United Nations Addressed to the Secretary-General' (16 March 1993) UN Doc S/25417, 15, where the need for the tribunal to 'guarantee the right of due process and the protection of individual rights of the accused' is emphasized; UNSC,

The draft Statute, created under the auspices of the UN Secretary-General (UNSG), contained a provision on the rights of accused persons modeled after Article 14 ICCPR. The report accompanying the draft stated that it was ‘axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.’¹⁹ This statement is often seen as establishing that the ICTY is bound by internationally recognized human rights because it expresses the legislative intent of the Tribunal’s creators.²⁰ Furthermore, this report has subsequently been endorsed by the UNSC and can be seen as an ‘authoritative interpretation of the Statute’, as has also been confirmed by the Tribunals themselves.²¹ The Tribunals have often referred to this report and this phrase to justify their reliance on international human rights norms.²²

‘Letter Dated 31 March from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General’ (5 April 1993) UN Doc S/25512, 3, which also emphasizes the importance of respect for the rights of the accused, and recommended that the Statute would include ‘[b]asic principles, norms and standards of due process and procedural fairness recognized by international human rights and international humanitarian law’, see also, 5, where the right to apply for release pending trial was provided; UNSC, ‘Letter Dated 6 April 1993 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General’ (6 April 1993) UN Doc S/25540, 7, which emphasizes the importance of due process of law, and 18, where it is stated that ‘[t]he work of the tribunal must be carried out with full respect for the human rights and fundamental freedoms of the defendants. International legal instruments in the field of human rights, especially the [ICCPR], and generally accepted principles of criminal law must be fully respected; UNSC, ‘Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General’ (14 April 1993) UN Doc S/25594, 13, which also emphasized the importance of respect for the rights of the defendant, as provided for by Article 14 ICCPR and other international conventions.

¹⁸ UNSC, ‘Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General’ (12 April 1993) UN Doc S/25575, 2. See also Morris and Scharf 1995, 32.

¹⁹ UNSC, ‘Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808’ (3 May 1993) UN Doc S/25704, 106.

²⁰ See eg James Sloan, ‘The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look’ (1996) 9 *Leiden J Int’l L* 479, 481; Cristian DeFrancia. ‘Due Process in International Criminal Courts: Why Procedure Matters’ (2001) 87 *Va L Rev* 1381, 1393; Sherrie Russell-Brown. ‘Poisoned Chalice: The Rights of Criminal Defendants under International Law, During the Pre-Trial Phase’ (2003) 8 *U C L A J Int’l & Foreign Aff* 127, 140; Lorenzo Gradoni, ‘International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down?’ (2006) 19 *Leiden J Int’l L* 847, 852; Guido Aquaviva, ‘Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations’ (2007) 20 *Leiden J Int’l L* 613, 618; Wolfgang Schomburg and Jan Nemitz, ‘The Protection of Human Rights of the Accused before the International Criminal Tribunal for Rwanda’ in Emmanuel Decaux, Adama Dieng and Malick Sow (eds), *From Human Rights to International Criminal Law - Studies in Honour of an African Jurist the Late Judge Laïty Kama* (Martinus Nijhoff 2007), 91; Patrick Robinson. ‘The Right to a Fair Trial in International law, with Specific Reference to the Work of the ICTY’ (2009) 3 *Berkeley J Int’l L Publicist* 1, 7; Masha Fedorova, Stan Verhoeven and Jan Wouters, ‘Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings’ in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia, Antwerp 2009) 55, 64; McDermott (n 13), 38.

²¹ ICTY, Appeals Judgement, *Prosecutor v. Tadić* (IT-94-1-A), 15 July 1999, 295; ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 48; See also Natasha Affolder, ‘Tadić, the Anonymous Witness and the Sources of International Procedural Law’ (1998) 19 *Mich J Int’l L* 445, 477.

²² See eg ICTY, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through to “M”, *Prosecutor v. Delalić et al* (IT-96-21-T), 28 April 1997, 26; ICTY, Appeals Judgement, *Prosecutor v. Delalić et al* (IT-96-21-A), 20 February 2001, 604; ICTY, Appeal Judge-

The UNSG report further clarified that such ‘internationally recognized standards’ are contained, in particular, in Article 14 ICCPR.²³ The report also ruled out the possibility of *in absentia* trials because that would be inconsistent with this provision.²⁴ There was thus an assumption that the Tribunal would be bound by IHL pertaining to the right to a fair trial, in particular as laid down in the ICCPR. However, the report does not address the possible applicability of other human rights norms, such as the right to liberty, or rights contained in regional human rights instruments or customary international law.²⁵ The draft Statute proposed by the UNSG was adopted without amendment by the Security Council and appended to resolution 827, creating the ICTY. Spain’s representative in the Security Council emphasized that the Tribunal’s activities will be governed by ‘the general principles of law, in particular respect for the guarantees of due process and the rights of the accused’.²⁶ The ICTR Statute was adopted by the UNSC in November 1994.²⁷ Its preparatory works are less extensive than those of the ICTY, since the latter’s Statute provided a blueprint for that of the ICTR.²⁸ The UNSC even considered extending the mandate of the ICTY, so as to create one single Tribunal.²⁹ Given the identical nature of the ICTR and ICTY Statutes, the considerations regarding the importance of fairness can safely be assumed to apply equally to both Tribunals. In fact, one of the main reasons to establish an international tribunal for Rwanda, as opposed to allowing for municipal prosecutions, was that an international tribunal would be better placed to conduct fair trials in an impartial manner.³⁰ This sentiment was also ex-

ment, *Prosecutor v. Furundžija* (IT-95-17/1-A), 21 July 2000, 177; ICTY, Decision on Motion for Judicial Assistance to Be Provided by SFOR and others, Separate Opinion of Judge Robinson, *Prosecutor v. Simić et al* (IT-95-9-PT), 18 October 2000, 3; ICTY, Appeal Judgement on Allegations of Contempt against Prior Counsel, Miljan Vujin, *Prosecutor v. Tadić* (IT-94-1-A-AR77), 27 February 2001, 3; ICTY, Decision on Miroslav Tadić’s Application for Provisional Release, *Prosecutor v. Simić et al* (IT-95-9-PT), 4 April 2000, 8; ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, Dissenting Opinion of Judge Patrick Robinson, *Prosecutor v. Krajišnik and Plavšić* (IT-00-39&40-T), 8 October 2001, 4; similarly Vasiliev, ‘International Criminal Trials’ (n 1), 98.

²³ UNSC, ‘Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808’ (3 May 1993) UN Doc S/25704, 106.

²⁴ *ibid*, 101.

²⁵ Sloan (n 20), 481, who notes that ‘[t]he ICCPR is singled out as a minimum standard, while the obligation of the ICTY is broader, to respect ‘internationally recognized standards regarding the rights of the accused’.

²⁶ UNSC, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting’ (25 May 1993) UN Doc S/PV.3217, Observations on behalf of the government of Spain, 39-40.

²⁷ UNSC Res 955 (8 November 1994) UN Doc S/Res/955; Arts 17(3), 19 and 20 ICTR Statute.

²⁸ Similarly Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda* (Transnational Publishers 1998), 101: ‘the Secretary-General’s Report on the former Yugoslavia provided a sufficient analysis of the relevant legal issues relating to the establishment of such a tribunal and the Yugoslavia Tribunal Statute provided an acceptable blueprint for its statute.’

²⁹ UNSC, ‘Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, Annex: Preliminary Report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935 (4 October 1994) UN Doc S/1994/1125, 125.

³⁰ UNSC, ‘Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, Annex: Preliminary Report of the Independent Commission of Experts Established in accordance with

pressed by a number of state representatives after having voted on the resolution establishing the ICTR.³¹ The axiomatic duty to respect internationally recognized human rights of suspects and accused persons thus applies equally to both the ICTY and the ICTR.

However, none of the sources quoted above unequivocally clarify whether the ad hoc Tribunals are bound by the entire corpus of IHRL. Instead, focus is mostly on the rights of suspects and accused persons specifically. In addition, the legal basis for the application of IHRL is not clarified, although the ICCPR is often mentioned. Unlike that of the ICC, the Statutes and RPEs of the Tribunals do not resolve the applicability of external sources of—international—law.³² The UNSG Report identifies customary international humanitarian law and a limited number of international conventions as the applicable substantive law.³³ However, the report does not spell out the applicable sources of procedural law.

It has been noted that the absence of a provision on applicable law is ‘regrettable, as it has led to inconsistent interpretations.’³⁴ Generally, however, the case law of both Tribunals

Security Council Resolution 935 (4 October 1994) UN Doc S/1994/1125, 136: ‘[m]unicipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees. Even where such trials are conducted with scrupulous regard for the rights of the accused, there is a great likelihood that a conviction will not be perceived to have been fairly reached.’; similarly UNSC, ‘Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955’ (13 February 1995) UN Doc S/1995/134, 42, which states that the Tribunal should be international and located outside of Rwanda so that the fairness of its trials are guaranteed, and that this will also increase the appearance of neutrality and impartiality.

³¹ UNSC, ‘Verbatim Record’ (8 November 1994) UN Doc S/PV.3453, 5, Statement of the representative of New Zealand: ‘there is a need for an *international* tribunal to deal with the principal perpetrators, a tribunal that will be demonstrably impartial. Only then will it be possible for all Rwandese, including those outside the country, to see that there is a guarantee that justice will be delivered fairly — that justice will, in fact, be done. [emphasis added, KZ]; *idem*, 8: Statement of the representative of Argentina, who emphasized that the Tribunal would ensure ‘that justice will be applied with impartiality and independence’, and that the resolution could adequately ensure ‘the human rights and fundamental freedoms of those accused.’; *idem* 12, Statement of the representative of Spain, which emphasized independence as the most important attribute of the international tribunal and that one of its main concerns in its decision to vote in favour of the tribunal’s establishment was that its Statute provided ‘legal guarantees to safeguard the rights of the accused’; 13, Statement of the representative of Nigeria: ‘[t]he international and impartial character of the Tribunal will, in our view, enhance the prospects of national reconciliation in Rwanda. Justice and fairness will also be the cornerstones of the Tribunal.’

³² However, the US proposal for the RPE did include a provision regarding ‘secondary sources’, which provided the following list of sources: ‘(A) international conventions, whether general or particular, (B) international custom, as evidence of general practice accepted as law; (C) general principles of the law of nations; and (D) judicial decisions and the teachings of other international tribunals and States. The provision did not make it into the final RPE. See: *Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, Suggestions Made by the Government of the United States, *IT/14* (1993), reprinted in Morris and Scharf (n 28), Vol 2, 543; Affolder (n 21), 484.

³³ UNSC, ‘Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808’ (3 May 1993) UN Doc S/25704, para 33; UNSC, ‘Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955’ (13 February 1995) UN Doc S/1995/134, 12, provides that the ICTR takes a more expansive approach, as a result of which its applicable substantive law includes a number of conventions regardless of their customary status; similarly Vasiliev, ‘International Criminal Trials’ (n 1), 99.

³⁴ Masha Fedorova and Göran Sluiter, ‘Human Rights as Minimum Standards in International Criminal Proceedings’ (2009) 3 *Hum Rts & Int’l Legal Discourse* 9, 19.

confirms the—subsidiary—relevance of the sources of international law. Cassese has held that the ad hoc Tribunals are required to apply international law because they are international courts.³⁵ He argued that, first and foremost, the tribunals must apply their own Statutes and RPEs, then the treaties to which their internal legal instruments refer explicitly, such as the Geneva Conventions, as well as customary international law. Subsidiarily, if the Tribunals cannot solve a legal problem based on these sources, they may also refer to general principles of international law or, failing that, to the ‘general principles of (criminal) law recognized in the major legal systems of the world’.³⁶ The ICTY seems to have endorsed such an approach in its case law.³⁷ However, as has been noted, the Tribunals have not been consistent in their identification of relevant sources, or in the hierarchy between these.³⁸

The question of the sources of international criminal law has received ample academic attention. For example, many commentators have questioned the utility of public international law sources and methodologies for the purposes of a criminal trial.³⁹ Similarly, the hierarchy of sources has been hotly debated, with a particular focus on the possible subsidiary and

³⁵ Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals’ (n 11), 19.

³⁶ *ibid*, 20.

³⁷ See, eg: ICTY, Judgement, *Prosecutor v. Furundžija* (IT-95-17/1-T), 10 December 1998, para 178; see also Benjamin Perrin, ‘Searching for Law while Seeking Justice: the Difficulties of Enforcing International Humanitarian Law in International Criminal Trials’ (2007) 39 *Ottawa L Rev* 367, 371: ‘judges of the modern ad hoc tribunals adopted Article 38(1) of the Statute of the International Court of Justice as their own to provide a normative superstructure to define applicable sources of international criminal law’; similarly Margaret McAuliffe deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck 2008), 703: ‘in practice, these Tribunals have looked in the first place to their Statutes and RPEs and in the second place to the sources of law enumerated in Article 38 of the ICJ Statute.’; Vasiliev, ‘International Criminal Trials’ (n 1), 100: ‘[i]n identifying sources of applicable law, ICTY judges naturally resorted to categories listed in Article 38 of the ICJ Statute, thereby assuming their applicability and relevance to the work of the court.’

³⁸ See also ICTY, Judgement, *Kupreškić et al* (IT-95-16-T), 14 January 2000, 591: ‘Indeed, any time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.’; on this issue, see eg Sergey Vasiliev, ‘General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification’ in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009), 62-80.

³⁹ See eg Vladimir-Djuro Degan, ‘On the Sources of International Criminal Law’ (2005) 4 *Chinese J Int’l L* 45, 50, where he addresses the relevance principle of legality in ICL which is more important than sources of public international law proper; Ilias Bantekas, ‘Reflections on Some Sources and Methods of International Criminal and Humanitarian Law’ (2006) 6 *Int’l Crim L Rev* 121; Dapo Akande, ‘Sources of International Criminal Law’ in Antonio Cassese and others (eds) *Oxford Companion to International Criminal Justice* (OUP 2009), 44: ‘there is a potential conflict between the customary rules of treaty interpretation and the principles which ought to apply to the interpretation of a criminal law instrument.’; Leena Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21 *Eur J Int’l L* 543; Alexander Greenawalt, ‘The Pluralism of International Criminal Law’ (2011) 86 *Ind L J* 1063, who questions the propriety of public international law sources for international criminal law.

gap-filling function of custom and general principles of law.⁴⁰ In the present study, it is neither possible nor necessary to address these debates at length, in particular because their focus is mainly on substantive law and they have little implications for an investigation into whether the Tribunals, as legal entities, are themselves bound by human rights standards.

The practice of Tribunal officials clearly conveys an assumption on their part that the Tribunals are bound by international human rights norms.⁴¹ Numerous official documents of the Tribunals can be quoted in support of this contention. For example, the first annual report of the ICTY to the Security Council discusses the influence of the ‘international bill of human rights’ on the Statute and the Tribunal: the report details that human rights have had a ‘significant impact on the development of international criminal law. These standards are *reflected* in the statute and rules of the Tribunal in a number of ways’, which illustrates the legislative influence of IHRL.⁴² Similarly, an annual report of the ICTR stated that ‘the judges are mindful of the due process requirements of international law and of the Statute of the Tribunal.’⁴³ These quotes show the perceived relevance of human rights standards to the work of the Tribunals, which seems required by international law and is reflected in the Statute. Furthermore, in 1999, an expert group conducted a review of the functioning of both Tribunals, in which they used human rights standards as a yardstick with which to measure the

⁴⁰ Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002), 36 : ‘customary law is applicable and binding when the statute and rules are silent on a particular point. In the hierarchy of sources applicable to the tribunals customary international law fulfils a gap filling function and is inferior to the statutes and RPE.’; Affolder (n 21), 489: ‘the practice of international tribunals reflects a reliance on general principles in formulating, interpreting and supplementing rules of procedure, but strong affirmations that international tribunals are bound to apply general principles of law are lacking.’, and *idem*, 470, where she address the gap-filling function of general principles, noting that they are used in ‘addressing the silence in international instruments on certain areas of evidence and procedure. See also Schabas 2009, who addresses the relevance of VCLT regime for ad hoc Tribunals specifically; Akande 2009, 43: ‘since international criminal law is part of international law, international criminal tribunals will be called upon to apply the sources of general international law.’; Fabián Raimondo, ‘General Principles of Law as Applied by International Criminal Courts and Tribunals’ (2007) 6 L & Pract Int’l Cts & Tribunals 393, who addresses general principles of law as a subsidiary source of international criminal law, and an interpretative tool.

⁴¹ Similarly Gradoni, ‘International Criminal Courts and Tribunals’ (n 20), 623; McDermott (n 13), 59, who notes that ‘references to the fact that ICTs see themselves enshrining the highest standards of procedural fairness can be found not only in the tribunals’ jurisprudence, but also on their websites and in external speeches made by court authorities.’

⁴² UNSC, ‘Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (29 August 1994) UN Doc S/1994/1007, 22.

⁴³ UNSC, ‘Fourth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994’ (7 September 1999) UN Doc S/1999/943, 41.

Tribunals' effectiveness.⁴⁴ This clearly shows the perceived importance of the Tribunals' obligation to comply with international human rights standards.

The presidents of the ICTY and the ICTR have similarly expressed their conviction that the Tribunals are bound by IHRL. While the Statutes of the Tribunals do not allow for compensation for defendants whose rights have been violated, the presidents of the Tribunals have urged the Security Council to amend the Statutes in order to change this and bring them in line with international human rights standards.⁴⁵ This was considered necessary because the Tribunal 'wishes, by definition, to abide fully by the internationally recognized norms relating to the rights of suspects and accused persons'.⁴⁶ What is more, the letters state that, due to the Tribunal's status as a subsidiary organ of the Security Council, its actions are attributable to the UN, which, in turn, considers itself bound by generally accepted human rights norms. Accordingly, the UN will be 'legally bound to compensate persons whose conviction by the Tribunal is subsequently overturned'.⁴⁷ Clearly, the Tribunals' presidents were convinced that the Tribunals must respect internationally recognized human rights norms of suspects and accused persons, even those that were not included in the Tribunals' own legal documents.

One final avenue for considering the applicability of IHRL to the ICTs could be their legal status as subsidiary organs of the UN, created by the Security Council.⁴⁸ As a result, the ad hoc Tribunals are arguably bound by the same international obligations as its parent organ-

⁴⁴ UNGA, 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (22 November 1999) UN Doc UN Doc A/54/634, 46, 51, 67, 77, 79 and 91, which refer to standards contained in the ICCPR, or general international human rights law, or the importance thereof.

⁴⁵ UNSC, 'Letter dated 19 September 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General' (26 September 2000), UN Doc S/2000/904 (Jorda Letter); UNSC, 'Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General' (26 September 2000) UN Doc S/2000/925 (Pillay Letter).

