

Chapter 2

Legal Sources and Legal Methodology Under the ICC Statute

Abstract Chapter 1 has provided a brief introduction into the topic of the present work. It was clarified that this work will not be yet another contribution to the debate on exclusionary rules within one or more domestic legal systems but that it will transfer the issue to the legal system of the first permanent international criminal court, the ICC. Before entering into the discussion on the exclusion of evidence itself however, Chap. 2 will examine in more detail the sources and methods available to develop an ICC approach to the exclusion of evidence. This includes, on the one hand, an assessment of the legal sources that may be drawn from under the ICC Statute and, on the other hand, a short analysis of the methods of interpretation applicable to these legal sources. As part of the latter of these two assessments, special attention will be given to the purposes that have guided the establishment of the International Criminal Court. This analysis is necessary to be able later on to develop the central rationale that guides the exclusion of illicitly obtained evidence under the ICC Statute.

Keywords Evidence • Exclusion • Legal resources • Interpretation • Purposes of the ICC • Rationale • Internationally recognized human rights • Hierarchy of norms • Article 21 of the ICC Statute

Contents

2.1 Introduction.....	12
2.2 The ICC Proper Law and Its Interpretation	13
2.2.1 General Considerations.....	13
2.2.2 The Vienna Convention on the Law of Treaties and Its Applicability to the ICC Statute and the Rules of Procedure and Evidence	15
2.2.3 The Purpose of the ICC.....	17
2.3 The Use of External Sources and Models for Interpretation	22
2.3.1 The Hierarchy of Norms in Article 21 of the ICC Statute	23
2.3.2 References Under Article 21 of the ICC Statute	27
2.4 Conclusion and Outlook	43
References.....	43

2.1 Introduction

Before entering into the discussion on the exclusion of evidence itself, some preliminary explanations are necessary. We will first have to determine the legal texts and authorities that this research can draw from and the methods that we can use to interpret the relevant provisions of the ICC Statute. Given the subject matter of this research, the focus of this assessment will be on the area of procedural law.

The starting point for the analysis must necessarily be Article 21 of the ICC Statute. This provision explicitly lists the legal sources applicable in ICC proceedings. Enumerating sources in this way is a novelty in the statute of an international criminal institution. None of the statutes of the previous international criminal tribunals contains a similar provision specifying the applicable law.¹ These tribunals have applied their own statutes first and then, as a secondary source, they have relied upon the proper sources of international law as stipulated by the authoritative codification contained in Article 38(1) of the International Court of Justice (ICJ) Statute.²

In order to be bound by international law, it would not have been necessary for the ICC to have such a provision as well. The Court is clearly an international organisation,³ and the legal personality attributed to international organisations is considered the basis for their obligation to observe international law.⁴ Nonetheless, the explicit enumeration in Article 21 of the ICC Statute was included in the Statute to promote the principle of legality.⁵

Article 21 of the ICC Statute modifies the approach taken by the ICJ Statute in order to adapt to the requirements of international criminal law. It does so in particular by defining a hierarchy between the different sources it sets out.⁶ The ICC provision on sources contains three paragraphs: para (1) establishes a tripartite regime of applicable norms. Its subpara (a) refers to the proper law of the ICC, namely the Court's Statute, its Elements of Crimes⁷ and its Rules of Procedure and

¹Schabas 2010, p. 379.

²Triffterer 2008—Margaret McAuliffe de Guzman, Article 21, para 140.

³The term '*international organization*' has been defined as a "*collectivity of States established by a treaty, with a constitution and common organs, having a personality distinct from that of its member-States [...]*", see ILC, 'Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', *Yearbook of the International Law Commission* (1963) II, p. 167, available at: <http://untreaty.un.org/ilc/publications/yearbooks/1963.htm> (last visited: October 2013).

⁴Fedorova and Sluiter 2009, p. 20. Legal personality is expressly attributed to the ICC by Article 4(1) of the ICC Statute.

⁵Triffterer 2008—McAuliffe de Guzman, Article 21, para 1 et seq. Critical with respect to the degree of detailedness, see Pellet 2002, p. 1083.

⁶Pellet 2002, p. 1076; Werle 2012, para 193.

⁷ICC Elements of Crimes, adopted on 9 September 2002, entered into force on 9 September 2002; available at: http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/elements%20of%20crimes.asp (last visited: October 2013).

Evidence.⁸ Subparagraph (b) sets forth the applicability of a number of external sources, in particular “*applicable treaties and the principles and rules of international law*”. Subparagraph (c) mentions as a further external source “*general principles of law derived by the Court from national laws of legal systems of the world*”. The two remaining paragraphs are not conceived as legal sources in the strict sense but rather determine methodological parameters.⁹ Article 21(2) of the ICC Statute allows for the consideration of the Court’s previous decisions. At the same time, it clarifies that the Court is not bound by its own case law. It clearly rejects therefore the methodological notion of *stare decisis* used in common law systems.¹⁰ Article 21(3) in turn provides for a general consistency rule with regard to “*internationally recognized human rights*”. The content of this phrase and the implications of the provision will be dealt with below.¹¹

The following section will elaborate in more detail on the different sources. It will in particular concentrate on the use of a number of legal texts and authorities that may be relevant for the research at hand. Firstly, the ICC proper law and the question of its interpretation shall be addressed. Secondly, the existing options of drawing from external legal texts and authorities will be considered.

2.2 The ICC Proper Law and Its Interpretation

2.2.1 General Considerations

As mentioned above, the main difference between Article 38(1) of the ICJ Statute and Article 21 of the ICC Statute is that the former lists the sources of international public law without ranking them, while Article 21 ICC Statute contains a hierarchy of its applicable sources.¹² According to this hierarchy, the primary source to be considered is the proper law of the ICC. This includes the ICC

⁸ICC Rule’s of Procedure an Evidence, adopted on 9 September 2002, entered into force on 9 September 2002; available at: http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rules%20of%20procedure%20and%20evidence.asp (last visited: October 2013).

⁹Safferling 2012, p. 114; Young 2011, p. 207. But see for a different view, Gradoni et al. 2013, p. 72, referring to Article 21(2) as a ‘*subsidiary source*’; see also Zahar and Sluiter 2008, p. 18, who characterize Article 21(3) as the most superior source of law in the hierarchy of norms set out by Article 21 of the ICC Statute.

¹⁰Safferling 2012, p. 119; Schabas 2010, p. 394. For a brief overview of the legal methodology in common law, including on the *stare decisis* rule, see Safferling 2012, p. 117 et seq.

¹¹See Sect. 4.3.3.3.

¹²Fedorova and Sluiter 2009, p. 23; Pellet 2002, p. 1076; Schabas 2010, p. 385 et seq.; Werle 2012, para 193 et seq.

Statute, the Elements of Crimes and the Rules of Procedure and Evidence.¹³ The first and the last of these documents both contain provisions on the procedure to be followed by the ICC. They are consequently most relevant for this research. In order to be able to properly apply these sources, we will first briefly consider some methodological aspects regarding their interpretation.

To date, no prevailing methodology of interpretation has emerged in the field of international criminal law. As far as the United Nations' *Ad hoc* tribunals are concerned, this lack of methodology can at least in part be attributed to the circumstances under which the statutes of these courts were created. Both tribunals were established within a short period of time under the pressure of the political events in the former Yugoslavia and Rwanda. As a consequence, their statutes remain vague in many respects. Neither statute contains interpretative guidance and their interpretation is complicated by the lack of a comprehensive and coherent legal system as would exist in a well-established area of law. Under these circumstances, a particularly broad discretion was granted to the judges to develop their own methods of interpretation. These methods, however, have been criticized for being inconsistent and strongly influenced by the legal training of the respective judges.¹⁴

For the interpretation of the ICC proper law, the situation is slightly different. This law has established a more sophisticated legal framework than that of its predecessors. Unlike the statutes of the *Ad hoc* tribunals, the ICC Statute was not created in short order as a result of a Security Council Resolution. It was rather created in a drafting process lasting over a decade and involving a wide range of states. As a result, the interpretation of the ICC Statute can resort to a more elaborate system, including with respect to its procedural law.¹⁵ It has been presumed that there is consequently scope for greater reliance at the ICC on traditional methods of treaty interpretation.¹⁶

This progress notwithstanding, any interpretation of the ICC Statute will have to take into account persisting flaws in methodology: The Statute was negotiated among a great number of states with strongly diverging legal systems. 120 of these states finally adopted the result of the drafting process. At the end of the Rome Conference, they all had to come to an agreement within a relatively short period of time and in a situation of political pressure. It is the nature of such a negotiated instrument that it cannot create a fully comprehensive and coherent legal framework comparable to a domestic legal system. In fact, constructive ambiguity is often willingly used as a diplomatic tool under such circumstances.¹⁷ Such ambiguity in certain provisions allows for a degree of consensus with regard to contentious

¹³Among the sources containing the proper law of the ICC, Article 21(1)(a) of the ICC Statute does not specify any hierarchy. The Statute however takes precedent over the Rules of Procedure and Elements according to Article 51(5) of the ICC Statute and over the Elements of Crimes according to Article 9(3) of the ICC Statute.