⁴⁶ Jorda Letter (n 45), 3; Pillay Letter (n 45), 3.

⁴⁷ Jorda Letter (n 45), 3-4; Pillay Letter (n 45), p 3.

⁴⁸ UNSC, 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134, 8; UNSC, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704, para 28. See also ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 49, where the ICTR held that 'the Tribunal, as a special kind of subsidiary organ of the U.N. Security Council, is bound to respect and ensure respect for generally accepted human rights norms. Indeed, the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights.' See also Gerhard Hafner, 'Limits to the Procedural Powers of the International Tribunal for the former Yugoslavia' in Karel Wellens (ed), *International law: Theory and Practice - Essays in Honour of Eric Suy* (Kluwer Law International 1998), 652; Kenneth Gallant, 'International Human Rights Standards in International Organizations: the Case of International Criminal Courts' in *International criminal law: quo vadis? - Proceedings of the International Conference Held in Siracusa, Italy, 28 November - 3 December 2002, on the Occasion of the 30th Anniversary of ISISC* (Erés 2004), 399; Acquaviva (n 20), 616; Kenneth Gallant, 'International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals' (2010) 43 J Marshall L Rev 603, 605.

ization.⁴⁹ Although the UN Charter (UNC) is not an ‘internal’ legal instrument of the Tribunals, it is the constitution of its parent organization as a result of which the Tribunals are arguably bound by it by extension. It has often been argued that the UN is bound by human rights norms based on its Charter. If this were the case, these obligations would extend to the Tribunals as subsidiary organs.

Article 1 of the UNC provides the organization’s purposes and principles, one of which is to ‘promote and encourage ... respect for human rights and for fundamental freedoms’. Article 55(c) provides that the UN shall ‘promote ... universal respect for, and observance of, human rights and fundamental freedoms for all’. It has been argued that the UN is bound by human rights norms based on these provisions.⁵⁰ However, this approach has been criticized for lacking ‘juridical finesse’.⁵¹ The Charter tasks the UN with promoting respect for human rights among its member states; however, nowhere in the Charter is the UN explicitly singled out as being bound by IHRL or the addressee of any obligation to respect human rights.⁵² Schwarzenberger emphasized the importance of distinguishing between an obligation to promote human rights, applicable to the UN, and an obligation to protect human rights, which ‘remains in the prerogative of each Member State’.⁵³

As a matter of policy, morality, and legitimacy, however, it cannot be denied that the UN *should* respect human rights in the exercise of its functions. Explicitly tasked to promote respect for human rights, it would be inconsistent for the UN not to respect human rights in the exercise of its own functions. However, from a formalist and legal perspective, the Charter does not appear to provide a strong legal basis for human rights obligations of the UN.

⁴⁹ Fedorova and Sluiter (n 34), 21: ‘the *ad hoc* Tribunals, as UN organs, inherit their obligations under general international law from the obligations incumbent upon the UN as an international organisation.’ Similarly Vasiliev, ‘International Criminal Trials’ (n 1), 126: ‘it is generally accepted that an international legal persons’ organs are bound by its international legal obligations’.

⁵⁰ Zenon Stavrinides, ‘Human Rights Obligations under the United Nations Charter’ (2007) 3 Int’l J Hum Rts 38; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004), 191-195; Guglielmo Verdirame, *The UN and Human Rights, Who Guards the Guardians?* (CUP 2011), 74; see also Vasiliev, ‘International Criminal Trials’ (n 1), 125.

⁵¹ Frédéric Mégret and Florian Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 Hum Rts Q 314, 317; similarly José Alvarez, ‘The Security Council’s War on Terrorism: Problems and Policy Options’ in Erika de Wet and André Nolkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003), 125; Noëlle Quénivet, ‘Human Rights Law and Peacekeeping Operations’ in Marco Odella and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff 2011), 118.

⁵² Quénivet (n 51), 119; similarly Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 40), 31: ‘the purposes and principles of the organization are extremely broad in scope and are hardly synonymous in most respects with specific rules of international treaties and general international law. In other words, it is fiddifult to distill from the principles clear-cut obligations of the Security Council.’

⁵³ Georg Schwarzenberger, *Power Politics: a Study of World Society* (3rd edn, Stevens 1964), 462. See also Stavrinides (n 50), 39-40, 44-45, who advocates strongly in favor of human rights obligations for the UN itself, based on the Charter. However, these obligations do not extend beyond the ‘promotion’ of respect for human rights by *Member States*.

Even if one accepts that the UN is bound by ‘human rights’ within the meaning of the Charter, this does not clarify which human rights are meant and thus has a limited utility for establishing specific obligations.⁵⁴ Even more so given the fact that the vast majority of international human rights treaties were concluded after the establishment of the UN, which makes it difficult to determine which human rights the UNC refers to. Although the UN’s obligation to promote respect for human rights might place the Security Council under an obligation to ensure that the organs it creates will respect human rights, the question whether the Security Council is restrained by human rights in the exercise of its powers is a matter of contentious debate.⁵⁵ A full examination of this question is not possible within the scope of this study, nor is it necessary, given the fact that there are clearer and more convincing legal arguments for considering the ad hoc Tribunals bound by IHRL.

2.2. Case law

The case law of the Tribunals confirms that they are bound by IHRL. One of the first decisions of the ICTY addressed the applicability of international human rights norms. Relying on the UNSG report quoted above, the Chamber held that ‘[i]n drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights.’⁵⁶ The Chamber further emphasized that Article 21 of the Statute ‘provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the [ICCPR].’⁵⁷

In *Tadić*, the ICTY strongly affirmed its obligation to respect human rights norms when it had to assess its own legality. The Appeals Chamber held that the Tribunal was required to have been ‘established by law’, which emanated from human rights law. To satisfy that requirement, the Tribunal must have been ‘established in accordance with the proper international standards’ and it must ‘provide all the guarantees of fairness, justice and even-

⁵⁴ Similarly Eric De Brabandere, *Post-Conflict Administrations in International Law* (Martinus Nijhoff 2009), 97; Quéniwet (n 51), 119. However, see, eg: De Wet (n 50), 13, proposes that the ‘International Bill of Rights’, ie the UDHR, ICCPR, and ICESCR, would bind the UN, because they ‘represent an elaboration upon the UN Charter’s original vision of human rights found in Article 1 (3) and Articles 55 and 56. See further: De Wet 2004, 191-195; Akande 2009, 46: ‘strong arguments, derived from the UN Charter, may be advanced regarding the potential invalidity of resolutions which violate human rights obligations’.

⁵⁵ See eg Hafner (n 48), 654: ‘there is no doubt that by virtue of their binding force and of Article 103 of the Charter, SC resolutions can override customary law and treaty law’; Alvarez (n 51), 129-135; Stephan Hollenberg, ‘Challenges and Opportunities for Judicial Protection of Human Rights against Decisions of the United Nations Security Council’ (PhD Thesis, University of Amsterdam 2013).

⁵⁶ ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 25.

⁵⁷ *ibid*, 25.

handedness, in full conformity with internationally recognized human rights instruments'; a requirement that the Appeals Chamber formulated on the basis of the ICCPR.⁵⁸ The ICTY thus premised its own legality, and thereby its very existence, on the requirement of respect for internationally recognized human rights norms, which suggests that the latter norms are superior to the legal instruments of the Tribunal itself. Although the Appeals Chamber's conclusion that the Tribunal indeed operated in accordance with such norms was not thoroughly reasoned and was based on a cursory examination of the Statute and RPE,⁵⁹ the decision did unequivocally affirm Tribunal's obligation to respect international human rights norms. In *Kanyabashi*, the ICTR employed a similar line of reasoning in its decision on jurisdiction, and held that 'when determining whether a tribunal has been 'established by law', consideration should be made to the setting up of an organ in keeping with the proper international standards providing all the guarantees of fairness and justice.'⁶⁰ Subsequent decisions have reiterated the *Tadić* decision, and confirmed that the Tribunal must 'genuinely afford the accused the full guarantees of fair trial set out in Article 14 [ICCPR]'.⁶¹ This case law implies that the exercise of jurisdiction by the Tribunals is subject to IHRL, since their shared Appeals Chamber was prepared to set aside the Statutes if it found their non-conformity with those standards.⁶² As a result, it has been argued that 'departures from universally established human rights principles by the Tribunal must ... render the exercise of jurisdiction by the Tribunal illegal'.⁶³

Many subsequent decisions confirm this proposition. In an early decision, the ICTR held that the right to be tried without undue delay was *provided* by Article 14 ICCPR and reaffirmed in Article 20 of the Statute, thus suggesting that the Tribunal was bound by IHRL

⁵⁸ ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (IT-94-I), 2 October 1995, 45.

⁵⁹ *ibid.*, 46.

⁶⁰ ICTR, Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 18 August 1997, 43.

⁶¹ ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević* (IT-02-54-T), 8 November 2001, 9-10; similarly ICTY, Decision on Motion Challenging Jurisdiction – with Reasons, *Prosecutor v. Krajišnik* (IT-00-39-PT), 22 September 2000, 15.

⁶² Similarly Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: a Documentary History and Analysis* (Transnational Publishers 1995), 39-40: 'the ICCPR ensures every individual the right to a fair trial by a competent, independent and impartial tribunal established by law. These are essential requirements, as a matter of international law, for the legitimate exercise of criminal jurisdiction by a permanent or an *ad hoc* Court.'; Gabrielle McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Koninklijke Brill NV 2003), 193: '[i]n the first case brought before the ICTY, it premised its legality as a functioning legal institution upon its full adherence to the rule of law. It interpreted the rule of law at international law as obliging it to adhere fully to international human rights principles'; Gradoni, 'International Criminal Courts and Tribunals' (n 20), 871; Gradoni, 'The Human Rights Dimension of International Criminal Procedure', 85.

⁶³ McIntyre (n 62), 197.

a priori.⁶⁴ The ICTY Appeals Chamber relied on the UNSG report in stressing that ‘the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.’⁶⁵ The ICTY has further held that the use of ‘methods and practices that would, in themselves, violate fundamental principles of international law and justice would be contrary to the mission of this Tribunal.’⁶⁶ In the same decision, the Tribunal also formulated its own ‘paramount duty and responsibility to respect fully the norms developed over the last decades [regarding protection of the rights of the accused], especially within, but not limited to, the framework of the United Nations.’⁶⁷ The ICTY has also held that it is obliged to respect ‘internationally recognized standards regarding the rights of the accused’.⁶⁸ The ICTR has similarly relied on its obligation to respect ‘generally accepted international human rights norms’.⁶⁹ It even employed this obligation to substantiate its power to grant compensation to a defendant whose rights had been violated, despite the fact that the legal instruments of the Tribunal did not provide for this possibility.⁷⁰ The ICTY Appeals Chamber has held that, in addition to the right to a fair trial, ‘other guarantees provided for in the context of the European Convention on Human Rights should also be respected’.⁷¹ Furthermore, the ICTY has emphasized that although Article 9 of the ICCPR ‘is not reflected in the International Tribunal’s Statute ... as one of the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and

⁶⁴ ICTR, Décision Faisant suite a la requête du Procureur aux fins de Disjonction, de Jonction d’Instances et de Modification de l’Acte d’Accusation, *Prosecutor v. Kayishema et al* (ICTR-95-1-T), 27 March 1997, 2; quoted in Gradoni, ‘International Criminal Courts and Tribunals’ (n 20), 852.

⁶⁵ ICTY, Appeals Judgement, *Prosecutor v. Delalić et al* (IT96-21-A), 20 February 2001, 604.

⁶⁶ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić* (IT-94-2-PT), 9 October 2002, 65; similarly ICTY, Appeal Judgement on Allegations of Contempt against Prior Counsel, Miljan Vujin, *Prosecutor v. Tadić* (IT-94-1-A-AR77), 27 February 2001, 4: ‘it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it’.

⁶⁷ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić* (IT-94-2-PT), 9 October 2002, para.110: ‘This Tribunal has a *paramount duty and responsibility* to respect fully the norms developed over the last decades in this field, especially within, but not limited to, the framework of the United Nations. For this reason, this Tribunal has a responsibility to fully respect “internationally recognized standards regarding the rights of the accused at all stages of its proceedings.” Such standards “are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights”; such standards are eg also contained in Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. This Chamber observes that these norms only provide for the absolute minimum standards applicable.’

⁶⁸ ICTY, Decision on Miroslav Tadić’s Application for Provisional Release, *Prosecutor v. Simić et al* (IT-95-9-PT), 4 April 2000, 8

⁶⁹ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 45.

⁷⁰ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 58-59; as also confirmed by the Appeals Chamber: ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-A), 13 September 2007, 26.

⁷¹ ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić* (IT-95-14-AR108 bis), 29 October 1997, 59.

indeed, has been acted upon by this International Tribunal.’⁷² Similarly, it has been held that ‘[a]rticle 14 ICCPR reflects an imperative norm of international law to which the Tribunal must adhere.’⁷³ It is therefore clear that the ad hoc Tribunals are bound by human rights norms.

All these decisions reaffirm, in one way or another, the Tribunals’ obligation to respect international human rights norms. Very few of them, however, elucidate the legal basis of this obligation, or its exact content. For example, the terms used to describe the body of law that the Tribunals are bound by differs across decisions and include ‘internationally recognized standards’, ‘recognised principles of human rights’, ‘fundamental principles of international law’, ‘fundamental human rights’, ‘internationally recognized standards of fundamental human rights’, ‘imperative norms of international law’ and ‘generally accepted human rights norms’. The decisions do not rely on specific sources of international law, but instead single out a certain category of norms, which is described with inconsistent terminology. Such inconsistency and lack of clarity render it difficult to ascertain what norms of international law can be considered binding on the Tribunals.⁷⁴

A small number of decisions do address the source of the Tribunals’ obligation to respect human rights norms. Some of the decisions discussed above relied on the UNSG report as an authoritative interpretation of the Statute. Further, in *Barayagwiza*, the ICTR Appeals Chamber held that it would apply the ICCPR because it formed part of ‘general international law’ and that it would rely on the ECHR and the ACHR and the case law of their respective courts because they ‘are persuasive authority which may be of assistance in applying and interpreting the Tribunal’s applicable law.’⁷⁵ The regional treaties and the related case law were regarded as evidence of international custom.⁷⁶ This approach was confirmed in *Kajelijeli*, where the Appeals Chamber referred to the ICCPR as reflective of customary international law, and to the ACHPR, the ECHR and the ACHR as ‘persuasive authority’ and as ‘evidence of international custom’.⁷⁷ The assumption is that human rights norms are binding on the tribunals by virtue of their status as customary norms. The Tribunals have also held that they are bound by customary international law.⁷⁸

⁷² ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević* (IT-99-37-PT), 8 November 2001, 38

⁷³ ICTY, Appeal Judgement on Allegations of Contempt against Prior Counsel, Miljan Vujin, *Prosecutor v. Tadić* (IT-94-1-A-AR77), 27 February 2001, 3

⁷⁴ See further *infra* section 4.

⁷⁵ ICTR, Decision, *Prosecutor v. Barayagwiza* (ICTR-97-19-AR.72), 3 November 1999, 40.

⁷⁶ *ibid.*

⁷⁷ ICTR, Appeals Judgement, *Prosecutor v. Kajelijeli* (ICTR-98-44A-A), 23 May 2005, 209.

⁷⁸ See eg ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), *Prosecutor v. Barayagwiza* (ICTR-97-19-AR72), 31 March 2000, 69; ICTY, Decision on the Prosecution Motion under Rule 73 for a Rul-

However, these decisions eschew the question of why the Tribunals are bound by customary international law.⁷⁹ One notable exception is an ICTR decision in *Rwamakuba*, where it had to determine whether it was obliged to provide compensation to an acquitted accused. This decision considered many aspects relevant to the applicability of IHRL. The underlying assumption was that the legal basis for the application of human rights norms to the Tribunal would be customary international law.⁸⁰ At the same time, the Chamber relied on the Tribunal's obligation to respect 'generally accepted international human rights norms'.⁸¹ The Chamber listed four legal bases for this obligation: it endorsed both the subject and the transfer thesis, it relied on the UN's purposes and principles, including the promotion and encouragement of respect for human rights, and it reiterated the UNSG's statement that it was axiomatic that the ICTY was to fully respect internationally recognized standards regarding the rights of the accused.⁸² In addition to the four separate rationales offered in *Rwamakuba*, several decisions of the ICTY have relied on the fact that the states in the former Yugoslavia were party to the ICCPR and, for the most part, to the ECHR. Therefore, no distinction should be drawn between persons standing trial on the domestic and on the international level.⁸³ The Tribunals have also quoted more general justifications of their obligation to respect human rights norms. For example, the ICTY has held that its 'important role in affirming and strengthening international human rights' requires it to respect human rights to a degree that does not fall below that offered by the ECtHR.⁸⁴ The ICTY also held that respecting individual rights of the accused was important to 'ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal

ing concerning the Testimony of a Witness, *Prosecutor v. Simić et al* (IT95-9-PT0, 27 July 1999, 76; see also ICTY, Decision on Motion for Judicial Assistance to Be Provided by SFOR and others, Separate Opinion of Judge Robinson, *Prosecutor v. Simić et al* (IT-95-9-PT), 18 October 2000, 4.

⁷⁹ Vasiliev, 'International Criminal Trials' (n 1), 100: 'the court essentially considered itself bound by a provision that establishes custom as a source of law on the basis of the customary nature of that provision, without there being, to use Herbert L.A. Hart's term, a rule of recognition validating its duty to be so bound as a matter of law.'

⁸⁰ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 40.

⁸¹ *ibid*, 45.

⁸² *ibid*, 49.

⁸³ See, eg ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al* (IT-01-47-PT), 19 December 2001, 4; ICTY, Decision on Request for Provisional Release of Accused Jokić, *Prosecutor v. Blagojević et al* (IT-02-53-PT), 28 March 2002, 15; ICTY, Decision on Vidoje Blagojević's Application for Provisional Release, *Prosecutor v. Blagojević et al* (IT-02-60-PT), 22 July 2002, 23-24; ICTY, Decision on Isak Musliu's Request for Provisional Release, *Prosecutor v. Limaj et al* (IT-03-66-AR65.3), 31 October 2003, 11.

⁸⁴ ICTY, Decision on Motion to Set aside Confidential Subpoena, *Prosecutor v. Brđanin and Talić* (IT-99-36-T), 7 June 2002, 30.

court of the future'.⁸⁵ While the ICTR has emphasized that the Tribunal is 'an institution whose primary purpose is to ensure that justice is done'.⁸⁶

Finally, the Tribunals' reliance on international human rights norms and their interpretation by international courts and supervisory bodies has been justified by the similarity of the provisions contained in the Statute and those contained in human rights treaties. The Tribunals have often confirmed that their Statutes reflect international human rights norms, referring mainly to the ICCPR, but also to regional human rights conventions.⁸⁷ This could explain the Tribunals' reliance on interpretations of these norms by human rights courts and supervisory bodies.

The Tribunals thus consider themselves bound by international human rights norms. They have interpreted and applied their applicable law in a manner consistent with internationally recognized human rights norms. At the same time, the Tribunals have exceeded the terms of their legal instruments to ensure respect for internationally recognized human rights by creating procedural remedies that found no explicit support in their legal instruments. In addition, they have displayed a willingness to set aside their Statutes if these would be inconsistent with such norms. The normative force of internationally recognized human rights in the law and practice of the Tribunals thus seems substantial. However, several important questions remain unanswered. First, the Tribunals have not consistently clarified the legal basis for their being bound by human rights norms. As a result, it is not clear whether the Tribunals' acceptance of their being bound by human rights norms is declaratory or constitutive of this bindingness. Second, they have failed to define clearly the scope and content of the category of norms that they are bound by.

⁸⁵ ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 25.

⁸⁶ ICTR, Decision, *Prosecutor v. Barayagwiza* (ICTR-97-19-AR.72), 3 November 1999, 112.

⁸⁷ See eg ICTR, Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 18 August 1997, 44: '[t]he rights of the accused enumerated above are based upon Article 14 of the [ICCPR] and are similar to those found in Article 6 of the [ECHR]', and 46: 'the important instruments on human rights in Africa, including the Charter of the Organization of African Unity (OAU.) and the [ACHPR] were indirectly included in the law applicable to the Tribunal'; ICTY, Appeals Judgement, *Prosecutor v. Tadić* (IT-94-1-A), 15 July 1999, 43: ICTY Statute provisions on fair trial 'mirrors' the ICCPR, ECHR, and ACHR; ICTY, Appeals Judgement, *Prosecutor v. Delalić et al* (IT96-21-A), 20 February 2001, 605; ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al* (IT-01-47-PT), 19 December 2001, 2; ICTY, Decision on Request for Provisional Release of Accused Jokić, *Prosecutor v. Blagojević et al* (IT-02-53-PT), 28 March 2002, 10; ICTY, Decision on Isak Musliu's Request for Provisional Release, *Prosecutor v. Limaj et al* (IT-03-66-AR65.3), 31 October 2003, 8; ICTY, Decision on Vidoje Blagojević's Application for Provisional Release, *Prosecutor v. Blagojević et al* (IT-02-60-PT), 22 July 2002, 20.

3. The ICC

The Rome Statute purports to regulate the position of international human rights norms in the legal framework of the ICC. Article 21(1) lays down the sources of applicable law, and paragraph (3) of the same provision requires the Court to interpret and apply the law contained in those sources in a manner consistent with internationally recognized human rights. The following analysis therefore takes this provision as its starting point. The first section scrutinizes Article 21(1), and the second addresses Article 21(3).

3.1. Article 21(1): Applicable law

Article 21 was the first provision of its kind in international criminal law.⁸⁸ The primary reason for the drafters to include this provision was to constrain the discretion of the judges in defining the applicable law themselves.⁸⁹ This provision has been described as complex, uncertain and ambiguous, since many of the terms used are open to multiple interpretations, and it does not follow the generally accepted terminology for the sources of international law.⁹⁰ It can be regarded as *lex specialis* that lays down the applicable law specifically for the purpose of the ICC, thus deviating from the general sources of international law as reflected in Article 38(1) of the ICJ Statute.⁹¹ The first paragraph of Article 21 provides a hierarchical system of sources of applicable law before the ICC.⁹² This section investigates whether and how the ICC may resort to sources of IHRL under this provision.

3.1.1. Internal legal instruments

Article 21(1)(a) provides that the primary source of applicable law for the ICC is its own internal law, which comprises its Statute, the Elements of Crimes and the RPE. The latter two

⁸⁸ 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* (Koninklijke Brill NV 2009), 286; Gudrun Hochmayr, 'Applicable Law in Practice and Theory – Interpreting Article 21 of the ICC Statute' (2014) 23 J Int'l Crim Just 655, 655.

⁸⁹ McAuliffe deGuzman (n 37), 702; Grover (n 39), 559; Hochmayr (n 88), 656.

⁹⁰ Alain Pellet, 'Applicable Law' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP 2002), 1053.

⁹¹ Sergey Vasiliev, 'Proofing the Ban on Witness Proofing: Did the ICC Get it Right?' (2009) 20 Crim L Forum 193, 210-14; Robert Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12 New Crim L Rev 390, 393-94; Akande (n 39), 43; Vasiliev, 'International Criminal Trials' (n 1), 101-102.

⁹² Per Saland, 'International Criminal law Principles' in Roy S. Lee (ed), *The International Criminal Court - the Making of the Rome Statute: issues, Negotiations, Results* (Kluwer Law International 1999), 213. See also Cryer (n 91), 393.

instruments are subsidiary to the Statute.⁹³ The Statute has multiple purposes: it enshrines the agreement between the parties and their obligations vis-à-vis the Court, but it is also the constitution of the organization, laying down its powers and the limits thereto, and finally, it is a code of criminal law as well as of criminal procedure.⁹⁴

The Statute regulates the ICC's applicable procedural law to an extent that far surpasses in detail the statutes of the ad hoc Tribunals. It enshrines a number of procedural rights of suspects and accused persons that are also recognized in IHRL.⁹⁵ For example, Article 67 lays down the rights of accused persons to a fair trial, and, like the parallel provisions in the Statutes of the ad hoc Tribunals, is similar to Article 14 ICCPR. It even expands the minimum guarantees laid down in the ICCPR, for example, by adding subparagraph (i), which recognizes the right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.' Furthermore, Article 66 enshrines the presumption of innocence and Article 55 provides for the rights of persons under investigation.⁹⁶ In addition to the inclusion of human rights norms, the Statute also provides for procedures that are intended to safeguard the rights of persons implicated by the activities of the Court. For example, the procedure for the issuance of an arrest warrant is regulated thoroughly in Article 58, and Article 40 enshrines the independence of the judges, but neither provision is formulated as containing 'rights' of suspected or accused persons.

The key provisions in the Rome Statute laying down the rights of suspects and accused persons reveal the legislative influence of IHRL, which has also been noted with respect to the ad hoc Tribunals.⁹⁷ These provisions have been inspired by, or modeled after,

⁹³ Art 51(5) ICC Statute provides that, in case of conflict between the Statute and the RPE, the Statute will prevail. Similarly, Article 52(1) provides that the Regulations of the Court must be 'in accordance with this Statute and the Rules of Procedure and Evidence'.

⁹⁴ Pellet (n 90), 1054-1055, 1063; Joe Verhoeven, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law' (2003) 33 *Neth Y B Int'l L* 3, 18; Hochmayr (n 88), 657.

⁹⁵ Sara Stapleton, 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation' (1998) 31 *NYU J Int'l L & Pol* 535, 553.

⁹⁶ For an examination of the rights of suspects and accused persons under the Rome Statute, see eg Salvatore Zappalà, 'Rights of Persons during an Investigation' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP 2002); Salvatore Zappalà, 'Rights of the Accused' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP 2002); William Schabas, 'The Right to a Fair Trial' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court - Volume II* (II Sirente 2004), 242; William Schabas, 'Article 67' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008); Christopher Hall, 'Article 55' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008).

⁹⁷ A complete examination of the Statute and all subsidiary legal instruments of the Court would doubtlessly reveal more examples of the legislative influence of IHRL. However, such an examination extends beyond the scope of the present study. The examples mentioned here are intended to illustrate the legislative influence of

international human rights norms, and even go further at times, thereby ‘setting a standard of respect for the rights of the accused that surpasses most if not all domestic legal systems.’⁹⁸ Although the ICC Statute represents an improvement from the legal instruments of the ad hoc Tribunals, in that the catalogue of rights provided for by the Statute itself is more exhaustive, the conclusion that it would ‘surpass most if not all domestic legal systems’ might be an overstatement.⁹⁹ For example, a much-cited omission is the absence of the right to privacy.¹⁰⁰

3.1.2. *Hierarchy of sources*

In addition to the internal legal instruments, Article 21 lists subsidiary sources of law. The provision creates a hierarchy between the sources laid down in the three subparagraphs, which clearly appears from the ordinary meaning of its wording. The chairman of the working group on applicable law noted that the debates prior to and during the Rome Conference evinced a ‘very clear majority in favor of establishing a hierarchy.’¹⁰¹ The Statute, RPE and Elements of Crimes (EoC), provided for in subparagraph (a), are applicable ‘in the first place’, whereas the sources in subparagraph (b) are applicable ‘in the second place’, which is further limited by the insertion of the phrase ‘where appropriate’.¹⁰² The source mentioned in subparagraph (c) only come into play ‘failing’ the application of paragraphs (a) and (b), and may only be relied upon if the result would be ‘consistent with [the] Statute and with international law and internationally recognized norms and standards’.

The Court has thus far been hesitant to use its subsidiary sources of applicable law to

IHRL, while the subsequent Chapters will address the interpretation and application of specific human rights norms in the law and practice of the ICTs in depth.

⁹⁸ Zappalà, ‘Rights of Persons during an Investigation’ (n 96), 1353, who notes that ‘the ICC Statute provides an exhaustive and detailed catalogue of rights of the accused’; Kenneth S. Gallant, ‘Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court’ in Mahmoud C. Bassiouni (ed), *International Criminal Law - Volume II: Enforcement* (2nd edn Transnational Publishers 1999), 693, who notes that ‘the ICC Statute is remarkable for its protection of internationally recognized individual human rights against the power of the organization – in this case, the Court – itself.’

⁹⁹ For a very critical account, see: Andrew Walker, ‘When a Good Idea is Poorly Implemented: how the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees’ (2004) 106 W Va L Rev 245, 247.

¹⁰⁰ See also Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 706, who notes this right as having been omitted. See also Edwards (n 100), ‘International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy’ (2001) 26 Yale J Int’l L 323; Karel De Meester, ‘Coercive Measures, Privacy Rights and Judicial Supervision in International Criminal Investigations: in Need of Further Regulation?’ in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009).

¹⁰¹ Saland (n 92), 214.

¹⁰² McAuliffe deGuzman (n 37), 705, who notes that the insertion of the phrase ‘where appropriate’ ‘serves to emphasize the discretion the Court enjoys in determining when treaties or principles and rules of international law are applicable.’

adopt procedural innovations that are not provided for by its primary legislation.¹⁰³ It has highlighted the phrase ‘where appropriate’ to justify its restrained approach.¹⁰⁴ The Appeals Chamber has confirmed that Articles 21(1)(b) and (c) only come into play if there is a gap in the Statute, the EoC and the RPE.¹⁰⁵ For example, the Appeals Chamber has rejected a prosecution submission that a gap in the ICC’s statutory framework existed because it failed to provide for a procedure for extraordinary review of decisions, which the Chamber considered to be an intentional omission by the drafters of the Statute.¹⁰⁶ The same line of reasoning was followed by the Appeals Chamber, when it found that the statutory framework of the Court exhaustively defines its power to relinquish jurisdiction and that, therefore, no lacuna existed and no remedy could be created by resort to Article 21(1)(b) or (c).¹⁰⁷ According to one commentator, the subsidiary sources will only come into play in cases where the Statute is ‘incomplete’, or where ‘the point at stake is not as such concerned with its provisions’.¹⁰⁸ For example, when the Court cannot avoid settling questions of public international law that the drafters of the Statute could not have contemplated.

3.1.3. *Applicable treaties*

Article 21(1)(b) provides for the subsidiary application of ‘applicable treaties’ and ‘principles and rules of international law’.¹⁰⁹ The first question raised by this provision from the perspective of this study is whether the ICC can apply human rights treaties under this heading. Ar-

¹⁰³ William Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (OUP 2010), 390, specifically n 62; similarly Hochmayr (n 88), 661, who notes that ‘[s]o far, such lacunae have rarely been found.’

¹⁰⁴ ICC, Decision regarding the practices used to prepare and familiarize witnesses for giving testimony at trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1049), 30 November 2007, 44.

¹⁰⁵ ICC, Decision on the Practice of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga* (ICC-01/04-01/06-679), 8 November 2006, 28; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 205; ICC, Decision regarding the practices used to prepare and familiarize witnesses for giving testimony at trial, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1049), 30 November 2007, para 35; ICC, Decision on the confirmation of charges, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-717), 30 September 2008, 508; ICC, Decision revoking the prohibition of contact and communication between Katanga and ngudjolo chui, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-322), 13 March 2008, 12; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), 4 March 2009, 44; ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Ruto, Kosgey, and Sang* (ICC-01/09-01/11-373), 23 January 2012, 289; Verhoeven (n 94), 11; Bitti (n 88), 294.

¹⁰⁶ ICC, Judgement on the Prosecutor’s Application for Extraordinary Review of PTC I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC* (ICC-01/04-168), 13 July 2006, 39.

¹⁰⁷ ICC, Judgment on the Appeal of Mr Lubanga 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, *Prosecutor v. Lubanga Dyilo* (ICC-01/04-01/06-772), 14 December 2006, 34.

¹⁰⁸ Verhoeven (n 94), 11

¹⁰⁹ ICC, Decision on the confirmation of charges, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-717), 30 September 2008, 508: ‘principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution.’

guably, treaties concluded by the Court itself constitute the primary category of ‘applicable treaties’.¹¹⁰ The relationship agreement with the United Nations and the Headquarters Agreement with the Kingdom of the Netherlands are primary examples, and the Court has indeed applied the former, citing Article 21(1)(b).¹¹¹ The Court, however, is not party to human rights treaties, which begs the question whether it could apply such treaties under this provision. Debates during the negotiations on Article 21 centred on the question whether it should refer to ‘applicable’ or to ‘relevant’ treaties.¹¹² According to the chair of the drafting committee on applicable law, debates focused particularly on the relevance of the VCLT and the Convention Against Torture, international treaties to which the Court is not party, but which many states felt should guide the Court’s application of law nonetheless.¹¹³ Additionally, it has been noted that a narrow reading of the term ‘applicable’ could prevent the Court from applying international human rights treaties, since it is not party to them.¹¹⁴ Therefore, it is open to question whether such conventions may be ‘applicable’ in the sense of Article 21(1)(b). The fact that a deliberate choice was made for the term ‘applicable’, instead of ‘relevant’, militates in favour of strict interpretation of this part of the provision. Arguably, the ICC should therefore refrain from applying human rights treaties directly under the heading of Article 21(1)(b), since the Court is not party to them and they are not ‘applicable’ within the strict meaning of this term.

Another way in which treaties could be rendered ‘applicable’ is if they were in force in the state with regard to which the ICC is exercising jurisdiction. The Court once considered that the DRC had ratified the Geneva Conventions, prior to applying their provisions.¹¹⁵ Since these treaties applied to the DRC, this may have rendered them ‘applicable’ before the Court in the case against Lubanga. A similar construction could perhaps be used for human rights treaties, but there is no further practice of the Court confirming such an approach to date.¹¹⁶

¹¹⁰ Schabas, *The International Criminal Court* (n 103), 390; similarly Verhoeven (n 94), 5; Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 66; Pellet (n 90), 1053.

¹¹¹ Schabas, *The International Criminal Court* (n 103), 390; ICC, Judgment on the appeal of the Prosecutor against the decision of TC I “Decision on the consequences of non-disclosure of exculpatory materials covered by art. 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06), 21 October 2008, 51.

¹¹² McAuliffe deGuzman (n 37), 705; Saland (n 92), 215.

¹¹³ Saland (n 92), 215.

¹¹⁴ McAuliffe deGuzman (n 37), 705.

¹¹⁵ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 309.

¹¹⁶ However, an approach in which the applicability of human rights treaties would depend on their ratification status by the state with regard to which the ICC is exercising jurisdiction would raise problems regarding, for

3.1.4. Rules and principles of international law

The second part of Article 21(1)(b) refers to ‘principles and rules of international law’. The particular wording chosen is unusual as a reference to applicable sources of international law. The phrase originated in the 1993 ILC draft Statute, the commentary to which explained that such rules and principles included general principles of law, but did not mention custom.¹¹⁷ The wording of this phrase evolved considerably during the deliberations of the Ad Hoc- and Preparatory Committee. The Rome conference commenced with a draft that referred to ‘applicable treaties and the principles and rules of general international law [, including the established principles of the law of armed conflict]’.¹¹⁸ The Working Group on applicable law changed the wording of this subparagraph during the final stages of the conference, which resulted in the current Article 21(1)(b). The preparatory works shed no further light on the exact scope of this provision, as the only explanation appended by the Working Group stated that international law should be understood to mean ‘public international law’.¹¹⁹ Apparently, an explicit reference to customary international law was controversial, which is why no explicit reference to custom was included in the end.¹²⁰ Nevertheless, most commentators agree that the phrase refers to general international law, or to custom specifically.¹²¹ The ICC has indeed referred to customary law citing this provision.¹²²

example, the equality of ICC defendants; see also Hochmayr (n 88), 666, who notes that ‘the ICC does not derive its sanctioning power from those states normally holding jurisdiction over the case. Thus the criterion cannot depend on which treaties these states have ratified.’

¹¹⁷ Schabas, *The International Criminal Court* (n 103), 384; ILC, ‘Report of the International Law Commission on the Work of its forty-fifth Session (1993) UN Doc A/48/10, 111.

¹¹⁸ Art 20(1)(b) Draft Statute, in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Report of the Preparatory Committee’ (14 April 1998) UN Doc A/CONF.183/2/Add.1, 46.

¹¹⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Report of the Working Group on Applicable Law’ (11 July 1998) UN Doc A/CONF.183/C.1/WGAL/L.2, 2.

¹²⁰ Pellet (n 90), 1070.

¹²¹ Pellet (n 90), 1071; McAuliffe deGuzman (n 37), 707; Verhoeven (n 94), 9; Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 64; Schabas, *The International Criminal Court* (n 103), 391, who suggests that the phrase is a reference to the sources of international law, generally, and thus to treaties, custom, and general principles of law, within the meaning of Article 38(1) of the Statute of the ICJ; Degan (n 39), 80; William Schabas, ‘Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals’ in José Doria, Hans-Peter Glaser and Mahmoud Bassiouni (eds), *The Legal Regime of the ICC: Essays in Honour of Prof I P Blishchenko* (Koninklijke Brill NV 2009), 78, who calls it ‘a nod in the direction’ of custom; Mégret (n 5), 71: ‘a broad ‘principles and rules of international law’ is included which is understood to comprise custom’; Vasiliev, ‘International Criminal Trials’ (n 1), 107; Hochmayr (n 88), 668-669.

¹²² ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 311, and 274, where it referred to Hague Regulations and noted these were part of customary international law.