¹⁴Schabas 2003, p. 849 et seq.

¹⁵Curat 2007, p. 151; Orié 2002, p. 1493; Gradoni et al. 2013, p. 69.

¹⁶Staker 2010, p. 212.

¹⁷Safferling 2012, p. 113.

issues, while at the same time leaving it to the legal practitioner to find a solution for the respective problem. This diplomatic tool, however, is not necessarily beneficial for the creation of a coherent system of criminal procedure.¹⁸ In fact, procedural law is one of the areas of international criminal law where the fragmentary nature of the system is particularly obvious. The ICC legal framework is still far from providing a comprehensive and fully developed procedural system as it would usually exist at the national level.¹⁹ As a result, despite the higher degree of regulation when compared to the *Ad hoc* tribunals, a considerable amount of discretion remains with the ICC judges as well. So far, the exercise of this discretion has not led to a prevailing hermeneutic. In fact, the approach to interpretation chosen by the ICC judges has been criticized as sometimes arbitrary and unclear.²⁰

2.2.2 The Vienna Convention on the Law of Treaties and Its Applicability to the ICC Statute and the Rules of Procedure and Evidence

Under general international law, the starting point for the interpretation of a convention is the Vienna Convention on the Law of Treaties.²¹ The Vienna Convention, or VCLT, is a codification of customary international law and provides authoritative rules of treaty interpretation.²² The general approach to treaty interpretation in international law is embodied in Article 31 of the VCLT. It sets forth that “[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*” This approach is primarily objective in nature. It focuses on the actual text of an agreement rather than on the intention of the parties that have adopted it.²³

Article 31 of the VCLT alludes to three aspects of interpretation: literal interpretation, systematic or contextual interpretation and a teleological interpretation that concentrates on the object and purpose of a treaty.²⁴ None of these three aspects has primacy over the others. Instead, the three approaches are meant to be

¹⁸Gradoni et al. 2013, p. 50.

¹⁹Gray 2004, p. 290; Sluiter 2010, p. 589.

²⁰Sluiter 2009, p. 477.

²¹Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980, UN Doc A/CONF. 39/27; 1155 UNTS 331, available at <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html> (last visited: October 2013).

²²Ipsen et al. 2004, p. 141.

²³Ipsen et al. 2004, p. 139.

²⁴Cassese 2005, p. 179.

used by means of “*a single combined operation*”.²⁵ Thus, any treaty interpretation will have to take into account all three aspects, the interaction of which will produce the legally relevant interpretative result.²⁶

In addition, under Article 32 of the VCLT, legislative history can be used as an auxiliary for interpretation. This includes in particular references to the preparatory work of a treaty. The consideration of such supplementary means of interpretation is however only permissible where the ordinary meaning of a word remains unclear or where it would lead to a “*manifestly absurd or unreasonable result*”. The fact that the legislative history of a treaty can only be considered subsidiarily is in line with the predominantly objective approach of the VCLT.²⁷

In principle, the ICC Statute is subject to the Convention’s rules of treaty interpretation. Unlike the Statutes of the *Ad hoc* tribunals, the ICC Statute is without question an international treaty.²⁸ At the same time, the specificities of the ICC Statute as the founding treaty of an international criminal court must be given due consideration. Ultimately, the interpretation of ICC provisions should function as follows:

Despite the equal rank of the different methods of interpretation, the general objective approach underlying the Vienna Convention implies that interpretation should start with a literal analysis. This demands an identification of the ‘*ordinary*’ or plain meaning of the text of the respective treaty.²⁹ The starting point of any interpretation would therefore be the wording of the ICC Statute.

In order to establish the ordinary meaning of a particular formulation, guidance can be obtained from a systematic approach, by assessing the wording in its ‘*context*’. The Vienna Convention defines the context of a treaty narrowly. Article 31(2) of the Convention limits the context to intrinsic material such as the treaty text itself, its preamble and annexes, as well as to agreements and instruments concluded in connection with the treaty.³⁰ As a consequence, a systematic interpreta-

²⁵See ILC, ‘Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session’, *Yearbook of the International Law Commission* (1966) II, p. 219 et seq., available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (last visited: October 2013).

²⁶Ipsen et al. 2004, p. 141.

²⁷Ipsen et al. 2004, p. 144.

²⁸*Prosecutor v. Lubanga* (Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chambers I’s 31 March Decision Denying Leave to Appeal), ICC (Appeals Chamber), decision of 13 July 2006, para 33; Volker Nerlich 2009, p. 295; Grover 2010, p. 546; Schabas 2010, p. 387. The applicability of the VCLT to the ICTY and ICTR Statutes is more in dispute but has mostly been recognized, see Lister 2005, p. 77 et seq.; it has also been confirmed by both tribunals, see *Prosecutor v. Delalić et al.*, (Judgment) ICTY (Trial Chamber), decision of 16 November 1998, para 1161 et seq.; *Prosecutor v. Bagosara and 28 others* (Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Theoneste Bagosara and 28 Others), ICTR (Appeals Chamber), decision of 8 June 1998, para 28.

²⁹Ipsen et al. 2004, p. 141 et seq.

³⁰ILC, Summary records of the eighteenth session, *Yearbook of the International Law Commission* (1966) I/2, p. 188, available at: [http://untreaty.un.org/ilc/publications/yearbooks/Yb_kvolumes\(e\)/ILC_1966_v1_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Yb_kvolumes(e)/ILC_1966_v1_p2_e.pdf) (last visited: October 2013); see also Nerlich 2009, p. 318.

tion in proceedings at the ICC would be restricted to the ICC Statute, the Final Act of the Rome Conference and to the instruments called for in the Statute, namely the ICC Elements of Crimes and the ICC Rules of Procedure and Evidence. It has been argued, however, that this limitation does not sufficiently take into account the evolution of the ICC and of its proper law. We will see that, accordingly, it can validly be argued that a contextual approach to the interpretation of ICC provisions may also rely on further instruments, in particular on the legal framework of the two *Ad hoc* tribunals.³¹

Further difficulties pertain to a teleological interpretation. This third aspect of interpretation requires the identification of the purpose of the ICC and of the impact of this purpose on the interpretation of its proper law. Teleological considerations will be of major significance for the present research and the following section will therefore contain a more thorough analysis of this subject. We will see that the main purpose of the ICC is a general preventive one, defined by the socio-pedagogical mandate of the Court. But the discussion of the overall purpose of the ICC can only be a starting point for this research. Building on this first assessment, the reasons that justify the exclusion of evidence in ICC proceedings will have to be clarified. This issue again calls for a closer examination. It will be dealt with in the section on the construction of Article 69(7) of the ICC Statute.³²

Finally, it can be added that beyond these three central interpretative aspects, any interpretation of an ICC provision may have recourse, under Article 32 of the Vienna Convention, to the legislative history of the ICC Statute. This includes in particular the work of the Preparatory Committee,³³ as well as the documentation of the Rome Conference.³⁴

2.2.3 The Purpose of the ICC

As a prominent scholar of comparative and international law has pointed out, the procedural features of any institution cannot be measured without some understanding of its goals.³⁵ This insight will guide this research and teleological considerations will be important for how we will interpret the ICC provisions on

³¹See Sect. 2.3.2.2.

³²See Sect. 4.3.2.

³³The *Preparatory Committee* was charged by the UN General Assembly in 1995 with the work on a draft statute for the future ICC. It held six sessions from 1996 to 1998. It is not to be confused with the *Preparatory Commission* that was appointed by the Final Act of the Rome Conference to work on further practical issues that were related to the establishment of the Court. See Werle 2012, paras 59 and 68.