If the provision is thought to refer to ‘general international law’, this would also comprise ‘general principles of law’ as a distinct source of international law within the meaning of Article 38(1) ICJ Statute. However, Article 21(1)(c) already refers to ‘general principles of law derived by the Court from national legal systems’, which begs the question regarding the difference between the ‘principles’ included in both subparagraphs. Some authors have advanced a straightforward answer to this: while Article 21(1)(c) addresses general principles derived from *national* laws, 21(1)(b) refers to principles of *international* law.¹²³ The doctrinal controversies surrounding these sources are further complicated by persisting debates in legal scholarship about the nature and scope of general principles of law as a source in and of itself. This study, however, will not attempt to settle these debates, as Article 21(1) of the ICC Statute can be rationalized as *lex specialis* to the generally accepted definition of sources of international law enshrined in the ICJ Statute. The ICC Statute will therefore be taken at face value. Regardless of the scope and content of these sources under Article 38(1) of the Statute of the ICJ, Article 21(1)(b) of the ICC Statute allows the Court to apply (rules and) general principles of international law, while Article 21(1)(c) allows it to apply general principles of law, derived from a comparison of national legal systems.

The Court has adopted such a reading of these provisions. When it derives a principle from a comparison of domestic legal systems, it refers to Article 21(1)(c).¹²⁴ In such an understanding of the provision, principles of *international* law are those that relate to basic relations between states and amount to what may be termed as constitutional or fundamental rules of the order of the international community.¹²⁵ One could think of principles such as sovereign equality of states, the prohibition of the use of force and the principle of *pacta sunt servanda*.¹²⁶ Such principles could, for example, serve the purpose of filling possible gaps or of making a particular construction prevail when two or more interpretations are possible.¹²⁷ It is not apparent why the ICC would have to turn to overarching constitutional principles that govern inter-state relations in order to decide on the most appropriate interpretation in the context of the administration of international criminal justice. However, such need cannot be

¹²³ See eg Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Dissertation, University of Amsterdam 2007), 45; Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008), 21; McAuliffe deGuzman (n 37), 706-707. For an overview of the different views and positions in this debate, see: Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 31-42 and the sources referred to there.

¹²⁴ See: *infra* section 3.1.4.

¹²⁵ Antonio Cassese, *International Law* (OUP 2001), 188; Verhoeven (n 94), 9; Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 37.

¹²⁶ Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 37-38.

¹²⁷ Cassese, *International Law* (n 125), 188; Vasiliev, ‘General Rules and Principles of International Criminal Procedure’ (n 38), 38.

ruled out. The declaration of acceptance of jurisdiction by the Palestinian Authority is but one example of a situation that may require the Court to enter into questions of public international law regarding statehood.¹²⁸

The Court has not formulated its own understanding of the sources enumerated in Article 21(1)(b). Most of the time, it refers to sources without explaining under which heading it considered them to fall. For example, it has relied on Common Article 2 of the Geneva Conventions,¹²⁹ the Additional Protocols to the Geneva Conventions,¹³⁰ and the Genocide Convention,¹³¹ and to the Convention on the Rights of the Child.¹³² It is not clear whether the Court considered these sources to constitute applicable treaties, principles of international law, or rules of international law. Thus far, the Court has mainly resorted to Articles 21(1)(b) in decisions related to substantive criminal law, for example to define the scope of the crime of conscripting children.¹³³ This focus on substantive law seems in keeping with Article 21(1)(b)'s reference to the 'established principles of the international law of armed conflict'. At the same time, this focus lessens the likelihood that the Court will apply rules of general IHRL for procedural purposes under the heading of this provision. Nevertheless, the wording of Article 21(1)(b) would surely allow for such an approach, as it mandates the Court to resort to customary international law and general principles of law.

3.1.5. *General principles of law derived from national legal systems*

Article 21(1)(c) provides for a source of law based on a comparative examination of national legal systems and the search for common principles contained therein, followed by their 'transposition to the international sphere'.¹³⁴ Given the fact that IHRL may have impacted the

¹²⁸ For an overview of the current status of the investigation, see: ICC Website, Structure of the Court, Palestine < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdn/palestine/Pages/palestine.aspx > accessed 26 September 2014.

¹²⁹ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 206ff; ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), 14 March 2012, 541.

¹³⁰ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 243, 259, 271, 231; ICC, Decision on the confirmation of charges, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-717), 30 September 2008, 266.

¹³¹ ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), 4 March 2009, 117.

¹³² ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 245; ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), 14 March 2012, 604.

¹³³ See, eg: ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 245.

¹³⁴ Pellet (n 90), 1073; McAuliffe deGuzman (n 37); Schabas, *The International Criminal Court* (n 103) 2010, 393.

development of domestic legal systems, the ICC may be expected to apply human rights principles under this provision.¹³⁵

Article 21(1)(c) poses several methodological difficulties. For example, how should the Court determine which domestic legal systems it must examine and how many must it examine? Arguably, it needs to examine a representative survey that includes the world's principal legal systems.¹³⁶ Similarly, how should the Court derive one formulation of a particular principle given the undoubtedly different ways in which principles are codified across different states?¹³⁷ However, these questions exceed the scope of this study.¹³⁸ For present purposes, it is sufficient to note that Article 21(1)(c) creates the possibility for the ICC to derive human rights principles from domestic legal systems, and apply these in its proceedings. To date, the Court has rarely resorted to Article 21(1)(c). The decisions that have addressed this provision have not formulated a principled understanding of the scope of this source. Two notable examples of decisions on this provision did relate to issues of procedural law, unlike its decisions on Article 21(1)(b), but the Court's examination did not touch upon human rights related issues.¹³⁹ As a result, it is difficult to assess this provision's potential for importing IHRL principles into the law and practice of the Court. Still, the wording of the provision supports such potential, and the possible human rights principle that the Court may derive could arguably be considered general principles of law as a source of international law within the meaning of Article 38(1)(c) ICJ Statute.

3.1.6. *Interim conclusion*

Article 21(1) provides a hierarchical list of sources of law that the Court may apply. Both subsidiary sources listed may contain international human rights norms. 'Rules and principles of international law' are generally considered to refer to customary international law, and general principles of international law. As a result, insofar as international human rights

¹³⁵ Pellet (n 90), 1068.

¹³⁶ McAuliffe deGuzman (n 37), 710; Pellet (n 90), 1073; Raimondo (n 123), 57.

¹³⁷ See eg Raimondo (n 123), 52, who notes that in order to derive a general principle, the specific rules in domestic legal need not be identical, but the principles underlying the rules should be similar and the Court should look for the common denominator.

¹³⁸ For an interesting interpretation of the meaning of this provision, see: Hochmayr (n 88), 670-672.

¹³⁹ See eg ICC, Judgement on the Prosecutor's Application for Extraordinary Review of PTC I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC* (ICC-01/04-168), 13 July 2006, 24-32, where the Appeals Chamber assessed the Prosecutor's submissions regarding the existence of a general principle of law 'entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal; ICC, Decision on the Practice of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga* (ICC-01/04-01/06-679), 8 November 2006, 37-42, where the Pre-Trial Chamber examines the Prosecutor's submissions regarding the existence of a general principle of law permitting the practice of 'witness proofing'.

norms are contained in these sources of law, the ICC may apply them under Article 21(1)(b). The same goes for Article 21(1)(c), which refers to principles derived from national law: as a result of their incorporation in domestic legal systems, international human rights norms may have impacted on the formation of such general principles of law.

In addition, IHRL has had a legislative influence on the ICC through the incorporation of particular human rights provisions in the internal legal instruments of the Court. The internal legal instruments of the ICC provide for rights of suspects and accused persons, and contain numerous procedures aimed at safeguarding such rights. At the same time, Article 21(1)(b) and (c) allow the Court to make further use of IHRL, where its primary law is silent. However, the case law of the Court to date has done little to clarify the nature and scope of the subsidiary sources of applicable law and resort to these subsidiary sources of law has thus far focused almost exclusively on issues of substantive law, not on the procedural rights of suspects and accused persons. The ICC's reliance on external sources of IHRL with regard to procedural issues has almost exclusively occurred under the heading of Article 21(3), which is the subject of the subsequent section.

3.2. Article 21(3): Consistency with internationally recognized human rights

Article 21(3) purports to regulate the impact of international human rights norms on the law and practice of the ICC, in providing that 'the interpretation and application of law pursuant to this Statute must be consistent with internationally recognized human rights'. This provision has been the engine of the ICC's employment of sources of IHRL and precedents from human rights courts and supervisory bodies. Essentially, it obliges the Court to act in full accordance with international human rights norms. Thereby, it creates a normative hierarchy, in which such norms are superior to those contained in the Court's internal legal instruments, including the Statute. Despite the clear wording of the provision, Article 21(3) has given rise to debates about its normative effect. This section first addresses whether the provision elevates human rights norms to a status superior to the ICC's internal law. Second, it will be argued that Article 21(3) creates an obligation for the Court to subject all its actions to consistency review with human rights norms, and that this review duty extends so far as to oblige to Court to set aside the Statute if internationally recognized human rights so require. Third, this section addresses the persisting confusion regarding both the normative effect and the scope of Article 21(3).

Although Article 21(3) gave rise to much debate at Rome, the *travaux préparatoires* of the Statute reveal that the part of the provision that is relevant to this study was subject to little to no discussion during the drafting of the Statute.¹⁴⁰ The draft provision first appeared in the official Preparatory Committee documents in the draft Statute during its March-April 1998 session.¹⁴¹ However, it did not include further comments as to the exact meaning of the terms used, nor did it further specify the envisaged implications of the provision. Discussions on Article 21(3) centred on the desired definition of gender (or sex) as a prohibited ground of discrimination, not on the part of the provision that relates to human rights.¹⁴² This might mean that there was little objection to subjecting all the ICC's application and interpretation of law to the requirement of consistency with internationally recognized human rights.¹⁴³

3.2.1. Superiority of 'internationally recognized human rights'

A plain reading of the text of Article 21(3) actually leaves little room for discussion: all interpretation and application of law by the Court must be in line with internationally recognized human rights. This makes these norms a type of *lex superior*. Nevertheless, several authors have contested the conclusion that Article 21(3) makes internationally recognized human rights superior to the Statute.¹⁴⁴ According to Gallant, such rights are adopted 'as part of the ICC Statute', and '[t]hey are not stated as being superior to the ICC Statute itself'; therefore, any inconsistency between the Statute and an internationally recognized human right should not be automatically solved in favor of the right.¹⁴⁵

Similarly, it has been argued that Article 21(3) does not explicitly establish the superiority of human rights 'as such'; according to Hafner and Binder, a distinction has to be made between the scope of the norm and its application. The interpretation and application of

¹⁴⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (1998) UN Doc A/CONF.183/13 (Vol.II), 221-224. See also Saland 1999, 215-216; Schabas, *The International Criminal Court* (n 103), 398.

¹⁴¹ Mahmoud Bassiouni, *The Statute of the International Criminal Court: a Documentary History* (Transnational Publishers 1998), 171-181.

¹⁴² Schabas, *The International Criminal Court* (n 103), 398.

¹⁴³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (1998) UN Doc A/CONF.183/13 (Vol.II), 221-224; only the Islamic Republic of Iran suggested that 'in view of the differences between the various legal systems as far as the concept of human rights was concerned, it might be better to speak of human rights norms recognized by the international community or recognized by the main legal systems', but this comment was not followed up.

¹⁴⁴ See, eg: Gerhard Hafner and Christina Binder, 'The Interpretation of Article 21 (3) ICC Statute - Opinion Reviewed' (2004) 9 Aust Rev Int'l & Eur L 163; Verhoeven (n 94); Gallant, 'Individual Human Rights in a New International Organization' (n 98).

¹⁴⁵ Gallant, 'Individual Human Rights in a New International Organization' (n 98), 702-703.

rules of the Statute may have to be consistent with internationally recognized human rights, but in their reasoning, that does not mean that the Statute as such is inferior to human rights.¹⁴⁶ Furthermore, they argue that the placing of Article 21(3) as the final paragraph of the provision on applicable law militates against superiority of human rights. If that had been intended, the paragraph would have been placed earlier on in the provision.¹⁴⁷ Moreover, other provisions of the Statute also refer to internationally recognized human rights, for example, with regard to the exclusion of evidence. According to these authors, this would not have been necessary if Article 21(3) had already established the absolute superiority of these norms.¹⁴⁸ Also, given the exhaustive and detailed nature of the procedural and substantive legal framework of the Court, it has been argued to be unlikely that the drafters intended to allow ‘a notion as imprecise as internationally recognized human rights’ to trump the Statute.¹⁴⁹ Finally, they propose that the wording and structure of Article 21 actually indicate a primacy of the Statute, while they concede that other sources of applicable law are inferior to internationally recognized human rights.¹⁵⁰

Similarly, Verhoeven contends that Article 21(3) cannot imply that human rights systematically trump the Statute.¹⁵¹ In his reasoning, that would mean that if the court found a rule in its statutory framework to conflict with ‘internationally recognized human rights’, it would have to create law, which is, according to Verhoeven, not for a (criminal) Court to do.¹⁵² In addition, he argues that criminal law rules are of an ‘*ordre public*’ character, which, according to the author, means that they should preferably be construed in the way so as to avoid conflicts with other norms of such a character, including human rights. However, if consistent interpretation appears impossible, ‘they cannot be set aside simply because of such inconsistency’. In order to solve such interpretational problems, Verhoeven suggests that where the procedural and substantive norms of the Statute cannot be reconciled with internationally recognized human rights, the Court must turn to ‘the will of the international community’.¹⁵³ However, he does not elaborate this further.

The ordinary meaning of the terms of Article 21(3) does not allow for a different conclusion than that it elevates human rights norms to the status of *lex superior*. Although the

¹⁴⁶ Hafner and Binder (n 144) 174; see also Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 702.

¹⁴⁷ Hafner and Binder (n 144), 174.

¹⁴⁸ *ibid.*, 175.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, 176-177.

¹⁵¹ Verhoeven (n 94), 14-15.

¹⁵² *ibid.*, 14.

¹⁵³ *ibid.*, 15.

Statute is the primary *source* of applicable law, Article 21(3) requires the law contained in this source, as well as the other sources listed in Article 21(1), to be interpreted and applied in a manner that is ‘consistent with internationally recognized human rights’. Article 21(3) makes no distinction between the different sources listed in the first paragraph of the provision, as a result of which the consistency review must apply to all sources, including the Statute. A proper understanding of Article 21(3) therefore implies that if the Statute or the other sources leave room for an interpretation of their terms that is in accordance with such rights, this line of interpretation must be followed. However, if the judges conclude that inconsistencies arise between the Statute and internationally recognized human rights that cannot be solved by means of interpretation, the Court cannot apply the provision in question. Any other conclusion would contravene the wording of Article 21(3), which does not provide for any exceptions to its mandatory rule of consistency. If the drafters of the Statute had not intended Article 21(3) to create a superiority of internationally recognized human rights over the Statute, this could have simply been specified in the provision by exempting the Statute from the consistency requirement.

Verhoeven’s argument that a power of the Court to set aside statutory provisions if they are inconsistent with internationally recognized human rights would be in contravention of the principle of legality is not without merit. Criminal courts should be strictly bound by the limits of their provisions on definitions of crimes and modes of responsibility, so as to respect the principle of *nullum crimen sine lege* and the rights of the accused. However, the principle of legality, enshrined in the Rome Statute in Articles 22 through 24, is part of internationally recognized human rights.¹⁵⁴ As a result, a proper understanding of Article 21(3) would also require the application and interpretation of law in a manner that is consistent with the principle of legality.¹⁵⁵ Furthermore, during the drafting of the Rome Statute, ‘there was virtual unanimity among delegations as to the desirability of stipulating that the interpretation of law must be consistent with internationally recognized human rights.’¹⁵⁶ The chair of the drafting committee has noted that this part of the provision was never seriously questioned during the drafting.¹⁵⁷

¹⁵⁴ See generally: Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009), 156-230, where the author traces the development of this principle in IHRL.

¹⁵⁵ Grover (n 39), 562, who argues that Article 21(3) must be read in conjunction with the principle of *in dubio pro reo*, enshrined in Article 22(2) of the ICC Statute, which would work in conjunction to prevent the broad construction of definitions of crimes and modes of liability.

¹⁵⁶ McAuliffe deGuzman (n 37), 711

¹⁵⁷ Saland (n 92), 216; similarly Hafner and Binder (n 144), 167: ‘the need for the court to adhere to human rights standards when exercising its functions seemed widely accepted.’

Pellet has described the system created by Article 21(3) as ‘a super-legality in favor of international human rights law’, and he contends that human rights norms take precedence over all other applicable legal rules.¹⁵⁸ Similarly, it has been held that ‘the ordinary meaning of the text is that the law referred to in art. 21 cannot be applied where inconsistent with human rights norms’, which means that human rights norms trump norms contained in the Statute, in case of conflict.¹⁵⁹ Any other interpretation of the provision, according to which the Statute would be superior to human rights, would still allow the ICC to interpret and apply norms in a manner that would violate such rights, which would go against the terms of Article 21(3).¹⁶⁰ As a result, ‘the standards specified in Article 21(3) will prevail, by virtue of higher normative force, over any other applicable norm of the ICC law, by shaping the manner in which it must be interpreted and applied.’¹⁶¹

Such a reading of the provision is supported by the practice of the Court. For example, the Appeals Chamber has stated that ‘Article 21(3) makes the interpretation as well as the application of the law applicable under the Statute *subject to* internationally recognised human rights.’¹⁶² The Appeals Chamber continued to explain that ‘[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights’.¹⁶³ Numerous other decisions have confirmed, implicitly or explicitly, that internationally recognized human rights are superior to the Statute. This is illustrated most neatly by the decisions of the ICC, discussed below, to create procedural remedies that find no explicit support in the Court’s internal legal instruments, and by its decision to set

¹⁵⁸ Pellet (n 90), 1077, 1080; Daniel Sheppard, ‘The International Criminal Court and “Internationally Recognized Human Rights”’: Understanding Article 21(3) of the Rome Statute’ (2010) 10 Int’l Crim L Rev 43, 46, who calls it a ‘quasi-constitutional provision’, because it places human rights norms even above the provisions of the Statute itself; Perrin (n 37), 398: ‘Article 21 has taken the unprecedented step of raising all [human rights] norms to the level of quasi-constitutional status in a manner that can allow the judges of the ICC to effectively rewrite international criminal law with the stroke of a pen.’; Vasiliev, ‘International Criminal Trials’ (n 1), 132: the provision ‘unequivocally elevates internationally recognized human rights to the status of superior norms’.

¹⁵⁹ Akande (n 39), 47; similarly Bitti (n 88), 303; Göran Sluiter, ‘Human Rights Protection in the ICC Pre-Trial Phase’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Koninklijke Brill NV 2009), 463: ‘both primary sources of law – the statute, rules and elements of crimes-, and the secondary gap-filling sources are subject to a consistency-review in light of international human rights standards’; Hochmayr (n 88), 677.

¹⁶⁰ Sheppard (n 158), 59.

¹⁶¹ Vasiliev, ‘Proofing the Ban on Witness Proofing’ (n 91), 215.

¹⁶² ICC, Judgment on the Appeal of Mr Lubanga 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-772), 14 December 2006, 36; see also ICC, Decision on Victims’ Participation, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, 35.

¹⁶³ ICC, 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-772), 14 December 2006, 37.

aside the Statute when applying its provisions would have violated internationally recognized human rights.

3.2.2. Normative effect: Mandatory review of consistency with human rights

Some uncertainties remain regarding the normative effect of Article 21(3). Some authors have contended that the provision imports human rights into the applicable law of the court, thus adding a source of law to those enumerated under Article 21(1).¹⁶⁴ Others, however, maintain that this is a principle of interpretation, which does not create an additional source of law, but rather subjects the applicable sources to consistency review with certain norms.¹⁶⁵ The latter view is adopted here. Article 21(1) exhaustively lists the sources of law, and had ‘internationally recognized human rights’ been intended to be an additional and distinct source of applicable law, it would have been included there. These rights are not a source of law in the formal sense, but rather provide a set of rules and principles that the Court must follow in its interpretation and application of its applicable law. Internationally recognized human rights constitute a category of norms, which have been selected on the basis of their subject matter, rather than their formal status. Article 21(3) does not establish a formal hierarchy of sources, but a substantive hierarchy of norms.¹⁶⁶ These norms ‘defy the hierarchy of sources’, since they must be considered regardless of which source of law the Court is employing.¹⁶⁷ As a result, the provision is a mandatory principle of consistency.¹⁶⁸ The applicable law, and the hierarchy among the applicable sources, is provided in Article 21(1), while Article 21(3) provides that the interpretation and application of these sources must be consistent with internationally recognized human rights norms.¹⁶⁹

The ICC has confirmed this understanding of the provision, stating that ‘prior to undertaking the analysis required by Article 21(3) of the Statute, the Chamber must find a provision, rule or principle that, under Article 21(1)(a) to (c) of the Statute, could be applicable

¹⁶⁴ See eg Sheppard (n 158), 60; Hochmayr (n 88), 677.

¹⁶⁵ Similarly Schabas, *The International Criminal Court* (n 103), 385; Vasiliev, ‘International Criminal Trials’ (n 1), 133.

¹⁶⁶ Pellet (n 90), 1077: ‘the formal hierarchy created between the sources of applicable law (in Article 21(1)) is overlaid by another substantial hierarchy between the applicable norms: some are superior to others, not by reason of their formal source, but due to their subject-matter or their veritable substance.’

¹⁶⁷ Vasiliev, ‘Proofing the Ban on Witness Proofing’ (n 91), 214.

¹⁶⁸ *ibid*, 216; Saland (n 92), 213, the author, who chaired the Working Group on Applicable Law during the Rome Conference, refers to the provision as a ‘general consistency test’; similarly Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 704; Rebecca Young, ‘Internationally Recognized Human Rights’ before the International Criminal Court’ (2011) 60 *Int'l & Comp L Q* 189, 207.

¹⁶⁹ Similarly Vasiliev, ‘International Criminal Trials’ (n 1), 132, who contends that Article 21(3) formalizes the function of internationally recognized human rights norms as ‘the obligatory and prime interpretive devices’ for the Statute.

to the issue at hand.’¹⁷⁰ The normative force of human rights is arguably just as strong, or even stronger than if they had been included as a source of law, because in such an understanding of the provision, it allows human rights norms ‘to soar, in terms of its normative force, above all applicable norms regardless of their origin in any of the ICC sources, with the crucial obligation on the Court to use it ceaselessly in the review of possible outcomes of its interpretation and application of the entirety of ICC law’.¹⁷¹

The Court generally employs an understanding of Article 21(3) as a mandatory framework for the interpretation and application of the applicable sources provided by Article 21(1), with the added function of creating the power to override these sources where they are inconsistent with this framework.¹⁷² Two similar approaches can be discerned in the Court’s case law. At times, it notes its obligation under Article 21(3) prior to its analysis of the applicable law and lists a number of provisions from international human rights treaties that it has taken into account.¹⁷³ More often, however, the Court reiterates its obligation under Article 21(3) subsequent to its analysis of the issues at hand, and simply notes that the decision it has reached is consistent with internationally recognized human rights.¹⁷⁴

However, it must be noted that the Court’s interpretation and application of the provision ‘is yet to reflect a consistent understanding’.¹⁷⁵ This manifests itself predominantly in

¹⁷⁰ ICC, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga* (ICC-01/04-01/06-679), 8 November 2006, 10; similarly ICC, Decision on 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”, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 62, where it stated that Article 21(3) required the interpretation and application of the sources from Article 21(1), in a manner that is consistent with internationally recognized human rights.

¹⁷¹ Vasiliev, ‘International Criminal Trials’ (n 1), 133.

¹⁷² *ibid.*, 134; Young (n 168), 198: who regards it as ‘a mandatory rule which affects the identification and use of all sources of law under the statute.’

¹⁷³ ICC, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, *Prosecutor v. Bemba* (ICC-01/05-01/08-323), 16 December 2008, 28; similarly ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. Bemba* (ICC-01/05-01/08-475), 14 August 2009, 35; ICC, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gagbo* (ICC-02/11-01/11-432), 3 June 2013, 39.

¹⁷⁴ ICC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-475), 13 May 2008, 57; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba* (ICC-01/05-01/08-14-tENG), 10 June 2008, 90: ‘In reaching this decision, the Chamber has taken account of internationally recognized human rights in accordance with Article 21(3) of the Statute.’; ICC, Decision on Application by Victims to Participate in the Proceedings, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, 95; ICC, Judgment on the Appeal of Mr Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons”, *Prosecutor v. Katanga* (ICC-01/04-01/07-3363) 27 March 2013, 86. See also Young (n 168), 202, who notes a similar pattern.

¹⁷⁵ Young (n 168), 189.

the Court's approach to the scope of 'internationally recognized human rights'. It remains unclear how the Court decides which norms fall within this category.¹⁷⁶ At the same time, the Court has at times shown a lack of certainty as to the actual effect of the provision. For example, it has been referred to as a general principle of interpretation that only comes into play if there is a gap in the Statute, which fails to acknowledge the mandatory consistency that the provision requires. In principle, Article 21(3) can be regarded as an interpretative principle, as long the mandatory nature of consistent interpretation is acknowledged and put into effect.

Some—early—decisions have displayed this limited understanding of Article 21(3). For example, the Appeals Chamber once held that it did not consider it necessary to address the human rights aspects of the pre-trial detention of the appellant, because it had already come to a conclusion 'based on the fundamental legal texts of the Court'.¹⁷⁷ Similarly, a Pre-Trial Chamber has held that gaps in the Statute must be filled by resort to Article 21(3).¹⁷⁸ These decisions suggest the superiority of the Statute over internationally recognized human rights, in that the latter only come into play once a gap in the former is established. Such an understanding of Article 21(3) is contrary to the wording of the provision, which establishes a clear obligation of result, that all interpretation and application of law must be consistent with internationally recognized human rights.¹⁷⁹

However, this lacuna-approach to Article 21(3) has disappeared from the later case law of the Court. The majority of the Court's decisions that refer to Article 21(3) affirm that the provision creates a normative hierarchy in which internationally recognized human rights trump the Statute. The Appeals Chamber has consistently reiterated that it is imperative that the provisions of the Statute, and indeed the entire Statute, be 'interpreted and applied in accordance with internationally recognized human rights', as required by Article 21(3).¹⁸⁰ Trial

¹⁷⁶ See further *infra* section 4.

¹⁷⁷ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled "Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo", *Prosecutor v. Lubanga* (ICC-01/04-01/06-824), 13 February 2007, para 107.

¹⁷⁸ ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), 4 March 2009, 44, 156.

¹⁷⁹ Bitti (n 88), 303; similarly Young (n 168), 201.

¹⁸⁰ ICC, Judgement on the Prosecutor's Application for Extraordinary Review of PTC I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC* (ICC-01/04-168), 13 July 2006, 38; ICC, Judgment on the Appeal of Mr Lubanga 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-772), 14 December 2006, 36; ICC, Judgment in the appeal by Ngudjolo Chui of 27 March 2008 against the decision of PTC I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-572), 9 June 2008, 15; ICC, Judgment on the appeal of the Prosecutor against the decision of TC I "Decision on the consequences of non-disclosure of exculpatory materials covered by art. 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1486), 21 October 2008, 46; ICC, Judgement

and Pre-Trial Chambers follow a similar approach. For example, the importance of disclosure to the defence, the threshold of ‘reasonable grounds to believe a crime within the jurisdiction of the Court has been committed’, and the scope and content of victims’ participatory rights, as well as the right of the accused to a fair trial and to be presumed innocent have all been shaped in light of internationally recognized human rights.¹⁸¹ The Court thus employs Article 21(3) as a mechanism that ‘works in conjunction with, and thereby expands human rights protections that are specifically enumerated in the Statute.’¹⁸² The Court often refers to Article 21(3) as a general principle of interpretation.¹⁸³ Such references to Article 21(3) as a principle of interpretation do not detract from its normative force; it is only when the Court employs this principle as a gap-filling mechanism that the superiority of human rights is not properly acknowledged.

Another question concerns the methodological implications of Article 21(3). The provision provides the Court with a power to create procedural remedies where the Statute is

on the Appeal of JP Bemba Gombo against the decision of PTC III entitled ‘decision on application for interim release’, *Prosecutor v. Bemba* (ICC-01/05-01/08-323), 16 December 2008, 28.

¹⁸¹ On disclosure, see eg ICC, 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”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1486) 28 October 2008, 46; on the ‘reasonable grounds to believe’ threshold, see eg ICC, Decision on the Prosecutor’s Application for Warrants of Arrest, *Situation in the Democratic Republic of the Congo* (ICC-01/04-01/07), 10 February 2006, 12; ICC, Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Harun and Al-Abd-Al-Rahman* (ICC-02/05-01/07-1), 27 April 2007, 28; idem: ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba* (ICC-01/05-01/08-14-tENG), 10 June 2008, 24; ICC, Decision on the confirmation of charges, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-717), 30 September 2008, 65; on victims participatory rights, see eg ICC, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101-tEN-Corr), 17 January 2006, 51-53; ICC, Fourth Decision on Victims’ Participation, *Prosecutor v. Bemba* (ICC-01/05-01/08-320), 12 December 2008, 40; ICC, Decision on Application by Victims to Participate in the Proceedings, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, 48; on the right to a fair trial and the presumption of innocence, see eg ICC, Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure, *Prosecutor v. Bemba* (ICC-01/05-01/08-75), 25 August 2008, 13; ICC, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-51), 31 January 2011, 9; ICC, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 22.

¹⁸² Young (n 168), 199-200.

¹⁸³ ICC, Decision on the Final System of Disclosure and the Establishment of a Final System of Disclosure and the Establishment of a Timetable, Annex I, *Prosecutor v. Lubanga* (ICC-01/04-01/06-102), 15 May 2006, 2; ICC, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Statute, *Prosecutor v. Lubanga* (ICC-01/04-01/06-108), 19 May 2006, 7; ICC, Decision on the Practice of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga* (ICC-01/04-01/06-679), 8 November 2006, 10; ICC, Decision on the Joinder of the Cases against Katanga and Ngudjolo Chui, *Prosecutor v. Ngudjolo* (ICC-01/04-02/07-48), 10 March 2008, 7; ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-474), 13 May 2008, 57, 78; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), 4 March 2009, 44, 156.

silent on a matter, or even to alter the legal framework of the Statute if doing so is necessary to ensure consistency with internationally recognized human rights. Academic commentary has often referred to the generative power of Article 21(3).¹⁸⁴ The Court has endorsed the interpretation of Article 21(3) as mandating the ICC to go beyond the provisions of the Statute if internationally recognized human rights so require. Early on in its case law, the ICC has held that the Chamber may be required to ‘exceed the specific terms of Article 67 of the Statute’ to ensure the proper protection of human rights.¹⁸⁵ Furthermore, the Appeals Chamber relied on Article 21(3) when it concluded that the remedy of a stay of proceedings, although absent from the Statute, was an inherent power of the Court. It emphasized that ‘[a] fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.’¹⁸⁶ When the Chamber decided to actually stay the proceedings, it also did so relying on Article 21(3).¹⁸⁷ The Court’s power to stay the proceedings, based on Article 21(3), has been reaffirmed in subsequent case law.¹⁸⁸ This is not the only example of the generative power of Article 21(3). For example, the ICC has also held that it has a positive obligation to fund the visits of family members to detained accused persons, in order to ensure their internationally recognized human right to family life, despite

¹⁸⁴ Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 93; Vasiliev, ‘International Criminal Trials’ (n 1), 135: ‘the provision may be deemed to have an overt generative function, a power-conferring function, or to enable the court to deduce – rather than generate – remedies that are already implicit in its applicable law and follow from it as a matter of course.’ Sheppard (n 158), 60, who states that human rights law is therefore somewhat of a ‘source of applicable law in and of itself;’ see also Biti (n 88), 300, 303.

¹⁸⁵ ICC, Decision on the Final System of Disclosure and the Establishment of a Timetable, Annex I: Discussion of the Decision on the Final System of Disclosure, *Prosecutor v. Lubanga* (ICC-01/04-01/06-102), 15 May 2006, 97; idem: ICC, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, *Prosecutor v. Lubanga* (ICC-01/04-01/06-108), 19 May 2006, 37.

¹⁸⁶ ICC, 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-772), 14 December 2006, 37.

¹⁸⁷ ICC, 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1401), 13 June 2008, 58; confirmed on appeal: ICC, 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”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1486) 28 October 2008, 76.

¹⁸⁸ ICC, Decision and Abuse of Process Challenges, *Prosecutor v. Bemba* (ICC-01/05-01/08-802), 28 June 2010, 252: ‘On the basis of the rights of the accused enshrined in the Statute, and applying the provisions of Articles 21(3) and 64(6)(f) of the Statute, the Chamber should stay the proceedings if a violation of the accused’s rights render a fair trial impossible.’ ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2690-Red2), 7 March 2011, 160: ‘the doctrine of abuse of process has had, ab initio, a human rights dimension (given it is largely associated with remedying breaches of the rights of the accused), that the rights of the accused safeguarded by the Statute should be interpreted and applied subject to internationally recognised human rights standards (see Article 21(3) of the Statute). In this context the jurisdiction of the Court is to be exercised in accordance with internationally recognised human rights norms’.

the fact that the Court's internal legal instruments did not provide for such a power.¹⁸⁹ These decisions confirm that the Court's obligation to respect internationally recognized human rights extends beyond the Statute, which has been termed the 'power-conferring function of human rights norms'.¹⁹⁰

In addition to its interpretation of law, Article 21(3) requires the Court to *apply* the law consistent with internationally recognized human rights. This supports the contention that Article 21(3) requires more than consistent interpretation of existing sources of law in conformity with human rights.¹⁹¹ The Appeals Chamber has emphasized that 'Article 21 (3) of the Statute makes the interpretation *as well as the application* of the law applicable under the Statute subject to internationally recognized human rights.'¹⁹² Such an emphasis on application as a distinctive and equally important aspect of the obligation enshrined in Article 21(3) can be found in numerous decisions of the ICC.¹⁹³ Such emphasis on application underlines the normative force of Article 21(3), because it suggests that, when the applicable law of the Court cannot be interpreted in the manner consistent with human rights norms, this law cannot be applied and the applicable law, including the Statute, must be set aside.¹⁹⁴ This is not a

¹⁸⁹ ICC, 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", *Prosecutor v. Katanga and Ngudjolo* (ICC-RoR217-02/08-8), 10 March 2009, 31.

¹⁹⁰ Gradoni, 'The Human Rights Dimension of International Criminal Procedure' (n 3), 93.

¹⁹¹ Pellet (n 90), 1080, where he argues that describing Article 21(3) as only relevant for interpretative purposes neglects the very wording of the provision, which speaks of interpretation *and application* having to be consistent with internationally recognized human rights, which therefore take precedence over all other applicable rules. Similarly Hafner and Binder (n 144), 172.

¹⁹² ICC, 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, *Prosecutor v. Lubanga* (ICC-01/04-01/06-772), 14 December 2006, 36; reiterated in: ICC, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings before this Court, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-286-Red), 2 November 2012, 45.

¹⁹³ ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), 13 July 2006, 38; ICC, Decision on Victim's Participation, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, 35; ICC, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-572), 9 June 2008, 15; ICC, Judgement 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", *Prosecutor v. Lubanga* (ICC-01/04-01/06-1486), 21 October 2008, 46; ICC, Fourth Decision on Victims' Participation, *Prosecutor v. Bemba* (ICC-01/05-01/08-320), 12 December 2008, 14; ICC, Decision on Application by Victims to Participate in the Proceedings, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, 48; ICC, Decision on 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", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 62; ICC, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings before this Court, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-286-Red), 2 November 2012, 45.

¹⁹⁴ Vasiliev, 'International Criminal Trials' (n 1), 135.

gap-filling function but a ‘logical corollary of the interpretation and application of the proper law of the ICC in light of internationally recognized human rights’.¹⁹⁵

The ICC has confirmed that Article 21(3) requires it to set aside the Statute if doing otherwise would violate internationally recognized human rights.¹⁹⁶ The Court faced an unprecedented situation in which several detained witnesses had requested asylum in the Netherlands, but had to be returned to the DRC pursuant to Article 93(7) of the Statute. The witnesses attempted to halt their return. In its decision on this issue, the Chamber relied on the right to request asylum, the principle of non-refoulement, and the right to an effective remedy. It held that ‘[a]s provided in Article 21(3) of the Statute, the Chamber must apply all of the relevant statutory or regulatory provisions in such a way as to ensure full exercise of the right to an effective remedy.’¹⁹⁷ Subsequently, the Chamber considered the right to request asylum to be an internationally recognized human right and decided that sending these witnesses back to the DRC would violate their rights. Therefore, the Court was ‘unable to apply Article 93(7) of the Statute in conditions which are consistent with internationally recognised human rights, as required by Article 21(3) of the Statute.’¹⁹⁸ As a result, it decided to set aside its obligation under Article 93(7) of the Statute and, instead, to keep these witnesses in detention pending the outcome of their asylum requests in the Netherlands. This also shows that the scope of protection of Article 21(3) extends to anyone implicated by the activities of the ICC.¹⁹⁹

3.2.3. *Persisting uncertainty: The ICC and the detained witnesses*

Subsequent developments in the case involving the detained witnesses reflect that confusion persists regarding the normative effect of Article 21(3). It must be admitted that the Court faced an unprecedented situation, with witnesses caught in a diplomatic struggle between the Court, the DRC, and the Netherlands. As a result of its decision of August 2011, the Court could not return the witnesses to the DRC as long as their asylum applications in the Netherlands were pending, because doing so would violate their right to request asylum. The ICC has held, on multiple occasions, that it would not be able to hold the witnesses in custody

¹⁹⁵ Vasiliev, ‘Proofing the Ban on Witness Proofing’ (n 91), 218-219.