³⁴The preparatory materials for the ICC Statute are all available at <http://untreaty.un.org/cod/icc/index.html> (last visited: October 2013). For a critical view of the use of the preparatory materials of consensus-based international treaties see Young 2011, p. 197.

³⁵Damaška 2009, p. 175.

exclusion. To this end, however, we must first consider the overall purpose of the Court and its proceedings.

As of today, there is no straightforward concept for the purpose of either the ICC or for the enforcement of international criminal law in general. In fact, such a panoply of different objectives has been advanced that it has been argued that the resulting agenda would overburden the young ICC.³⁶ A closer look at the possible objectives reveals indeed that not all of these goals are equally realistic or, where they are, equally significant. To some extent, the theoretical justification for the operation of international criminal justice can draw on the classical justifications supported in the respective domestic debates.³⁷ At the same time, the peculiarities of the international legal system must not be disregarded.

A look at the predecessors of the ICC reveals that both the Nuremberg Trial and the Tokyo War Crimes Trials focused primarily on the classical idea of retribution.³⁸ It is not surprising that these tribunals, which were marked by the victory of their creators, were guided by a concept that emphasizes expiation over more future-oriented goals. Admittedly, to some degree, retribution remains significant for modern international criminal trials as well.³⁹ It cannot, however, serve as the sole justification for the enforcement of international criminal law today. As a matter of principle, this rationale has been criticized for being anachronistic. Retribution as the only purpose of a criminal trial is in fact hardly compatible with a modern understanding of criminal law as a goal-oriented protection of legal values.⁴⁰ Moreover, at the international level, true retribution seems difficult to achieve. In light of the tremendous dimensions of international crimes, a fair compensation for the harm done is even more difficult to imagine than for domestic capital crimes.⁴¹

Accordingly, while the UN *Ad hoc* tribunals, in their early decisions, recognized retribution as a main purpose of their proceedings,⁴² over the years, they have increasingly emphasized the significance of the more future-oriented concepts of prevention and deterrence.⁴³ This approach also seem to have been guiding for the adoption of the ICC Statute. In its preamble, the Statute stipulates that its State Parties are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”⁴⁴

³⁶Damaška 2009, p. 178.

³⁷Werle 2012, para 97.

³⁸Neubacher 2006, p. 967.

³⁹Jäger 1995, p. 339; Werle 2012, para 98.

⁴⁰On the latter notion, see Ambos 2002, p. 307 et seq.

⁴¹Neubacher 2006, p. 967 et seq.

⁴²See *Prosecutor v. Kupreškić et al.* (Judgment) ICTY (Trial Chamber), decision of 14 January 2000, para 848 et seq., where the tribunal explicitly recognizes the different rationales for punishment known from domestic law.

⁴³Nemitz 2002, p. 165; Neubacher 2006, p. 967.

⁴⁴See Sect. 5 of the Preamble of the ICC Statute.

The preventive function of criminal proceedings can generally operate in a number of different ways and it includes special prevention, as well as general prevention, both in a positive and a negative form. For international criminal proceedings, the impact of these different aspects slightly deviates from the situation in domestic proceedings.

Special prevention relates to the asserted impact of criminal proceedings on the individual and is regularly considered particularly important at the domestic level. For international proceedings, however, this goal can at best be attributed a minor significance. One major aspect of special prevention is the positive idea of the rehabilitation and reintegration of a former criminal into society. Whether this is a workable mechanism at the level of international criminal law is doubtful. Perpetrators of macro-crimes generally do not display the usual kind of social shortcomings that characterize ordinary criminals. In fact, at the time of the commission of the crimes, they often rather act in conformity with societal expectations.⁴⁵ At most, the deterrent aspect of negative special prevention could be relevant for international criminal proceedings: A perpetrator who has been tried could be discouraged from committing further offences.⁴⁶ This goal may be advanced at least as one reason for the arrest of the respective person and for the conduct of proceedings. But it does not necessarily justify the punishment of a perpetrator of international crimes. Once the person has been deprived of power, repetition by the same offender will often become impossible in any case. Most of the time, not least because of this deprivation of power, the political circumstances will change and often the perpetrator will no longer be in a position to commit further international crimes.⁴⁷

Preventive effects at the international level are in fact predominantly of a general character. Admittedly, the idea of negative general prevention, namely the deterrent effect on potential offenders, can be called into question as well. To support such an effect, it has been argued that persons in the position to commit international crimes tend to calculate rationally the costs and benefits of their actions. Accordingly, they should also be influenced by the risk of prosecution.⁴⁸ In fact, the opposite seems much more likely. The conflicts that lead to the commission of such crimes tend to evoke strong emotions attached, for instance, to nationalism or religion. In light of these motives, it is doubtful whether the risk of prosecution will often have much influence.⁴⁹

The most compelling and most widely recognized rationale for international criminal proceedings pertains to the effects of positive general prevention. The underlying idea is that the notorious impunity of massive human rights violations has a negative influence on the general belief in the validity of international

⁴⁵Neubacher 2006, p. 968.

⁴⁶In favour of the significance of special prevention in general, Werle 2012, para 106.

⁴⁷Ambos 2002, p. 319.

⁴⁸Neubacher 2006, p. 969.

⁴⁹Damaška 2009, p. 183.

humanitarian and criminal law. According to this view, international criminal proceedings have a socio-pedagogical effect. The proceedings provide information about the validity of said norms and strengthen the moral inhibition against massive crimes. This means that the best way in which these proceedings contribute to the prevention of future international crimes is through their exemplary function.⁵⁰ Such a purpose, however, necessarily implicates the public perception of the International Criminal Court: The ICC will only be able to promote the validity of international humanitarian and criminal law if it is perceived as a legitimate moral authority.⁵¹

In this context, difficulties arise, however, from the realities of the system of international criminal justice as it stands today. The power structures within the international community lead to shortcomings when it comes to the comprehensive execution of international criminal proceedings. This in turn threatens the socio-pedagogical effect of those proceedings that actually take place.

The problem can best be illustrated by reference to social contract theories. Under these theories, the obligation for an individual to abide by the law arises from an agreement between society and the individual. The individual sacrifices a certain amount of freedom. In return, he is promised protection from the freedom-restricting acts of other individuals but also from the arbitrary exercise of power of the sovereign that this agreement created in the first place.⁵² The consideration of these theories reveals one of the biggest threats to the legitimacy of international criminal institutions. These institutions ultimately exercise a part of the power that was originally conferred upon the domestic sovereign. With the establishment of a system of international criminal justice, the pledge was made to both enhance the protection of the possible victims of international crimes and to do so by means of a system that would respect the rights of suspects and accused. But up to now, the international community, insofar as it is involved in this process, has not been able to deliver on this promise. The realities of global politics prevent the comprehensive prosecution of international crimes, as well as the implementation of a fair framework for their investigation. The prosecution of international crimes remains only fragmentary, which frustrates the hope for effective law enforcement. In addition, the international community fails to fulfil the duties that arise from the social contract vis-a-vis those that have broken the law. The selective implementation of international criminal law exposes the system to the criticism of arbitrariness.⁵³ Moreover, with respect to law enforcement, international criminal institutions, and the ICC in particular, are heavily dependent on states. This prevents the exercise of the supervision over investigating authorities that would be needed to guarantee the respect of the rights of potential perpetrators.⁵⁴

⁵⁰Ambos 2002, p. 320; Damaška 2009, p. 184; Neubacher 2006, p. 969; Werle 2012, para 99.

⁵¹Damaška 2009, p. 184.

⁵²Jackson and Summers 2012, p. 17.

⁵³Safferling 2012, p. 125.

⁵⁴Jackson and Summers 2012, p. 114. For more details see on the cooperation between the ICC and states, see Sect. 4.2.

We can derive from this that it is both crucial and difficult for the ICC to be perceived as a legitimate moral authority. The question arises: What are the consequences for a teleological approach to the interpretation of the Court's evidentiary framework? The most important implication is one that will have a considerable impact on the present research: Since the Court can do only little to change the realities of global politics, it will have to take even greater care not to gamble away its moral authority. As a consequence, the ICC in its proceedings, including with respect to questions of evidence, will have to adhere to a particularly high standard where due process rights are concerned. Its socio-pedagogical mandate would be doomed to failure if its work could be assailed for disrespect of those guarantees that are regularly provided to the individual in modern criminal proceedings.