¹⁹⁶ Similarly Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 83.

¹⁹⁷ ICC, Decision on 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”, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 70.

¹⁹⁸ *ibid.*, 73.

¹⁹⁹ Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 86.

indefinitely.²⁰⁰ However, despite repeated urges to the Netherlands to decide swiftly on the asylum applications and to enter into negotiations with the Court on the status of these witnesses, they have been detained at the ICC's detention unit for more than three years.²⁰¹

After around two years of detention, the witnesses applied for interim release, alleging that their continued detention without any possibility for review was in violation of internationally recognized human rights. In its decision on this issue, the Chamber backtracked from its previous position regarding the effect of Article 21(3). It held that the ICC itself was not responsible for the detention of the witnesses, because the title of their detention was Congolese. Therefore, the Chamber held that it was unable to review their detention, because that would require it to review the reasons for their detention, which was within the exclusive purview of the Congolese authorities. If it would decide to do so, said the Chamber, it 'would evidently be acting as a court of human rights – it was never conceived as such, and Article 21(3) of the Statute does not require it to ensure that States Parties respect internationally recognised human rights in their domestic proceedings.'²⁰²

What is more, the Chamber offered additional considerations regarding the scope and effect of Article 21(3) that significantly detract from its previous approach. According to the Chamber, Article 21 of the Statute 'enshrines in no uncertain terms the primacy of the Rome Statute as the founding text over the other sources of law enumerated by the provision.'²⁰³ It then reinterpreted its previous decision, in which it had set aside the Statute, as having been based on 'the risk of the immediate violation of a fundamental norm of international customary law whose peremptoriness finds increasing recognition among States and from which no derogation is permitted', ie the rule of *non-refoulement*.²⁰⁴ However, the original decision

²⁰⁰ ICC, Decision on 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", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 85; see further: ICC, Decision on the Request for Release of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3352), 8 February 2013, 11-12; ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 23: 'the Chamber has considered it necessary to underline on a number of occasions, notably on 8 February 2013, that the processing of the witnesses' asylum applications could not be the cause of unreasonable extension of their detention in The Hague and that, pursuant to Article 21(3), among others, the Court could not contemplate holding them in its custody indefinitely.48 In so ruling, the Chamber was seeking to demonstrate how imperative it was, in its view, for the Dutch authorities to adjudge the asylum applications forthwith and to even consider, if necessary, taking on the witnesses' custody hitherto assumed ad interim by the Court.'

²⁰¹ See, eg: ICC, Decision on the Request for Release of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3352), 8 February 2013, 22.

²⁰² ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 27.

²⁰³ *ibid*, 29.

²⁰⁴ *ibid*, 30.

was primarily based on the witnesses' right to request asylum, albeit in conjunction with their right to an effective remedy and the principle of *non-refoulement*. This is further illustrated by the fact that the ICC subsequently decided that it had received sufficient guarantees from the DRC so that it could return the witnesses without impinging on the principle of *non-refoulement*, yet it still decided that the witnesses could not be returned to the DRC, pending their asylum application.²⁰⁵

The Chamber drew a distinction between what it called the fundamental rule of *non-refoulement* and the right to liberty, which it said 'cannot be considered an intransgressible or peremptory norm of international law.'²⁰⁶ In addition, the Chamber held that the witnesses could challenge their detention before the Congolese authorities.²⁰⁷ Interestingly, the Chamber did appeal to the Netherlands again, considering that it might have 'the duty in certain circumstances to take the necessary measures to prevent or end a human rights violation on their territory', essentially hinting that if the Netherlands considered continued 'detention by the DRC' on Dutch territory 'antithetical to their international obligations, they could consider themselves duty-bound to take all appropriate measures.'²⁰⁸ This is peculiar, since the Court itself had just determined that the detention of the witnesses was not in violation of internationally recognized human rights.

This decision displays a high level of unease with the detention of the witnesses, but it seems as though implicit considerations led the Court to refrain from acting in line with the right to liberty, as would have been appropriate. Judge Van den Wyngaert dissented and issued an opinion in which she criticized the majority's finding. Aptly, she noted that '[d]espite the clear language of these previous decisions, my colleagues' view regarding the scope of Article 21(3) seems to have changed.'²⁰⁹ She confirmed the suggestion that the Chamber refused to review the witnesses detention because doing so 'would undermine the essence of the cooperation regime and would affect the fundamental principle of state sovereignty.'²¹⁰ Regarding the majority's distinction between the effects of the rule of *non-refoulement*, on

²⁰⁵ ICC, Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3128), 24 August 2011, 15.

²⁰⁶ ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 33, where the Chamber noted, amongst other things, that there are numerous exceptions to the right to liberty (and its corollary, the prohibition on arbitrary arrest and detention).

²⁰⁷ *ibid.*, 34.

²⁰⁸ *ibid.*, 35.

²⁰⁹ ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 3.

²¹⁰ *ibid.*, 3.

the one hand, and of the right to liberty, on the other hand, she pointed out the shortcomings of their reasoning. She noted that Article 21(3) requires the Court to interpret and apply the Statute in line with *internationally recognized human rights*, not norms of *ius cogens* or non-derogable norms. Furthermore, she noted that the majority’s assertion that the right to liberty is not intransgressible or peremptory is of ‘doubtful legal merit’, and more importantly, fails to answer the question whether this right could be limited in this specific case.²¹¹ According to Judge Van den Wyngaert, ‘the Majority’s total deference to the state sovereignty of the DRC not only completely ignores the Court’s obligations under Article 21(3) but also undermines [IHRL], which exists precisely in order to protect individuals against the powers of the state.’²¹² In the remainder of her dissent, Judge Van den Wyngaert applied a correct understanding of Article 21(3), assessing the continued detention of the witnesses based on their right to liberty, as enshrined in human rights conventions and the case law of the HRC, ECtHR, and the IACtHR.²¹³ According to Judge Van den Wyngaert, ‘the Court is under an obligation to apply and interpret the Statute in conformity with internationally recognised human rights norms in all circumstances, including when they are exceptional and unprecedented, it therefore seems necessary for the Court to review the arbitrariness of the continued detention of the Detained Witnesses itself.’²¹⁴ She found their detention to be in violation of the witnesses’ right to liberty, and concluded that ‘[t]he only remedy for this continuing violation is [their] immediate release.’²¹⁵

The Appeals Chamber subsequently declined to allow an appeal on the matter, because of the limited scope of the right to appeal, as enshrined in the Statute.²¹⁶ This also goes against the wording of Article 21(3), which enshrines the supremacy of human rights vis-à-vis the Statute. Judge Song dissented, relying on Article 21(3) and the right to liberty, in particular on the right to review of detention. He considered that the witnesses were currently detained ‘as a result of a decision of this Court ... Accordingly, it is the Court’s responsibility

²¹¹ *ibid.*, 6.

²¹² *ibid.*, 7.

²¹³ *ibid.*, 12-14.

²¹⁴ *ibid.*, 20.

²¹⁵ *ibid.*, 21.

²¹⁶ ICC, Decision of the Appeal against the “Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350”, *Prosecutor v. Katanga* (ICC-01/04-01/07-3424), 20 January 2014, 30: ‘The Appeals Chamber considers that the Detained Witnesses’ arguments regarding Article 21 (3) of the Statute are misplaced. The Detained Witnesses do not identify, nor does the Appeals Chamber find, an internationally recognised human right to appeal that requires the Appeals Chamber to expand its limited subject-matter appellate jurisdiction under the Statute, beyond the scope of the powers vested in it by the States Parties.’

to ensure their human right to judicial review of the lawfulness of their detention.’²¹⁷ According to Judge Song, the Appeals Chamber’s narrow understanding of the right to appeal, as enshrined in the Statute, was irreconcilable with the obligation to interpret and apply the Statute consistently with internationally recognized human rights. ‘It would be an especially peculiar result for a court such as the ICC, which is meant to provide a forum to address the most serious human rights violations, not to be able to address and remedy human rights violations for which it itself is responsible.’²¹⁸ He therefore held he would remit the matter to the Chamber, ordering it to decide on the lawfulness of the witnesses’ detention.

On the same day, the Appeals Chamber, acting *proprio motu*, also issued a decision in which it set aside all previous findings regarding the ICC’s inability to return the witnesses to the DRC, and ordered the Registrar to arrange for the witnesses’ imminent transfer.²¹⁹ In what can only be qualified as a narrow understanding of the Court’s obligations under Article 21(3), the Appeals Chamber, by majority, considered that Article 21(3) could not require the ICC to ‘violate’ its obligation under Article 93(7) of the Statute to return the witnesses to the DRC. According to the Chamber, such an understanding of the provision ‘would seriously damage the Court’s ability to enter into future cooperation agreements with States, which would undermine the Court’s ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.’²²⁰ Thereby, it exposed the underlying practical justifications for its decision to reverse its previous findings. The Appeals Chamber further noted that it was for the Netherlands to determine whether or not it had to intervene in the return of the witnesses to the DRC, were it to consider that its taking part in their return would violate its own obligations under national or international law regarding the asylum procedure.²²¹ After all, the actual transfer of the witnesses from the Court’s detention facilities to the airport and onwards had to be carried out by the Dutch authorities. The Appeals Chamber thus shifted the responsibility for the protection of the rights of these witnesses to the Netherlands, neglecting its own possible – partial – responsibility. The Appeals Chamber did emphasize that the ICC had already found that its own obligations under the rule of *non-refoulement* had been discharged, given the assurances for protective measures

²¹⁷ ICC, Decision of the Appeal against the “Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350”, Dissenting Opinion of Judge Sang-Hyun Song, *Prosecutor v. Katanga* (ICC-01/04-01/07-3424), 20 January 2014, 11, 13.

²¹⁸ *ibid*, 17.

²¹⁹ ICC, 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, *Prosecutor v. Ngudjolo* (ICC-01/04-02/12-158), 20 January 2014, 30.

²²⁰ *ibid*, 26.

²²¹ *ibid*, 29.

from the DRC regarding these witnesses, which the Court had ordered in June 2011.²²² However, the Appeals Chamber ignored another decision, taken simultaneously with the order for protective measures, that even if the DRC complied with the Court's order for protective measures, it could only return the detained witnesses once and if the Dutch authorities had rejected their request for asylum.²²³ Regarding these findings, the Appeals Chamber did instruct the Registrar to 'consult with The Netherlands in order to establish a procedure for this implementation that permits the Host State to determine whether it is necessary to intervene based on its own obligations in relation the Detained Witnesses' asylum claims.'²²⁴

This approach seems similar to the one taken by the *Lubanga* Chamber when it was confronted with a comparable issue. In that case, the Chamber also limited its own obligation under Article 21(3) to ensuring that the witness has a real opportunity to request asylum, which obliged the Court only to grant him access to his lawyers while in ICC detention.²²⁵ The Chamber held that it was for the Netherlands to decide whether or not to intervene in order to take control of the witness, so as to allow the Netherlands to discharge its international obligations regarding the asylum request.²²⁶

The ICC seems keenly aware of the human rights issues raised by these matters, but, faced with uncooperative domestic authorities of the Netherlands, which refused to accept these witnesses into their jurisdiction, the Court interpreted its obligations under Article 21(3) in a way that is at odds with its own established case law and the ordinary meaning of the provision. Admittedly, this situation was unprecedented and confronted the Court with a dif-

²²² *ibid*, 31; ICC, Decision on the Security Situation of Three Detained Witnesses in Relation to their Testimony before the Court (art. 68 of the Statute) and Order for Request Cooperation from the DRC to Provide Assistance in Ensuring their Protection in Accordance with Article 93(1)(j) of the Statute, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3033), 22 June 2011.

²²³ ICC, Decision on the Security Situation of Three Detained Witnesses in Relation to their Testimony before the Court (art. 68 of the Statute) and Order for Request Cooperation from the DRC to Provide Assistance in Ensuring their Protection in Accordance with Article 93(1)(j) of the Statute, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3033), 22 June 2011, 42.

²²⁴ ICC, 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, *Prosecutor v. Ngudjolo* (ICC-01/04-02/12-158), 20 January 2014, 31. Subsequently, The Appeals Chamber reiterated its order for the transfer of the witnesses to the DRC after four months of inaction: ICC, Decision on the "Registry's urgent request for guidance" and further order in relation to the Appeals Chamber's "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", *Prosecutor v. Ngudjolo* (ICC-01/04-02/12-179), 21 May 2014, 8; subsequently, the witnesses were released from ICC detention and taken into 'asylum detention' by the Dutch authorities, which, after the rejection of the witnesses' asylum request, sent them back to the DRC. See eg Tjitske Lingma, 'The Hague Deports ICC Witnesses to DRC' (International Justice Tribune 163, 9 July 2014) http://www.justicetribune.com/Article/?tx_jjtArticles_homecarousel%5BArticle%5D=546&tx_jjtArticles_homecarousel%5Baction%5D=show&tx_jjtArticles_homecarousel%5Bcontroller%5D=Article&cHash=b504824b9054dc38df5d2e6bd2c62176 > accessed 5 september 2014.

²²⁵ ICC, Redacted Decision on the Request by DRC-DOI-WWWW-0019 for Special Protective Measures Relating to his Asylum Application, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2766-Red), 5 August 2011, 86.

²²⁶ *ibid*, 87.

difficult dilemma of either forcing the Netherlands to accept these individuals into their jurisdiction, or sending them back to the DRC, thereby hampering the effective application of their right to request asylum in the Netherlands. The Court's decision to order the return of the witnesses to the DRC, while emphasizing the Netherlands' possible obligation not to effectuate such transfer, and accept them into its jurisdiction instead, may have been implicitly intended to force the Netherlands to accept these individuals into their jurisdiction. However, from the perspective of the Court's obligations to interpret and apply its applicable law consistently with internationally recognized human rights, the Court should have taken a more principled and explicit stance on the matter. As aptly noted by Judge Van den Wyngaert, the Court's obligation under Article 21(3) also applies to exceptional and unprecedented cases.

4. Methodological Complications: Defining the Scope of 'Internationally Recognized Human Rights'

Based on their internal law and practice the ICTs are bound by 'internationally recognized human rights'. However, several questions remain regarding the scope and content of this category of norms, which complicates the ascertainment of the actual human rights norms that bind the ICTs.

When it comes to the ad hoc Tribunals, it is not entirely clear what category of norms is binding on them because they have been inconsistent in the terminology used to describe it. As has been seen in the above, the Tribunals have employed a wide variety of terms to describe the body of norms that they are bound by, including 'internationally recognized standards', 'recognised principles of human rights', 'fundamental principles of international law', 'fundamental human rights', 'internationally recognized standards of fundamental human rights', 'imperative norms of international law' and 'generally accepted human rights norms'.²²⁷ The oft-quoted report of the UNSG stated that the ICTY had to respect 'internationally recognized standards regarding the rights of the accused'.²²⁸ The content of these standards, however, remained 'shrouded in obscurity'.²²⁹ In addition, the Tribunals have also been inconsistent in their identification of the source of their obligation to respect human rights norms.²³⁰ Such inconsistency betrays uncertainty regarding the applicable norms and

²²⁷ See *supra* section 2.2.

²²⁸ UNSC, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704, 106.

²²⁹ Vasiliev, 'International Criminal Trials' (n 1), 96-97.

²³⁰ *ibid*, 110, where he notes that the approach to these issues has been inconsistent both across and within tribunals.

corresponding obligations of the Tribunals under IHRL. At the same time, it significantly diminishes the coherence and predictability of their approach to defining their human rights obligations.

The ad hoc Tribunals' approach to the identification of the human rights norms that they apply in practice has been far from consistent. They have referred to a large variety of sources of human rights norms and granted them various degrees of authority, ranging from irrelevant to persuasive to binding. The ad hoc Tribunals have also proposed an equally wide variety of justifications for these approaches. For example, some decisions provide that the tribunals are bound by the ICCPR because it forms part of general international law, while the ECHR and ACHR are said to have 'persuasive authority', as a consequence of their being 'evidence of international custom'.²³¹ However, these decisions fail to explain why the ICCPR is part of 'general international law', why the ECHR and ACHR are 'evidence of international custom', or what the concept of 'persuasive authority' means. Moreover, a subsequent decision of the same Appeals Chamber referred to the ICCPR as having 'persuasive authority', without acknowledging or justifying its apparent departure from its previous decisions.²³²

Furthermore, a number of decisions of the ICTY have held that the Tribunal has an obligation to respect the ECHR, the legal basis for which was said to be that no distinction could be drawn between people standing trial at the domestic level and at the international level.²³³ At the same time, the ICTY has held that it is free to deviate from existing human rights standards because it is more akin to a military tribunal, with limited due process rights.²³⁴ Thus, the Tribunals have at times denied being formally 'bound' by human rights

²³¹ ICTR, Decision, *Prosecutor v. Barayagwiza* (ICTR-97-19-AR.72), 3 November 1999, 40; See also ICTR, Appeals Judgement, *Prosecutor v. Kajelijeli* (ICTR-98-44A-A), 23 May 2005, 209, where the Appeals Chamber referred to the ICCPR as being 'reflective of customary international law', and to the ACHPR, the ECHR and the ACHR as 'persuasive authority' and as 'evidence of international custom'.

²³² ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-A), 13 September 2007, 25, where the Appeals Chamber employed the ICCPR as 'persuasive authority in determining the Tribunal's powers under international law'.

²³³ See, eg ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al* (IT-01-47-PT), 19 December 2001, 4; ICTY, Decision on Request for Provisional Release of Accused Jokić, *Prosecutor v. Blagojević et al* (IT-02-53-PT), 28 March 2002, 15; ICTY, Decision on Vidoje Blagojević's Application for Provisional Release, *Prosecutor v. Blagojević et al* (IT-02-60-PT), 22 July 2002, 23-24; ICTY, Decision on Isak Musliu's Request for Provisional Release, *Prosecutor v. Limaj et al* (IT-03-66-AR65.3), 31 October 2003, 11.