At the same time, we should not, in this research, forget about a different aspect of legitimacy. The previous findings notwithstanding, the perception of the Court as a legitimate and relevant actor in the international arena will not only depend on the fairness of its proceedings. It is also closely linked to its ability to effectively implement the substantive rules of international humanitarian and criminal law in those proceedings that it actually conducts. Closely related to this aspect of positive general prevention are two wider objectives which, beyond the classical justifications for criminal prosecution, have been advanced for international criminal proceedings. When it comes to the conception of the Court's evidentiary framework, these objectives in particular point in a different direction compared to what has been outlined above.

Firstly, international criminal proceedings are meant to demonstrate solidarity with the victims of gross human rights violations. It has been pointed out that recognizing the suffering of the victims is important in order to avoid a second victimisation through denial or even through a possible attribution of guilt to the victims themselves.⁵⁵ This brings us back to the assumptions of the social contract theories. We have seen that the system of international criminal justice, as it stands, is not able to truly protect the members of a supposed global society from international crimes. The proceedings, however, enable the international community at least to demonstrate its solidarity with the victims. This in turn has consequences for the teleological interpretation of rules of evidence. The demonstration of solidarity suggests that as much evidence as possible should be admitted at trial. Every exclusion of relevant evidence in order to protect the rights of an accused will be met with the understandable incomprehension of the victims.

Secondly, it is asserted that international criminal proceedings construct a historical record of the atrocities that took place during the respective conflicts. Proponents of this truth-telling function claim that remembrance of the past is necessary for reconciliation and in order to avoid future conflicts.⁵⁶ Doubt has been cast on whether courts are the proper forum for establishing a comprehensive

⁵⁵Neubacher 2006, p. 969.

⁵⁶Neubacher 2006, p. 969; Werle 1997, p. 822.

historical record.⁵⁷ A slightly more modest aspiration might be more realistic. Criminal proceedings contribute to national reconciliation by shedding at least some light on the history of events.⁵⁸ Such a documentary purpose in turn requires that an account of the facts is given that is as accurate as possible. An accurate documentation also calls for admitting as much evidence as possible.

For a teleological interpretation of evidentiary rules, both of the aforementioned objectives would then require focussing primarily on the reliability of evidence and not as much on the kind of external values that are affected by due process considerations.

As a consequence, these two latter functions add further aspects to the general preventive purpose of international criminal proceedings. The need for law enforcement and accurate truth finding will often stand in contrast to the rights and interests of the persons under the jurisdiction of the ICC.⁵⁹ Any procedural solution, including those pertaining to the admissibility of illicitly obtained evidence, will have to maintain a balance between these two poles. Only then will it comply with the legitimacy concerns of the ICC and ultimately foster its overall socio-pedagogical purpose.

2.3 The Use of External Sources and Models for Interpretation

The previous chapter has dealt with the interpretation of the proper law of the ICC. As mentioned above, this body of law covers procedural issues in greater detail when compared to the legal framework of the Court's predecessors. It nevertheless falls short of providing a comprehensive system of criminal procedure. Accordingly, we will see in this research that there is often no legal rule for evidentiary issues in the ICC proper law. This raises the question to what degree recourse may be had to other legal texts and authorities. This includes in particular the statutes and jurisprudence of the two *Ad hoc* tribunals, domestic law and, finally, the large body of human rights law, including human rights treaties and the jurisprudence of their monitoring bodies.

We have already determined that, while the ICC proper law is first and foremost applicable, the applicability of external legal texts and authorities is possible under Article 21(1) and (3) of the ICC Statute. The next section will first give some closer consideration to the relationship between the ICC proper law and external legal texts and authorities. This relates to the above-mentioned hierarchy set out in

⁵⁷See Damaška 2009, p. 180, who doubts that historical documentation is a proper goal for an international criminal court given the constraints that legal relevancy and the need for expediency place on judicial fact-finding.

⁵⁸Jackson and Summers 2012, p. 112. See also Douglas 2006, p. 513 et seq.

⁵⁹Damaška 2012, p. 619.

Article 21. It will then deal in more detail with the application in practice of those external legal texts and authorities that are most important for this research, and with their applicability under Article 21(1) and (3) of the ICC Statute.

2.3.1 The Hierarchy of Norms in Article 21 of the ICC Statute

2.3.1.1 The Relation Between the Sources of Article 21(1) of the ICC Statute

If the ICC proper law is the primary legal source applicable in proceedings before the ICC, the question is: what are the conditions that should exist for the other legal sources enumerated in Article 21(1) of the ICC Statute to be considered? Looking at the plain wording of Article 21, those sources enumerated in subpara (b) are applicable “*in the second place, where appropriate*”. The reference to domestic law as contained in subpara (c) in turn is only allowed “*failing*” the consideration of the previously mentioned sources. What the consequence of these formulations are, however, remains contentious.

Looking at the Court’s jurisprudence, the ICC has understood Article 21 rather narrowly. Its judges have held that the sources both in Article 21(1)(b) and (c) of the ICC Statute were only applicable in the case of a *lacuna* in the written law that cannot be closed by dint of interpretation.⁶⁰ This jurisprudence favours an extremely positivist approach to the finding of justice. The primacy of the ICC Statute is strongly emphasized so as not to rely too much on legal rules that were not discussed and adopted in detail by the Assembly of States Parties as the Court’s legislative authority.⁶¹

With respect to substantive criminal law, the preference for legal positivism can be explained with reference to the prohibition of retroactive criminality. While this notion is not as such transferable to procedural issues, the underlying legality principle also has its place in the law of criminal procedure. The implications are certainly less strict than with respect to substantive law.⁶² However, the requirements of reliability and foreseeability, as well as of the equal treatment of affected persons, demand regulation of procedural matters that is as precise and definite as possible.⁶³ External legal sources such as customary law and general principles of

⁶⁰See *Prosecutor v. Al Bashir* (Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar al Bashir), ICC (Pre-Trial Chamber), decision of 4 March 2009, para 126.

⁶¹Also see Safferling 2012, p. 111, who identifies a preference of both the ICC and the Ad hoc tribunals for a positivist approach.

⁶²Gradoni et al. 2013, p. 71.

⁶³On the principle of legality with respect to judicial decisions in general, see Cassese 2003, p. 21. With respect to the law of criminal procedure, see Safferling 2012, pp. 111 and 115; Gradoni et al. 2013, p. 70.

law are often vague and rest on uncertain foundations. Accordingly, they are less able to do justice to the requirements arising from the legality principle. On this basis alone, the jurisprudence of the Pre-Trial Chamber could be regarded as sensible even if one views it from the perspective of procedural law.

The approach of the ICC judges has nevertheless been criticised in general for overly restricting the use of external sources. On a level of principle, doubts have been raised about how often gaps in law that absolutely cannot be closed by interpretation will actually arise.⁶⁴ With respect to substantive issues, the—then very limited—possibility of considering external sources has been found to encourage a problematic fragmentation of international criminal law.⁶⁵ In fact, the wording used in Article 21(1) would also allow for a more open approach. This is most clear from the expression “*as appropriate*” used in Article 21(1)(b).⁶⁶ And while admittedly more restrictive, the formulation “*failing that*” used in para (c) is also open enough to allow for a broader understanding. Given the topic of this research, we shall assess this criticism from the perspective of procedural law. Our assessment will show that while, theoretically, a more open understanding of Article 21 would be advisable, the use of customary law and general principles of law as external legal sources in the strict sense is subject to practical limitations.

First of all, some remarks are necessary on the issue of fragmentation. The problem for procedural law is not the same as it is with respect to substantive law. In substantive law, fragmentation clearly has an adverse effect on the legitimacy of the ICC and of international criminal law in general. This is because international criminal law is based on the very idea of universal validity.⁶⁷ In procedural law, on the other hand, it is less problematic if each institution implements its own procedure, as long as it respects a common core of values. A possible fragmentation of procedural law does not automatically have an adverse impact on the rights of the accused or other persons affected by the proceedings. While these persons have a right to legal certainty with respect to the law of a certain institution, there is no right to be treated according to one specific legal procedure. In fact, there is often not one just solution for procedural problems but several.⁶⁸ The fairness of a solution depends not least on the overall procedural system applicable in a certain situation. To a large degree, procedural law is thus relative to the institution that applies it.⁶⁹ We will see in the next sections that this autonomy does not entirely bar recourse to external sources in the area of procedural law. It calls, however, for particular caution when assessing the transferability of solutions. And, most importantly at this point, it limits the danger that arises from fragmentation when compared to substantive law.