²³⁴ ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 28; the military tribunal parallel has not resurfaced in subsequent case law. However, the ICTs' alleged power to deviate from human rights standards has been relied on more often, in various degrees. This issue will be central in the discussion of the ICTs' interpretation and application of specific human rights norms in the subsequent Chapters.

law, treating it (and interpretations thereof) as persuasive authority instead, which has been argued to ‘suggest significant room for maneuver’.²³⁵

However, the most prevalent use of human rights norms has been for the Tribunals to refer to several human rights treaties without clarifying why they do so and what normative force and effect they have actually been given. In that regard, the Tribunals have referred extensively to the ICCPR, ECHR, ACHR, as well as the case law of the ECtHR and IACtHR, mostly without distinguishing between international and regional treaties and between treaty norms, and between decisions of regional human rights courts and views of the HRC.

The same can be said of the ICC. Article 21(3) of the Statute requires consistency with ‘internationally recognized human rights’, but fails to specify the scope or content of this category of norms, or a method for its identification.²³⁶ The *travaux préparatoires* do not help fill this gap, nor has the Court clarified its understanding of this term and the respective methodology.²³⁷ The chairman of the Preparatory Committee for the Rome Statute has stated that Article 21(3) ensures respect by the ICC for ‘human rights instruments that are universally recognized as part of international customary law.’²³⁸ It has also been held that ‘internationally recognized human rights’ can be discerned from those rights ‘listed in the universal or regional treaties protecting human rights, to the extent at least that they have a customary (general) character.’²³⁹ However, a majority of commentators agrees that the customary status of a right is not decisive in determining whether it is ‘internationally recognized’ within the meaning of Article 21(3). The threshold for being ‘internationally recognized’ is generally regarded to be lower than for being ‘customary’.²⁴⁰ Given the difficulty of identifying the content of customary international (human rights) law, it is appropriate and more practical not

²³⁵ Frédéric Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’ (2009) 14 *UCLA J Int’l L & Foreign Aff* 37, 52-53: ‘this ambiguity arguably limits the role human rights law might have, in contrast to its status in legal systems, where it clearly forms part of a supra-legality to which all the procedure must conform.’

²³⁶ Vasiliev, ‘International Criminal Trials’ (n 1), 133: ‘the content of internationally recognized human rights is unclear and potentially very broad.’

²³⁷ Sheppard (n 158), 44: the court ‘has yet to articulate rules that explain why the sources they rely on generate applicable rules and how those rules are to be applied.’ Similarly Young (n 168), 198.

²³⁸ Adriaan Bos, ‘1948-1999: the Universal Declaration of Human Rights and the Statute of the International Criminal Court’ (1998) 22 *Fordham Int’l L J* 229, 234.

²³⁹ Verhoeven (n 94), 14; similarly Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 705: ‘custom, general principles of internationally recognized law, and other sources may be consulted, as well as law derived from those treaties or declaratory documents that a large majority of countries have acceded to or approved’; Hafner and Binder (n 144), 187.

²⁴⁰ Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 705: the source of human rights law to be applied under Article 21(3) ‘is broader, and should be given a more concrete form, than the often limited or vague rules of international custom.’

to require the Court to establish the customary status of any given human rights norm it wishes to apply under Article 21(3).²⁴¹

However, how should the Court decide which norms fall within the scope of Article 21(3)?²⁴² The term ‘internationally recognized’ has been said to denote ‘a certain level of broad acknowledgement and acceptance of the human rights in question.’²⁴³ In addition, it has been held that, because it refers to internationally recognized rights, as opposed to generally recognized ones, it relates to treaty norms rather than customary ones.²⁴⁴ Such broad acceptance can arguably be established by reference to any given right’s inclusion in treaties, without having to assess international practice and *opinio iuris*. As shown below, the Court has indeed adopted this approach.

The question remains how to decide whether a treaty contains ‘internationally recognized human rights’: does this apply only to global treaties that are almost universally ratified or can regional human rights treaties contain ‘internationally recognized’ rights as well? Commentators agree that ‘universal’ acceptance of the right is not required.²⁴⁵ Hafner and Binder have proposed a methodology for the ICC to determine whether a given right is indeed ‘internationally recognized’, which includes an assessment of the number and geographic distribution of the parties to a given treaty, as well as the possible reservations to the specific provision in question.²⁴⁶ Thus far, however, the practice of the ICC has not included such in-depth assessments.

The Court has not formulated a general understanding of the meaning of the term ‘internationally recognized human rights’.²⁴⁷ Some limited guidance regarding these questions

²⁴¹ *ibid.*, 705.

²⁴² Similarly Hochmayr (n 88), 679, who notes that ‘it remains unclear how internationally recognized human rights are identified.’

²⁴³ Young (n 168), 193.

²⁴⁴ Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 86.

²⁴⁵ Bitti (n 88), 301; Sheppard (n 158), 47. See also Hafner and Binder (n 144), 185, who discuss the drafting history of Article 69(7), which contains an identical reference to ‘internationally recognized human rights’, and with regard to which they note that proposals to refer to universally recognized human rights were rejected because it would be too limiting.

²⁴⁶ Hafner and Binder (n 144), 188-189.

²⁴⁷ One exception is a Separate Opinion of Judge Pikis, who has argued that ‘[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions.’ However, he then relied on the fact that the right to a fair trial has been enshrined in the ICCPR, the UDHR, the ECHR, the ACHR, and the ACHPR, stating that the right’s ‘incorporation in international instruments denotes comprehensive assent to its emergence as a principle of customary international law.’ He fails to clarify whether the fact that the right in question is enshrined in these conventions renders it ‘internationally recognized’ or ‘customary’. ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, Separate opinion of Judge Georghios M. Pikis, *Prosecutor v. Lubanga* (ICC-01/04-01/06-424), 12 September 2006, 3; See also Georghios Pikis, *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* (Martinus Nijhoff 2010), 89-90.

can nonetheless be derived from the Court's practice under Article 21(3). The Court generally refers to a number of concurrent sources, mostly international and regional human rights conventions, to support a given right's status of being 'internationally recognized'.²⁴⁸ This has been described as a 'shotgun-approach' and criticized for being haphazard.²⁴⁹ The Court does not distinguish between international and regional human rights treaties.²⁵⁰ It has often referred to case law of the ECtHR and, to a lesser extent, of the IACtHR under the heading of Article 21(3).²⁵¹ However, it has never explained or justified its use of such case law, as a result of which its authority or persuasive force remains unclear or at least unspecified.²⁵² Finally, the Court has also relied on so-called 'soft law' standards,²⁵³ although the Appeals Chamber emphasized that the Court may only be 'guided' by them.²⁵⁴

²⁴⁸ Sheppard (n 158), 49; Gradoni, 'The Human Rights Dimension of International Criminal Procedure' (n 3), 88: 'human rights instruments are referred to cumulatively or interchangeably.' The ICCPR is the most cited instrument, the ECHR follows it for a short distance and the ACHR too, is often mentioned.; Young (n 168), 203: the Court has consistently looked to 'human rights norms and their related jurisprudence from a geographically broad spectrum, which commonly includes references to the global UDHR, the ICCPR, and the CRC, and the regional ECHR and IACHR.'

²⁴⁹ Sheppard (n 158), 49, 44: 'the use of external legal norms requires some greater explanation. Unfortunately, these norms have been used haphazardly and without full accounting, rendering judgments unclear and less convincing, even if ultimately correct.'

²⁵⁰ Gradoni, 'The Human Rights Dimension of International Criminal Procedure' (n 3), 89: 'in no case has the relevance of a single regional instrument been excluded due to its geographically limited scope'; Christophe Deprez, 'Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: on Possible Reductive Factors' (2012) 12 Int'l Crim L Rev 721, 733.

²⁵¹ See eg ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 38; ICC, Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Harun and Al-Abd-Al-Rahman* (ICC-02/05-01/07-1), 27 April 2007, 28; ICC, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 22; ICC, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gagbo* (ICC-02/11-01/11-432), 3 June 2013, 39; similarly Bitti (n 88), 301; Schabas, *The International Criminal Court* (n 103), 400; Hochmayr (n 88), 674.

²⁵² Nicolas Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' (2011) 11 Hum Rts L Rev 91, 109: 'in several instances, the ICC has simply applied the ECtHR's case law without theorizing as to the legal basis for its incorporation into its reasoning.' Vasiliev, 'International Criminal Trials' (n 1), 120-121: 'in the ICC, reasons for deference to the ECtHR and the HRC have not always emerged clearly in its case law', 122: 'they refer to human rights jurisprudence, but provide explanation neither of the reasons for using it nor of its authority.'; Sheppard (n 158), 52: '[the Court] fails to articulate how those very sources are being used.'

²⁵³ See eg ICC, Decision on Victim's Participation, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, 35; ICC, Fourth Decision on Victims' Participation, *Prosecutor v. Bemba* (ICC-01/05-01/08-320), 12 December 2008, 16; ICC, Decision on Application by Victims to Participate in the Proceedings, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, 48; ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09-24), 3 November 2010, 5. See also Young (n 168), 205.

²⁵⁴ ICC, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, 33: 'The Appeals Chamber notes that the Trial Chamber in referring to the Basic Principles of 2005 was "guided" by the language set forth in Principle 8. However, as noted above, its decision was based on its analysis of rule 85 (a) and rule 85 (b) of the Rules. The Appeals Chamber finds no error in the Trial Chamber's reference to the Basic Principles of 2005 for the purpose of guidance.' See also Sheppard (n 158), 51.

The Court thus appears to interpret the requirement of ‘international recognition’ as ‘being enshrined in international and/or regional human rights treaties’. However, the flexibility of this approach implies a large measure of discretion for the Court. In addition, such uncertainty regarding the norms that bind the Court has been said to impose a great burden on the parties, because it is difficult to predict which norms the parties can invoke in the proceedings before the Court.²⁵⁵ More fundamentally, it can lead to questionable decisions, which is illustrated by the Court’s decision in the case of the detained witnesses, discussed above, where the majority decision drew an incorrect, and irrelevant distinction between the right to liberty and the rule of *non-refoulement* and held that the former, in contrast with the latter, ‘cannot be considered an intransgressible or peremptory norm of international law’.²⁵⁶ The distinction drawn by the majority finds no support in the wording of Article 21(3) and conflicts with the Court’s previous approach.

The ICC’s approach to Article 21(3) and its obligation to respect internationally recognized human rights has not been a formalist, source-driven process.²⁵⁷ The decisions of the ICC involving the interpretation of human rights norms do not rely on a formalist approach to identifying norms contained in the sources of law that apply to the Court as a subject of international law. Instead, a certain category of norms has been singled out as applying to the ICC, and the precondition for that is that they be ‘internationally recognized’, ie laid down in international or regional human rights treaties. The approach of the ad hoc Tribunals has been comparable.²⁵⁸ It has been argued that Article 21(3) can be seen as a codification of existing

²⁵⁵ Sheppard (n 158), 44.

²⁵⁶ ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 33, *i.a.* because there are numerous exceptions to the right to liberty (and its corollary, the prohibition on arbitrary arrest and detention; a decision aptly criticized by dissenting Judge Van den Wyngaert: ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 6: ‘who noted that Article 21(3) requires the Court to abide by ‘internationally recognized human rights’, not only by underogable norms or norms of *ius cogens*.’

²⁵⁷ Vasiliev, ‘International Criminal Trials’ (n 1), 116: ‘a conservative source-based approach to establishing the requirements of IHRL that can be deemed to make part of general international law has proved to be a deficient methodology for the tribunals. They sought to supplement and surmount it by interpretive techniques that were more capable of leading to intuitively correct outcomes’; Young (n 168), 205-206: the Court’s approach ‘is not rigid and is not restricted to human rights norms as embodied in traditional sources of law such as treaty, custom and general principles.’

²⁵⁸ See, on the ICTs, generally: Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 88: a general reference to internationally recognized human rights without specification of which sources are meant ‘dovetails with the practice generally followed by the ICTs, which do not pay much attention to the standard-selection problems, including, most prominently, the identification of customary norms’; see also Göran Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’ (2003) 37 *New Eng L Rev* 935, 938, who has explained this tendency, observing that ‘the application of human rights treaties and their authoritative interpretations by (quasi-) judicial bodies is a far more attractive alternative to attempting to identify customary rules and/or general principles of law’.

practice before the ad hoc Tribunals.²⁵⁹ Like the ICC, the ad hoc Tribunals have never formulated a principled understanding of what norms that they consider binding. In the absence of a principled understanding or consistent methodology, the ICTs retain more leeway to change the scope and content of human rights norms binding on them.

5. Contextualization: Adapting Human Rights to the ICTs' Context

When determining the human rights obligations of an ICT, two questions arise. The first is *whether* an ICT can be bound by certain norms related to its functions and the areas in which it exercises public power. The second question is *how* an ICT can be bound by certain human rights norms, ie how its obligations under these rights can be established, whether under customary international law, general principles of law, or pursuant to its obligation to adhere to 'internationally recognized human rights'.

An important caveat to the application of general IHRL, or 'internationally recognized human rights to ICTs, lies in their fundamental difference from states. As has already been noted in Chapter 2, 'large areas of international law are patently inapplicable to international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as states.'²⁶⁰ International law has developed as law governing the conduct of states, primarily vis-à-vis other states, and increasingly vis-à-vis individuals. The functioning of an international organization and of an ICT is fundamentally different from that of a state. It cannot simply be assumed that norms of general international law apply in the same way to those different subjects of international law.²⁶¹ The way international organizations relate to other subjects of international law, including states and individuals, is difficult to compare to the way states do, and their exercise of power is normally far more circumscribed than that of states. International organizations are often defined as 'non-state actors'.²⁶² Their

²⁵⁹ Vasiliev, 'International Criminal Trials' (n 1), 132: 'Article 21(3) 'purports to crystallize an interpretative technique that has been used with relative regularity by the ad hoc Tribunals'; Gradoni, 'The Human Rights Dimension of International Criminal Procedure' (n 3), 74-75.

²⁶⁰ Felice Morgenstern, *Legal Problems of International Organizations* (Grotius Publications Ltd., Cambridge 1986), 4; See also Moshe Hirsch, *The Responsibility of International Organizations Towards Third Parties* (Martinus Nijhoff 1995), 36; August Reinisch, 'Governance without Accountability?' (2001) 44 *German Y B Int'l L* 27, 135; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 2010, p 395-396; Henry Schermers and Niels Blokker, *International Institutional Law - Unity within Diversity* (5th edn, Koninklijke Brill NV 2011), 995, 1004.

²⁶¹ Gallant, 'Individual Human Rights in a New International Organization (n 98), 696.

²⁶² See eg Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); Jean D'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011); these volumes discuss international organizations as 'non-state actors' (amongst other non-state actors such as multinational

definition in legal doctrine is thus based on a distinction from states. Conceptually, it is difficult to grasp how the obligations of international organizations and ICTs under international law could be identical to those of states.²⁶³ The application of one uniform body of customary or general international law to different subjects of international law is contested.²⁶⁴ General international law, state-oriented as it is, cannot be mechanically transposed and applied to govern the behavior of non-state actors, such as ICTs. Even if the applicability of a certain set of norms of general international law to ICTs is accepted, the interpretation of those norms may require adaptation, including possible (partial) non-application, based on the fundamental differences between states and ICTs.²⁶⁵

Many authors propose that a solution to the questions raised by the fundamentally different nature of international organizations as compared to states, can be found in a functional approach to their obligations under international law.²⁶⁶ Under such an approach, international organizations can only be bound by rules of international law in the areas in which they exercise public power.²⁶⁷ The obligations that can be binding on them should logically be connected to their function.²⁶⁸

Applying this logic to ICTs, the functional approach requires that they be bound, for example, to respect general international law pertaining to the right to a fair trial. For instance, these courts and tribunals cannot be considered bound by general international law pertaining to the right to freedom of movement on their territory (art. 12 ICCPR), for the simple reason that they have none. Predictably, however, there is a substantial grey area where it is possible to argue either way. Is an ICT capable of protecting the right to privacy? Some might argue that they are not, since they do not have full control over investigations conducted on their behalf by national authorities. Does this imply that they are under no obligation to ensure respect for the privacy rights of persons affected by their investigations to the extent possible? An affirmative answer to that question would meet substantial re-

corporations, armed opposition groups and non-governmental organizations) and address the way international law accommodates them.

²⁶³ Similarly Hirsch (n 260), 36, who notes that the differences between states and international organizations necessitate adjustments of the rules governing their respective behavior.

²⁶⁴ Lindsey Cameron, 'Human Rights Accountability of International Civil Administrations to the People Subject to Administration' (2007) 1 Hum Rts & Int'l Legal Discourse 267, 273.

²⁶⁵ Naert (n 260), 395.

²⁶⁶ See *supra* Chapter 2 Section 3.2.

²⁶⁷ Schermers and Blokker (n 260), 993; Naert (n 260), 394.

²⁶⁸ As has been stated in Chapter 2, This finds support in an ICJ Advisory Opinion, where it was held that 'the rights and duties of an entity such as the United Nations [ie international organizations] must depend upon its purposes and functions': ICJ, Advisory Opinion, *Reparations for Injuries*, 11 April 1949, 9.

sistance.²⁶⁹ An ICC Pre-Trial Chamber has noted that it was questionable whether it could be bound by the rule of *non-refoulement*, because it is not a state and therefore unable to respect this fundamental rule in the same way as states.²⁷⁰ However, this begs the question whether this means that an ICT has no obligations under this rule at all or other obligations within the ‘grey area’? This goes to show that the operation of human rights norms in the context of an ICT may have to be different from how these norms operate in a state context.

This brings us to the second question. It may be possible to establish that a given human rights norm is customary or provides an ‘internationally recognized human right’, or even to identify specific obligations that stem from it. But even in such cases, these obligations will be addressed to a state, not to an ICT. The question is therefore how to establish the specific obligations of an ICT under a given human rights norm? Answering this question requires an assessment of the differences between states and ICTs and of their possible impact on the ICTs’ capability to bear certain obligations under human rights norms. IHRL has developed in the domestic context for the protection of individuals against the abusive exercise of *state* power. As a result, human rights are addressed to states and are formulated with reference to the way those entities operate. For example, human rights norms impose obligations on all branches of government: the executive, the legislature and the judiciary. International organizations generally, and ICTs specifically, have a fundamentally different institutional design. The nature of human rights obligations evinces a presumption of the existence of a state, ie the actor that is capable of protecting rights such as the right to freedom of religion, freedom of assembly, or the right to a fair justice system. As a result, it is uncertain whether and to what extent ICTs can practically have such obligations, or how such obligations would apply to them.²⁷¹ It may therefore be necessary to translate and contextualize such rights before they can adequately function before an ICT.

²⁶⁹ See, eg: Edwards (n 100); De Meester (n 100), 302-303, who points out the possible need for a ‘contextualised’ right to privacy.

²⁷⁰ ICC, 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), *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07), 9 June 2011, 64; where the Pre-Trial Chamber held that ‘since [the ICC] does not possess any territory, it is unable to implement the principle within its ordinary meaning, and hence is unlikely to maintain long-term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. In the Chamber’s view, only a State which possesses territory is actually able to apply the *nonrefoulement*’ rule.’

²⁷¹ Mégret and Hoffmann (n 51), 320; Colin Warbrick, ‘International Criminal Courts and Fair Trial’ (1998) 3 *J Conflict & Sec L* 45, 51: ‘there is only limited guidance which can be gained from the basic human rights law. human rights treaties like the covenant and the European convention are posited on the existence of national legal orders which will be the primary guarantors of the rights of individuals.’; similarly Gallant, ‘Individual Human Rights in a New International Organization’ (n 98), 696: ‘most international human rights have developed in the context of protections from states rather than from international organizations.’; similarly Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’ (n 258), 940; McIntyre (n 62), 194;

For example, the right to be tried by an independent and impartial tribunal, being part of the right to a fair trial, should surely apply to an ICT under a functional approach to its human rights obligations. However, the requirement of independence and impartiality in IHRL is closely connected to Montesquieuan conceptions of the separation of powers.²⁷² Since no such structures apply at the international level, the question arises how this requirement should be shaped when applied to an ICT.²⁷³ Similar considerations apply to concepts such as limitations and derogations, which equally presume the existence of a state. For example, states may limit the enjoyment of certain human rights, provided that such limitations are ‘prescribed by law’, ‘pursue a legitimate aim’, and are ‘necessary in a democratic society’. States are also permitted to derogate from certain human rights obligations in times of ‘public emergency threatening the life of the nation’.²⁷⁴ How should such requirements apply to an ICT?²⁷⁵ Can they also limit human rights and, if so, what meaning should the terms such as ‘prescribed by law’, ‘democratic society’, and ‘the nation’ be given in the context of an ICT? They cannot simply be copy-pasted and applied to an ICT because its law is fundamentally different from that of a state; it is not a ‘democratic society’ nor does it have a ‘nation’ whose life can be threatened. Given the ICTs’ limited mandates and the fundamentally different way in which they exercise public power, it is not obvious how such requirements could operate in their context. If these norms are to be applied to non-state entities, they must be translated and be given a meaning that fits the ICTs’ context.

When the ICTY was established, the human rights norms it had to apply had only been employed in the context of domestic criminal justice. The Tribunal was the first to apply such rules and principles in international criminal proceedings.²⁷⁶ These norms had been crafted and subsequently interpreted to apply in domestic legal systems, which differ in many respects from the context in which the ICTs operate. Since human rights norms ‘can only have meaning in context’, the ICTs may, or even must ‘develop [their] own set of human

Fedorova and Sluiter (n 34), 30: ‘[a]nother interpretative difficulty arises from the fact that international and regional human rights treaties were formulated to apply to a domestic level’.

²⁷² See eg David Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), 286-287.

²⁷³ Similarly José Alvarez, *International Organizations as Law-Makers* (OUP 2005), 376: ‘it is less clear whether the ICTY and ICTR constitute the “independent” tribunals “established by law” anticipated in the ICCPR. The independence of these tribunals appears to be a matter of degree. What would happen if the Council were to demand hom one of these tribunals, which presumably were established pursuant to the Council’s power to establish subsidiary bodies, that a defendant’s trial be expedited or dealt with in a particular fashion? Are these courts independent of political control in the sense anticipated by the ICCPR if they cannot require the arrests of suspects or the securing of evidence without the effective cooperation of the Council?’

²⁷⁴ See on these concepts and the requirements underlying them *supra* Chapter 2, section 4.2.

²⁷⁵ Fedorova and Sluiter (n 34), 37-38.

²⁷⁶ McIntyre (n 62), 194.

rights standards in light of [their] context as international criminal court[s] dealing with crimes committed in times of war.’²⁷⁷ Indeed, ‘the applicability of general international law does not prevent international criminal jurisdictions from developing, through interpretation and taking account of their specific situation and exigencies, their own human rights judicial policy.’²⁷⁸ This possibility is further supported by the fact that, from a formalist perspective, the ICTs’ legal instruments could be classified as *lex specialis* that develops special human rights law to govern the functioning of an ICT and which could take precedence over general IHRL. The differences between domestic legal systems and international criminal justice may require the contextualized interpretation and application of human rights norms by the ICTs, simply because the ICTs and domestic courts are ‘not in comparable situations.’²⁷⁹ According to Cassese, the Judges of the tribunals have perfectly understood this need to take the specificity of international criminal justice into consideration when applying international human rights norms or using their interpretations by human rights courts and bodies.²⁸⁰ Judge Shahabuddeen has similarly opined that human rights treaties ‘were made by states for states. The Tribunal is not a state and is not party to those instruments.’²⁸¹ He argues that although the ICTs are bound by human rights norms, they are authorized to give them their own interpretations that reflect the differences between states and ICTs.²⁸²

Judge Shahabuddeen has further argued that ‘internationally recognized human rights instruments do not apply to the Tribunal lock, stock and barrel’.²⁸³ The exact content of human rights norms applicable before an ICT can only be established when taking into account the specific characteristics and context of the ICT in question.²⁸⁴ However, taking the specificity of ICTs into account in interpreting human rights norms should not be misconstrued as automatically allowing for ‘more limited rights of due process’, contrary to what the ICTY

²⁷⁷ *ibid.*, 194; similarly DeFrancia (n 20), 1393-1394: ‘another difficulty is the sui generis nature of the legal system of international criminal law. Domestic and international norms of due process can undergo substantial transformation when incorporated into a new legal system.’

²⁷⁸ Gradoni, ‘Human Rights and International Criminal Courts and Tribunals’ (n 20), 855.

²⁷⁹ Møse (n 11), 179, 189, see also 208: ‘some provisions that originally were inspired by the CCPR and other human rights instruments now generally live a life of their own in the specific context of the Tribunals’; similarly Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal - A Judge's Recollections* (OUP 2012), 231: ‘human rights ... can only be transposed to the Tribunal if they take into consideration the ‘specificities’ of that body of law’.

²⁸⁰ Cassese, ‘The Impact of the European Convention on Human Rights on the International Criminal Tribunal for the former Yugoslavia’ (n 11), 26.

²⁸¹ ICTY, Appeals Judgement, Separate Opinion of Judge Shahabuddeen, *Prosecutor v. Galić* (IT-98-29-A), 30 November 2006, 25.

²⁸² *ibid.*

²⁸³ *ibid.*, 19.

²⁸⁴ Deprez (n 250), 723.

has once held in an early decision.²⁸⁵ This has also been reaffirmed by Judge Shahabuddeen, who noted that what applies to the Tribunal is the ‘substance’ of the standards or goals that are set by human rights norms, not the provisions in international treaties, while ‘the supreme goal is fairness’.²⁸⁶ Similarly, while international criminal justice might have different requirements regarding the contents and application of defence rights, the *function* of those rights cannot be different.²⁸⁷

Contextual interpretation of human rights means that in determining, for example, what ‘fairness’ means before the ICTs, they cannot be strictly bound by international instruments or interpretations thereof, which ‘are suited for a different context.’²⁸⁸ Instead, the interpretation and application of such standards before the ICTs must be done in a manner that takes due account of the specific legal and factual context in which they operate.²⁸⁹ This by no means detracts from the universality and applicability of human rights norms.²⁹⁰ Instead, it means, as has been stated above, that such rights can only have meaning in context, and that the context of an ICT is fundamentally different to that of a domestic legal system.

However, such a contextual approach poses risks for the effective protection of human rights norms, particularly in the absence of external review mechanisms. Key questions are which contextual factors may legitimately impact on the ICTs’ interpretation and application of human rights norms, and how these factors may impact on this process. These considerations should be kept in mind, and will be further elaborated in the final Chapter of this study. It has been held that the basic differences between the ICTY and a domestic legal system lay mainly in the former’s ‘complete reliance’ on state cooperation for, ‘amongst other

²⁸⁵ ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 28.

²⁸⁶ ICTY, Appeals Judgement, Separate Opinion of Judge Shahabuddeen, *Prosecutor v. Galić* (IT-98-29-A), 30 November 2006, 18.

²⁸⁷ Michail Wladimiroff, ‘Rights of Suspects and Accused’ in Gabrielle Kirk McDonald and Olivia Q. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: the Experience of International and National Courts* (Kluwer Law International 2001), 421; similarly Robinson (n 20), 9: who argues that before the ICTY, fairness must have the same face as fairness in a domestic court, subject only to differences yielded by contextual and teleological interpretation of the basis of the VCLT.

²⁸⁸ Olivia Swaak-Goldman, ‘The ICTY and the Right to a Fair Trial: A Critique of the Critics’ (1997) 10 *Leiden J Int’l L* 215, 219.

²⁸⁹ Patrick Robinson, ‘Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia’ (2000) 11(3) *Eur J Int’l L* 569, 572; similarly Shahabuddeen (n 279), 231: ‘these differences may affect the interpretation to be given to normal human rights principles in their application to the Tribunal.’

²⁹⁰ Robinson, ‘Ensuring Fair and Expeditious Trials’ (n 289), 573; similarly Gideon Boas and others, *International Criminal Procedure* (CUP 2011), 466: ‘this does not mean that [rules of international criminal procedure] are always interpreted and applied in a manner consistent with human rights law or international law more broadly. The regime of icp applies rules that, while broadly consistent with the right to a fair trial, can vary or modify the application of what are described in the tribunals’ statutes as ‘minimum guarantees ... These variations do not undermine the legitimacy and coherence given to ICP by human rights principles. Quite the contrary, they show that this body of law holds together despite differences in application.’

things, access to evidence, execution of arrest warrants and protection of victims and witnesses and their families'.²⁹¹ Generally, their complete dependence on state can indeed be regarded as one of the most significant differences between the ICTs and states. The ICTs themselves have often referred to it and highlighted their reliance on states essentially for all matters related to the investigation, including arrest of suspects.²⁹² Academic literature has often referred to the 'fragmented nature of the investigation, in the context of which the ICTs must rely on states for the collection of evidence, the arrest of suspects and the identification but also the protection of witnesses.'²⁹³ Other differences include the fact that the ICTs' procedural systems are an amalgamation of civil and common law elements;²⁹⁴ budgetary constraints;²⁹⁵ the often volatile security situation in which investigations must be carried out;²⁹⁶ the gravity of the crimes that they adjudicate;²⁹⁷ and legal and factual complexity of these crimes.²⁹⁸ One commentator has argued that these differences are so substantial, that they are 'not just a matter of degree but of kind.'²⁹⁹

The ICTs thus do not operate in situations that are similar to the contexts to which

²⁹¹ Swaak-Goldman (n 288), 215, 221.

²⁹² See eg ICTR, Decision, *Prosecutor v. Barayagwiza* (ICTR-97-19-AR.72), 3 November 1999, 42: '[u]nlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal lacks any such enforcement agency. Consequently, in the absence of the suspect's voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects.'; similarly ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin and Talić* (IT-99-36-PT), 25 July 2000, 18; ICTY, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, Dissenting Opinion of Judge Patrick Robinson, *Prosecutor v. Krajišnik and Plavšić* (IT-00-39&40-T), 8 October 2001, 10.

²⁹³ See eg Fedorova, Verhoeven and Wouters (n 20), 66; similarly Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 J Int'l Crim Just 558, 559; McDermott (n 13), 178-179: 'investigations are often complex cross-border affairs, carried out after the atrocities under investigation occurred and without judicial oversight. The trial process is beset with difficulty in obtaining witness attendance, communicating thousands of pages of documents between the parties and limiting complex legal arguments to reasonable time-frames'; Vasiliev, 'International Criminal Trials' (n 1) 2014, 6, 138: 'the uniqueness of the tribunal context implies features that make it different from domestic systems, including the unavailability of police force and the ultimate dependence on states for a variety of matters.' See also Stapleton (n 95), 567; Warbrick (n 271), 52; Vojin Dimitrijević and Marko Milanović, 'Human Rights before International Criminal Courts' in Jonas Grimheden and Rolf Ring (eds), *Human Rights Law: from Dissemination to Application: Essays in Honour of Göran Melander* (Martinus Nijhoff 2006), 149.

²⁹⁴ ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 22; similarly Deprez (n 250), 726; Mégret, 'Beyond Fairness' (n 235), 61: 'the tribunals' multicultural backdrop creates pressure to accommodate various traditions, yet it provides little structural guidance on how to do so. This means many practices, both international and domestic, risk being "lost in translation".'

²⁹⁵ Vasiliev, 'International Criminal Trials' (n 1), 6; similarly Antonio Cassese, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 4 Eur Hum Rts L Rev 329, 342, who notes the limited resources of the ICTs.

²⁹⁶ Cassese, 'The ICTY and Human Rights' (n 295), 341.

²⁹⁷ Dimitrijević and Milanović (n 293), 150.

²⁹⁸ *ibid*, 149-150.

²⁹⁹ Warbrick (n 271), 52.

human rights instruments were anticipated to apply.³⁰⁰ The differences between domestic courts and the ICTs mean that the latter may be led to adopt a different approach to defining human rights.³⁰¹ Such differences require the adaptation of human rights standards, which can sometimes result in departures from them.³⁰² The point is that the specific position of the ICTs and the particular difficulties they face have an impact on the way in which they protect human rights.³⁰³ Turning a blind eye to these differences and demanding that the ICTs mechanically implement human rights norms in the same way that states should, will not result in the effective protection of these rights. Therefore, ‘the human rights practice of the tribunals by definition is—and should be—the process of contextualization.’³⁰⁴ How to determine the limits to this process, however, remains the crucial question.

6. Conclusion

Despite the significant differences between the legal frameworks of the ad hoc Tribunals and the ICC, their approach to IHRL is comparable, both regarding the sources of human rights law to which they refer, and regarding the normative effect ascribed to these norms.

The so-called ‘legislative influence’ of IHRL has led to the incorporation of its norms into the legal instruments of the ICTs. This goes for the ICC Statute, and, to a lesser extent, for the Statutes and RPEs of the ad hoc Tribunals. IHRL has thus clearly had an *a priori* impact on the legal instruments of the ICTs. In addition, Article 21(1) of the Rome Statute provides a hierarchical list of sources of applicable law before the ICC, including subsidiary sources of general international law, and general principles derived from national legal sys-

³⁰⁰ Swaak-Goldman (n 288), 221; similarly Warbrick (n 271), 51: ‘It might be asked whether human rights standards, directed as they are to national trial processes, have any real relevance to an international process because the international court will have to operate in a much sparser legal environment and in much different factual circumstances than a domestic court.’

³⁰¹ Gallant, ‘International Human Rights Standards in International Organizations’ (n 48), 400; similarly Dimitrijević and Milanović (n 293), 150: ‘these distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal justice.’

³⁰² Gabrielle McIntyre, ‘Equality of Arms Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia’ (2003) 16 *Leiden J Int’l L* 269, 270: ‘The Tribunal is an international criminal forum unsupported by the mechanisms of a domestic society and reliant on the cooperation of states, including those of the former Yugoslavia. The tribunal’s statute is crafted to suit its unique position as an international legal forum without the support of domestic institutions. Thus in some instances the Tribunal has necessarily had to depart from a strict adherence to human rights standards as understood in domestic proceedings. It has made those departures to protect the effectiveness of its proceedings, and it has justified those departures by reference to its unique structure, status, and subject-matter.’

³⁰³ Mirjan Damaška, ‘Reflections on Fairness in International Criminal Justice’ (2012) 10 *J Int’l Crim Just* 611, 614: ‘The criteria for evaluating fairness in international criminal justice should thus be crafted with an eye to the specific position of international criminal courts and the peculiar difficulties they face. Given their innate weakness, the complexity of crimes they process and the multiplicity of their goals, some departures from domestic conceptions of fairness should be expected and accepted.’

³⁰⁴ Vasiliev, ‘International Criminal Trials’ (n 1), 138.

tems. These subsidiary sources may contain IHRL, as a result of which the ICC can theoretically apply such law directly if lacunae exist in its internal legal instruments. The practice of the ad hoc Tribunals reveals a similar approach.

More fundamentally, the ICTs have an obligation to adhere to ‘internationally recognized human rights’. This obligation has manifested itself in different ways in the case law of the ICTs. First, they consistently refer to such norms when interpreting and applying norms contained in their own legal instruments. Second, both the ad hoc Tribunals and the ICC have created legal obligations and procedures that find no explicit support in their internal law, but are based on their obligation to respect international human rights norms. Third, the ICC has even set aside its obligations under the Statute because doing otherwise would violate internationally recognized human rights, a willingness that the ad hoc Tribunals have also displayed in subjecting their exercise of jurisdiction to consistency with such norms.³⁰⁵ According to their own law and practice, IHRL thus constitutes *lex superior* before the ICTs. Human rights norms have been held to constitute ‘a foundational part of the construct of international criminal law’, since international criminal procedure derives its coherence from its compliance with these norms.³⁰⁶

However, the decisions of the ICC in the case of the detained witnesses reveal a persisting ambiguity regarding the normative superiority of human rights norms. One Chamber has even held that these norms cannot be regarded as superior to the Statute, which is at odds with the Court’s previous case law on the matter. In addition, uncertainty persists regarding the exact scope of the category of international human rights norms that bind the ICTs. In the absence of a consistent methodology as to how the ICTs determine whether an ‘internationally recognized human right’ exists, they retain a large measure of freedom in determining the existence, content, and scope of their human rights obligations.

Finally, there are fundamental differences between the context in which human rights norms normally apply, and the context of an ICT. As a result, the process of interpreting and applying human rights norms before an ICT may have to be a process of contextualization. In order to ensure the effective protection of human rights before them, the ICTs will sometimes have to adapt these rights to the specific context of international criminal justice. These considerations must necessarily accompany the conclusion that the ICTs are bound by internationally recognized human rights, because they will have a profound impact on the way in which the ICTs will actually interpret and apply these norms. A meaningful assessment of the

³⁰⁵ Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 3), 93.

³⁰⁶ Boas and others (n 290), 466.

human rights practice of the ICTs therefore consists of two components. The first is the ICTs' obligation to adhere to internationally recognized human rights. The second is the fact that the specific context in which the ICTs operate may and sometimes must have an impact on the way in which they interpret and apply these norms. Human rights can only effectively fulfill their purpose if the ICTs take due account of their specific context when they interpret and apply them. These components jointly compose the theoretical framework against the background of which the actual interpretation and application of specific human rights norms by the ICTs will be assessed in the following part of this study. Chapters 4, 5, and 6 address the interpretation and application of, respectively, the right to privacy, the right to liberty, and the right to be tried without undue delay by the ICTs. Chapter 7 will further assess the strengths and pitfalls of the ICTs' approach against the backdrop of the ICTs' obligation to adhere to IHRL and the possibility to interpret human rights contextually, in order to develop a methodological framework that is envisaged to improve the ICTs' interpretative practice.