⁶⁴Burghardt and Geneuss 2009, p. 132.

⁶⁵Burghardt and Geneuss 2009, p. 133.

⁶⁶Safferling 2012, p. 113.

⁶⁷Burghardt and Geneuss 2009, p. 133; Safferling 2012, p. 111.

⁶⁸With respect to general principles of law, see Gallant 1999, p. 709, fn. 86.

⁶⁹Safferling 2012, p. 111.

More important than the danger of fragmentation is the methodological objection against the ICC case law mentioned above. This objection pertains to the difficulties in identifying gaps in the Court's procedural law as required by the ICC judges. In this context, we must once more take into account that the procedural system applicable at the ICC is not a coherent codification.⁷⁰ However, the very idea of identifying gaps in a legal system is based on the assumption of a theoretically coherent system of law. Where no such system exists, a generally more open approach to the consideration of external sources seems preferable.⁷¹ Often, these sources will provide at least some legal guidance. In particular where a system remains fragmentary in many respects, the line between interpretation and a dangerously subjective creation of law is often thin. Admittedly, in light of the discretion vested in them, judges will always be law creators to a certain degree, especially in a system as new as the system of international criminal justice. But before developing entirely independent interpretations or creating completely new solutions, ICC judges should try to turn to pre-existing concepts and ideas. Such an approach is ultimately more fitting with the principle of legality. In general, the recourse to external texts and authorities seems less problematic than purely judge-made solutions.

Thus, under the hierarchy of Article 21 of the ICC Statute, external sources should theoretically be applicable to a larger extent than suggested in the ICC case law. But as we will see in more detail below, the consequences of this assessment are subject to considerable practical limitations. The reason is simply that external sources in the strict sense are often not very fruitful when it comes to questions of the law of criminal procedure. Accordingly, we will often not be able to rely on the sources set forth in Article 21(1)(b) and (c) of the ICC Statute in order to seek the external guidance that we have called for above. Instead, we will have to benefit from the guidance of external texts and authorities as a means of interpretation that will enhance our understanding of the proper law of the ICC.

2.3.1.2 The Status of Internationally Recognized Human Rights

The impact of human rights will be of paramount importance for determining the admissibility of illicitly obtained evidence. This is why the discussion on the hierarchy of sources needs to include some deliberations on the status of the explicit reference to "*internationally recognized human rights*" in Article 21(3) of the ICC Statute. This provision does not contain a legal source in the strict sense; it is rather to be considered a consistency rule. This does not however diminish the significance of human rights norms in the legal framework of the ICC. Quite the

⁷⁰See Sect. 2.2.1.

⁷¹Safferling 2012, p. 113. In favour of a wider interpretation, see also Burghardt and Geneuss 2009, p. 133; Schabas 2010, p. 385; Triffterer 2008—McAuliffe de Guzman, Article 21, para 9; Werle 2012, para 189.

contrary: Article 21(3) represents a quasi-constitutional provision that enjoys a superior status when compared to the other paragraphs of Article 21.⁷² Accordingly, all law applied by the Court has to be tested against the standard provided by this last paragraph.⁷³ In the case of an inconsistency, the provision authorizes the Court to find a legal norm inapplicable and to set it aside.⁷⁴

Some have cast doubt on this understanding, stating that it would imply a considerable increase in the power of the Court, which might not have been intended by the drafters of the Statute.⁷⁵ However, the assumption of the superiority of human rights is not only indicated by a literal reading, the wording of the provision being unequivocal in this respect. Such a reading is also justified by a teleological interpretation. We have seen that the main rationale of international criminal proceedings is to be found in their socio-pedagogical effect.⁷⁶ This effect is dependent upon the perception of international criminal institutions as legitimate, which in turn necessitates their abidance by the fundamental protections of human rights law. Previous institutions have become aware of this necessity and have acknowledged the superior legal status of human rights. The International Criminal Tribunal for the former Yugoslavia for instance had been hesitant to apply human rights law at its beginnings.⁷⁷ Over time, however, it has successively recognized their fundamental role.⁷⁸ Likewise, other tribunals have shown readiness to set aside procedural provisions incompatible with human rights law.⁷⁹ The ICC itself has confirmed the fundamental role of Article 21(3), repeatedly citing it in its case law.⁸⁰

According to the wide interpretation of Article 21(3) supported here, the provision not only requires a consistency test for other regulations but also broadens the power of the judges.⁸¹ This understanding will have some impact in the context of this research.⁸² It is derived from the word “*application*” which implicates some-

⁷²Bititi 2009, p. 294; Fedorova and Sluiter 2009, p. 24; Sheppard 2010, p. 46; Werle 2012, para 206.

⁷³Arsanjani 1999, p. 29; Pellet 2002, p. 1180.

⁷⁴Pellet 2002, p. 1081; Gradoni et al. 2013, p. 83 et seq. and p. 93.

⁷⁵Hafner and Binder 2004, p. 173 et seq. Declining a superiority of human rights over the Statute also Gallant 1999, p. 703.

⁷⁶See Sect. 2.2.3.

⁷⁷Safferling 2012, p. 119; Swoboda 2012, p. 86; Zahar and Sluiter 2008, p. 16. See also Sect. 2.3.2.4.

⁷⁸See for instance *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY (Appeals Chamber), decision of 2 October 1995, para 45: “*For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.*” But see Swoboda 2012, p. 89 et seq. for a sceptical assessment of this decision.

⁷⁹Gradoni et al. 2013, p. 93.

⁸⁰See Schabas 2010, p. 398 with further references.

⁸¹Safferling 2012, p. 120; Gradoni et al. 2013, p. 93.

⁸²See Sect. 4.3.3.5.3 with respect to the significance of Article 21(3) for the establishment of the requirement of a search warrant.

thing more than the mere interpretation of other legal sources.⁸³ The Court itself has in fact interpreted the provisions as performing a power-conferring function, thereby extending the role of its judges as law creators where this is necessary to make the ICC procedure compatible with human rights.⁸⁴ In this sense, while the provision is not conceived as a legal source in the strict sense, it clearly contains aspects quite similar to a legal source.

2.3.1.3 Interim Conclusion

It can be concluded that any interpretation of an ICC provision needs to proceed in the following way: The proper law of the ICC must first be considered; additionally the judges have the discretion to refer to a number of external sources of law, as well as to the Court's own jurisprudence. This jurisprudence, however, is not binding. Finally, any interpretation must take into account human rights law, which takes precedence in cases of incompatibility with human rights, and which allows for further development of the ICC legal system where this is required to achieve compatibility.

As this research is concerned with a procedural issue, external texts and authorities will have a distinct impact. We have seen that the necessity to refer to external texts and authorities arises from the fact that the drafters of the Statute could not regulate every conceivable matter and left the legal practitioner with an incomplete legal framework, including with regard to the details of criminal procedure. The following sections will attempt to classify those external legal sources that will be most important for the research at hand under the hierarchy laid out above. This assessment will show *inter alia* that these sources will mostly serve as a means of interpretation rather than as legal sources in the strict sense.

2.3.2 References Under Article 21 of the ICC Statute

2.3.2.1 General Considerations

The case law of the ICC contains numerous references to the jurisprudence of other courts and institutions such as the UN *Ad hoc* tribunals and human rights monitoring bodies. In their decision-making, ICC judges have also relied on legal

⁸³Sheppard 2010, p. 62; Gradoni et al. 2013, p. 115.

⁸⁴With respect to the power to stay the proceedings, see *Prosecutor v. Lubanga* (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), ICC (Appeals Chamber), decision of 14 December 2006, para 37; *Prosecutor v. Lubanga* (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"), ICC (Appeals Chamber), decision of 21 October 2008, para 77.

texts outside the ICC Statute, in particular on the legal foundations of these courts and institutions. The practice of reference to the precedents and law of other institutions is generally widespread among international courts. It has been supported among scholars relying on the argument of its benefit for cross-fertilization among international judicial institutions and as a remedy against the fragmentation of international law.⁸⁵ While we have seen that fragmentation is not a central concern with respect to procedural matters,⁸⁶ this does not make the consideration of texts and authorities outside the ICC proper law futile *per se*. Useful cross-fertilization may still result from such examination.

It must, however, be noted that the ICC has been criticized because, like previous international courts and tribunals, it has refrained from developing clear methodological guidelines on the application of external law and jurisprudence. Such an absence of methodological accuracy bears the danger of lacking the predictability required under the principle of legality.⁸⁷ Closely linked, then, is the danger that a want of justification for the application of legal sources will have a negative impact on the legitimacy of a judicial institution like the ICC.⁸⁸

Accordingly, referring to external texts and authorities in order to find solutions for the ICC requires some further assessment. We will therefore look more closely at those sources that will subsequently be referred to, which will include a classification of these sources in the hierarchy of Article 21 of the ICC Statute as depicted above. The sources examined below include the procedural systems and jurisprudence of the *Ad hoc* tribunals, domestic law and legislation and, finally, human rights treaties and the jurisprudence of their monitoring bodies.

As we will see, none of these sources as such is directly binding on the ICC. Article 21, however, provides for a number of options of including them in the legal assessment under the ICC system of procedure. Albeit to varying degrees, all of these texts and jurisprudence may be invoked when (1) determining the principles and rules of international law according to Article 21(1)(b) of the ICC Statute, which includes in particular customary law and⁸⁹ (2) when establishing the content of general principles of law according to Article 21(1)(c) of the ICC Statute,

⁸⁵Miller 2002, p. 499; Nerlich 2009, p. 320.

⁸⁶See Sect. 2.3.1.1.

⁸⁷On the principle of legality with respect to the law of criminal procedure, see Sect. 2.3.1.1.

⁸⁸Sheppard 2010, p. 44.

⁸⁹The ICC would in any case be able to apply customary international law under Article 38 ICJ Statute since, as an international organisation, it is bound by general international law. Article 21 of the ICC Statute in turn does not explicitly refer to custom as a source of law. There is however consensus that customary law is encompassed by the “*principles and rules of international law*” as referred to in Article 21(1)(b) ICC Statute. While the exclusion of the word ‘custom’ is not entirely clear, the term might have been avoided for its vagueness in order to adhere to the principle of legality, see Pellet 2002, p. 1071. At the same time, the formulation “*principles and rules of international law*” can hardly be considered more precise. In particular, it is unclear which other notions besides customary international law are included in this term; see Schabas 2010, p. 390 et seq.

which allows for a comparative law perspective.⁹⁰ In addition, external texts and authorities play (3) a role in the interpretation of the rule of consistency with *internationally recognized human rights* contained in Article 21(3). The greatest impact that these sources will have, will not, however, be in the context of the previously named provisions but rather, as mentioned above, with respect to the interpretation of the ICC Statute and Rules of Procedure and Evidence under Article 21(1)(a).

2.3.2.2 References to the Procedural Systems and the Jurisprudence of the *Ad Hoc* Tribunals

The establishment of the *Ad hoc* tribunals in the last decade of the previous century brought about the resuscitation of international criminal law after a long period marked by a political climate unfavourable to any further practical implementation of the principles developed in Nuremberg and Tokyo.⁹¹ The *Ad hoc* tribunals were the direct precursors of the first permanent international criminal court. It is therefore not surprising that the law and practice of these tribunals had a major impact both on the drafting of the ICC Statute and on its first jurisprudence.⁹² For the drafters of the ICC Statute, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) could be referred to for first-hand experience of the challenge of trying large scale mass crimes.⁹³ With respect to the present research, it may be added that the law of evidence was one of those areas where the influence of the *Ad hoc* tribunals was particularly strong. This is reflected by the high degree of similarity of the legal framework on evidence at the ICC when compared with the *Ad hoc* tribunals.⁹⁴

Other international tribunals have of course emerged in the last two decades. This limited research will nevertheless be confined to the *Ad hoc* tribunals as examples of other international criminal institutions. The ICTY and ICTR are the only tribunals that are not hybrid or mixed with a procedure influenced by a specific domestic legal system. Furthermore, they are the most senior of the modern international courts and tribunals, which enhances the probability of deriving useful answers from their case law.

⁹⁰There is some debate on whether Article 21(1)(c) of the ICC Statute parallels Article 38(1)(c) of the ICJ Statute or whether the “*general principles*” in the latter provision should better be subsumed under Article 21(1)(b) of the ICC Statute. Given the similarity in wording, a parallelism between Articles 21(1)(c) and 38(1)(c) will be assumed in this research; for this understanding see also Pellet 2002, p. 1073; Gradoni et al. 2013, p. 71. For a different view, see Safferling 2012, p. 114; Schabas 2010, p. 391.

⁹¹Werle 2012, para 45.

⁹²Gray 2004, pp. 287 and 290.

⁹³Curat 2007, p. 151; Nerlich 2009, p. 307.

⁹⁴Gosnell 2010, p. 379 et seq.

Today, references to the jurisprudence of the *Ad hoc* tribunals remain popular among the actors involved in ICC proceedings. This practice has both sociological and practical reasons. There has been a great amount of movement of staff from the *Ad hoc* tribunals to the International Criminal Court, a phenomenon that is due *inter alia* to the approaching closure dates of the ICTY and the ICTR.⁹⁵ These staff members have obtained expert knowledge of the law and practice of the *Ad hoc* tribunals and are thus likely to be inclined to import solutions previously found by these tribunals.⁹⁶ Moreover, not only for former *Ad hoc* tribunal staff members, but for the actors involved in ICC proceedings in general, it has always been easier to refer to an already consolidated legal system than to create a completely new one.⁹⁷ Finally, the tendency observable in the submissions of participants in ICC proceedings to frequently refer to precedents of the *Ad hoc* tribunals might also be influenced by the fact that many of these participants have a common law background. It is only natural that these lawyers tend to refer to the case law of other courts as their legal training and work experience means they are familiar with the doctrine of judicial precedent.⁹⁸

It goes without saying that while they served as models for the conception of the ICC Statute, the Statutes of the *Ad hoc* tribunals are not as such a legal source for the ICC. In particular, they are not “*applicable treaties*” according to Article 21(1)(b) of the ICC Statute. Likewise, the jurisprudence of the *Ad hoc* tribunals is in no way binding for the ICC.⁹⁹ Precedents in general are not binding on the Court. No rule of *stare decisis* exists for the Court’s own case law,¹⁰⁰ let alone for the decisions of other institutions. The ICC judges themselves, while referring to the jurisprudence of the *Ad hoc* tribunals, have thus been cautious to repeatedly emphasize that this does not entail an automatic importation of this jurisprudence.¹⁰¹ At the same time, Article 21(2) of the ICC Statute does not by a process

⁹⁵See for instance Møse 2005, p. 9.

⁹⁶Bitti 2009, p. 295; Nerlich 2009, p. 307.

⁹⁷Bitti 2009, p. 296.

⁹⁸On the use of ECtHR precedents by international criminal tribunals, see Cassese 2003, p. 20. For a critique of the use of precedents primarily by international lawyers with a common-law background, see Bantekas 2006, p. 132.

⁹⁹For a detailed rejection of the categorization of precedents of the *Ad hoc* tribunals as autonomous sources of law, see Nerlich 2009, p. 315 et seq.

¹⁰⁰See Sect. 2.1.

¹⁰¹See for instance *Prosecutor v. Joseph Kony et al.*, (Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification), ICC (Pre-Trial-Chamber), decision of 28 October 2005, para 19: “[T]he rules and practice of other jurisdictions, whether national or international, are not as such ‘applicable law’ before the Court beyond the scope of Article 21 of the Statute. [...]”. See also *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC (Pre-Trial Chamber) decision of 31 March 2010, Dissenting Opinion Judge Kaul, para 29.

of a *contrario* reasoning preclude the ICC judges from taking into account the legislation of other courts and tribunals.¹⁰²

One option would be to turn to the jurisprudence of the *Ad hoc* tribunals when determining customary law as part of the “*principles and rules of international law*” under Article 21(1)(b) of the ICC Statute.¹⁰³ However, the case law of neither tribunal is customary law in itself. In general, the case law of an international institution cannot itself contribute to the development of customary law. Under Article 38(1)(b) of the ICJ Statute, customary law arises out of a combination of the practice of states and their corresponding *opinio juris*.¹⁰⁴ Only states are therefore the decisive actors for the establishment of customary law. And while all members of the international community are bound by the statutes of the *Ad hoc* tribunals,¹⁰⁵ the routine function of these tribunals alone can hardly be considered evidence of customary law. With respect to state practice, the connection between judicial practice and states as law creators is rather remote. But even more importantly, it is doubtful whether an *opinio juris* could be determined among states that would involve the transferability of procedural solutions from the *Ad hoc* tribunals to other institutions by means of customary law. This finding alludes once more to the relativity of procedural law. We have seen that the correct procedural solutions depend to a great extent on the overall procedural system of the respective institutions. Correspondingly, even if states had an *opinio juris* with respect to a specific institution such as the ICTY or the ICTR, it might very well pertain only to this very institution. As a consequence, it cannot simply be transferred to another institution, operating with a different procedural system, such as the ICC.¹⁰⁶

The significance of the jurisprudence of the *Ad hoc* tribunals for customary law is therefore not an obvious one. However, Article 38(1)(d) of the ICJ Statute can be used as a gateway to the consideration of the case law of the *Ad hoc* tribunals as indirect evidence of customary law. The provision mentions “*judicial decision [...] as subsidiary means for the determination of rules of law*”. The general methodological approach that has been derived thereof is that judicial decisions are not sources of law as such but may be reflective of a rule of international law such as a

¹⁰²Schabas 2010, p. 396. See also *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC (Pre-Trial-Chamber), decision of 31 March 2010, Dissenting Opinion Judge Kaul, para 30.

¹⁰³For the subsumption of customary law under Article 21(1)(b) of the ICC Statute, see fn. 114.

¹⁰⁴See *Germany v. Denmark/Germany v. The Netherlands* (North Sea Continental Shelf case), ICJ, decision of 20 February 1969, para 77. Also see Werle 2012, para 154, with references to the discussion of this term in public international law.

¹⁰⁵The statutes of the *Ad hoc* tribunals were included in the Security Council resolutions that established these tribunals. These resolutions are binding upon all members of the United Nations, see Article 25 of the Charter of the United Nations, adopted on 26 June 1945, entered into force on 24 October 1945, available at: <http://www.un.org/en/documents/charter/> (last visited: October 2013). See also Ipsen et al. 2004, p. 55.

¹⁰⁶Safferling 2012, p. 115 et seq.

customary rule.¹⁰⁷ In other words, where one of the *Ad hoc* tribunals has established a rule of customary law, the ICC judges may use this as a resource for their own legal determination.

But even on this basis, the consideration of the case law of the *Ad hoc* tribunals for the determination of customary law is subject to considerable limits. First of all, the determination of international custom necessarily requires that the respective state practice manifests a relationship to international law.¹⁰⁸ This will only very rarely be the case with respect to the law of criminal procedure. It is, however, conceivable, especially where the determination of the human rights of persons affected by criminal proceedings is concerned.¹⁰⁹ But what is more, the determination of a custom is most likely to concern broad concepts rather than detailed procedural issues.¹¹⁰ By and large determining customary law through ICTY and ICTR case law will often not be very fruitful for the development of procedural solutions for the ICC.

Secondly, ICTY and ICTR precedents can also be used indirectly when determining general principles of law according to Article 21(1)(c) of the ICC Statute. However, the recourse to such principles is constrained by similar limitations as that of international custom. These limitations will be discussed in more detail in the section on domestic law, where general principles are most significant.¹¹¹ For now, it suffices to say that the determination of general principles is often particularly assailable and that this determination will also usually establish only broad notions and thus fail to provide guidance for specific problems.

Two further remarks can be made on the indirect identification of general principles through ICTY and ICTR precedents. Article 21(1)(c) of the ICC Statute demands that these principles be “*derived by the Court*”, thus explicitly entrusting this difficult legal assessment to the ICC judges. The judges should not circumvent this by simply referring to the determination of another judicial body. Instead, the persuasiveness of evaluations made by the judges of the *Ad hoc* tribunals has to be assessed carefully in every case. And what is more, Article 21(1)(c) emphasises the relevance of “*the national laws of States that would normally exercise jurisdiction over the crime*”. Given the different states affected by the jurisdiction of the ICC when compared with the *Ad hoc* tribunals, this naturally requires a shift in perspective when compared to ICTY and ICTR case law.¹¹²

Thirdly, the *Ad hoc* tribunals also play a role when determining the content of “*internationally recognized human rights*” in Article 21(3). The significance of the tribunals’ case law is plausible in this context since these tribunals are also

¹⁰⁷Nerlich 2009, p. 313 et seq. See also Werle 2012, para 155.

¹⁰⁸Werle 2012, para 156.

¹⁰⁹See Sect. 4.3.3.5.1 on the customary law status of the prohibition of torture and Sect. 4.3.3.5.2 on the same assumption for the right to privacy.

¹¹⁰Swoboda 2012, p. 97.

¹¹¹See Sect. 2.3.2.3.

¹¹²Altogether, see Nerlich 2009, p. 315.

regularly confronted with human rights related issues in international criminal proceedings.¹¹³ The general consistency rule in Article 21(3) will be dealt with in more detail below when considering references to human rights law.¹¹⁴

Article 21(3) of the ICC Statute concerns *inter alia* the interpretation of the ICC proper law. This brings us to the last way in which the *Ad hoc* tribunals are relevant for this research. Beyond its limited influence on Article 21(3) of the ICC Statute, the law of the *Ad hoc* tribunals can be used for the interpretation of the ICC proper law. In fact, in light of the limited fruitfulness of comparative law and general principles in particular, the statutes and the jurisprudence of the *Ad hoc* tribunals will have their greatest impact not as sources in the strict sense but through the interpretation of the principal legal instruments of the Court. The next sections will show that this is the case for all of the external sources referred to in this research. Admittedly, the use of external sources for the interpretation of a specific legal instrument is not evident. With respect to the ICTY and the ICTR, the most convincing methodological foundation would be a consideration of their legal instruments and jurisprudence as part of a systematic interpretation of the proper law of the ICC. It can be argued that because the *Ad hoc* tribunals had such a major impact on the drafters of the ICC legal instruments, they may also be taken into consideration when analysing the significance of these instruments.¹¹⁵

However, irrespective of the methodology used, it is important to note that any consideration of the statutes and jurisprudence of the *Ad hoc* tribunals must take into account the aforementioned relativity of procedural law. We have seen that the law of procedure is generally dependent on the institution that applies it.¹¹⁶ The ICC Statute establishes a legal system that differs, in some instances significantly, from the legal framework of the *Ad hoc* tribunals. This is especially true for procedural issues. Such differences result in particular from the different combination of adversarial and inquisitorial elements and from the different ways in which these institutions were created.¹¹⁷ The different shape of the systems precludes any one-

¹¹³Gradoni et al. 2013, p. 90.

¹¹⁴See Sect. 2.3.2.4.

¹¹⁵Such an approach is not without problems. Article 31(2) of the Vienna Convention of the Law of Treaties defines the context of the terms of a treaty in a narrow way, as comprising only the text of the treaty, including its preamble, as well as agreements concluded in connection with the conclusion of the treaty. A broader definition for the founding documents of an international organisation seems however justified where this foundation was clearly influenced by the existence of a previous institution, see Nerlich 2009, p. 319. Another, albeit more assailable possibility would be to resort to Article 31(3)(c) of the VCLT. The Statutes and jurisprudence of the *Ad hoc* tribunals however can hardly be considered "*relevant rules of international law applicable between the parties*", see Young 2011, p. 195 et seq., fn. 37. But see Nerlich 2009, p. 320, who argues that the purpose of Article 31(3)(c) VCLT to avoid the fragmentation of international law might allow for a consideration on this basis anyhow.

¹¹⁶See Sect. 2.3.1.1.

¹¹⁷For more details, see Sects. 2.2.1 and 3.1.1.

to-one transfer of judicial solutions found by the judges of the *Ad hoc* tribunals.¹¹⁸ The adoption of any solution will thus depend not only on its persuasiveness *per se* but also on its transferability to the ICC system of procedure.¹¹⁹ This assessment will further limit the possibility of relying on the law and jurisprudence of the *Ad hoc* tribunals, including where they are simply used as interpretative aids.

In conclusion, the present research will, in principle, be able to refer to the jurisprudence of the *Ad hoc* tribunals. While this is possible in the course of the determination of customary law and general principles and “*internationally recognized human rights*”, it will be of use mostly for the general interpretation of the ICC proper law. For all of these assessments, the systematic differences between the *Ad hoc* tribunals and the ICC will have to be given due consideration.

2.3.2.3 References to Domestic Law

The question whether domestic law may be considered is particularly relevant for the law of criminal procedure. Whereas substantive international criminal law can rely to a larger extent on international treaties and other international sources, procedural law is marked by a considerable lack of regulation, but also of models. Until recently, the law of criminal procedure was exclusively a matter of domestic law.¹²⁰ The only models available to the ICC at the international level are other international tribunals, which are also relatively young. This is particularly true for the so-called mixed or hybrid tribunals that have existed for a similar amount of time as the ICC.¹²¹ But even the systems of procedure of the slightly more senior *Ad hoc* tribunals have not reached a level of development comparable to domestic systems, which have evolved over several decades and sometimes centuries.

From a methodological point of view, one option of using domestic law is, once again, to identify the content of the external sources of Article 21(1)(b) and (c) of

¹¹⁸For a much discussed procedural decision confirming this conclusion, see *Prosecutor v. Lubanga* (Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial), ICC (Trial Chamber), decision of 30 November 2007, where the Chamber prohibited witness proofing, thereby declining to adopt the respective jurisprudence of the ICTY; see in particular para 45, stating: “*The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, [...]. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. [...] Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.*”

¹¹⁹Nerlich 2009, p. 314.

¹²⁰Kamardi 2009, p. 120 et seq.

¹²¹The first of the hybrid tribunals were the Special Panels for Serious Crimes (SPSC) in East Timor, which was created in 2000. For a summary on the establishment of the hybrid tribunals, see Werle 2012, para 326 et seq. For an introduction into their procedural systems, see Gradoni et al. 2013, p. 52 et seq.

the ICC Statute or of ‘*internationally recognized human rights*’. The latter of these options, the process of identifying ‘*internationally recognized human rights*’, will be dealt with below.¹²² For now, it suffices to say that while the term necessitates a degree of widespread approval, it does not require that a right be recognized in all societies worldwide. With respect to the determination of customary law in turn, domestic law can be evidence of a specific state practice or *opinio juris* and thus decisive for the determination of customary law.¹²³

Domestic law may be considered primarily through the determination of general principles of law. The reference to such principles is an invitation to the judges to consult domestic law by way of a comparative law approach.¹²⁴ The ICC so far has been quite resistant to this invitation. Where this source is mentioned at all, the Court has ruled out the existence of a general principle of law.¹²⁵ While this seems to be in line with an overall reluctance of international courts and tribunals to use such principles, examples can nevertheless be found in the jurisprudence of other institutions. The jurisprudence of the ICTY offers examples of the use of general principles¹²⁶ and so does the jurisprudence of the ICJ.¹²⁷ Especially where new, partly unregulated areas of law have emerged, this legal source has been said to have a gap-filling function. In light of its incompleteness, the international law of criminal procedure is such a legal area.¹²⁸ The inclusion of this source in the ICC Statute was in fact based on this very consideration. Both in the Preparatory Commission and at the Rome Conference, scepticism was widespread about whether it was appropriate for the Court to assess the law of sovereign states. But the argument that the practical need to fill gaps had to be expected finally overruled such objections.¹²⁹

On a practical level, it is, however, doubtful whether general principles are the most adequate way of considering domestic law and filling legislative gaps.

¹²²See Sect. 4.3.3.

¹²³Kamardi 2009, p. 120; Staker 2010, p. 201. Similar for general international law, Bothe 1976, p. 281.

¹²⁴Cassese 2008, p. 22; Werle 2012, para 202.

¹²⁵*Prosecutor v. Lubanga* (Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial), ICC (Trial Chamber), decision of 30 November 2007, para 41; *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I, 31 March 2006 Decision Denying Leave to Appeal), ICC (Appeals Chamber), decision of 13 July 2006, para 32.

¹²⁶See for instance *Prosecutor v. Erdemović* (Sentencing Judgment), ICTY (Trial Chamber), decision of 29 November 1996, para 31. *Prosecutor v. Furundžija* (Sentencing Judgment), ICTY (Trial Chamber), decision of 10 December 1998, para 177 et seq. Also see *Prosecutor v. Furundžija* (Judgment), ICTY (Appeals Chamber), decision of 21 July 2000, Declaration of Judge Shahabuddeen, para 256.

¹²⁷See for example *United Kingdom of Great Britain and Northern Ireland v. Albania* (Corfu Channel Case), ICJ, decision of 9 April 1949, p. 22; *Effects of awards of compensation made by the U.N. Administrative Tribunal* (Advisory Opinion), ICJ, decision of 13 July 1954, p. 10.

¹²⁸Similar for international criminal law in general, Cassese 2005, p. 193.

¹²⁹Edwards 2001, p. 406 et seq.

Similar to customary law, their generality often hampers their usefulness for practical purposes. General principles must not be confused with their specific manifestations within a legal system.¹³⁰ Whereas procedural systems in different states might share general principles, their solutions for a specific practical problem often greatly differ from each other.¹³¹ Consequently, the finding of a general principle is usually limited to common denominators. This means that they are often unlikely to produce answers for questions of detail.¹³² Moreover, the finding of such principles is difficult. It is often based on an uncertain epistemological basis.¹³³ The main difficulty consists in choosing among the legal systems to be compared. Theoretically, the identification of general principles would require a universal comparative analysis. Since this is not feasible in practice, it has been claimed that a representative number of legal orders belonging to all of the world's legal systems should be taken into consideration.¹³⁴ In the reality of international jurisprudence, this latter standard has not been met either. Comparative deliberations justifying the establishment of a general principle of law are often cursory.¹³⁵ Where such deliberations are made at all, the number of legal systems considered is regularly unrepresentative and the choice seems highly subjective.¹³⁶ Beyond this dogmatic criticism, the practice has also been opposed for being eurocentric because common law and civil law systems are usually the main, and often the only, systems consulted.¹³⁷ Such a reproach is naturally serious for a court that is as dependent on its perception as a legitimate institution as is the case for the ICC.

The question arises whether, as a consequence, the recourse to domestic law is flawed *per se*. For substantive law, the conclusion has been drawn that the true function of a comparative approach lies less in its benefits for the finding of justice and more in its ability to promote the understanding of international criminal law by translating the solutions found by the Court into the codes of domestic legal systems.¹³⁸ This assessment notwithstanding, for questions of international criminal procedure, the situation is slightly different. While fostering mutual understanding is an important goal, and hopefully also something that this research will contribute towards, a more direct impact of comparative analyses is easier to justify when it comes to procedural law.

¹³⁰Staker 2010, p. 203.

¹³¹Bitti 2009, p. 300.

¹³²Bothe 1976, p. 288.

¹³³Gradoni et al. 2013, p. 71.

¹³⁴This would include states belonging to the common law and the civil law system but also those of the Islamic world, as well as Asian and African states, see Cassese 2008, p. 22; Kamardi 2009, p. 130.

¹³⁵Bothe 1976, p. 283.

¹³⁶Burghardt 2011, p. 245. See also Nerlich 2009, p. 314.

¹³⁷See Kamardi 2009, p. 131. On this choice of systems, see also Werle 2012, para 161, fn. 336, with further references.

¹³⁸Burghardt 2011, p. 162 et seq.

We have seen that the international law of criminal procedure is both incomplete and in particular need of external sources and models to fill legislative gaps. At the same time, a comparative approach seems less problematic for procedural issues. The consequences of the principle of legality are less strict than for substantive law, where clear definitions of crimes are mandatory.¹³⁹ As mentioned above, in procedural law, there is often not only one single just way to proceed. It thus seems less problematic if judges draw from domestic solutions to find an adequate solution to procedural problems.¹⁴⁰

This suggests the application of a pragmatic approach to the use of comparative assessments. Domestic systems can be used not as a discrete legal source under Article 21 of the ICC Statute, but as models from which to discover solutions that might work at the international level as well.¹⁴¹ Numerous examples for references to domestic law on this basis can be found in international case law.¹⁴² Such an approach seems also to have been applied at times in international criminal case law.¹⁴³

This understanding of the comparative law exercise diminishes the importance of the choice of a representative sample of legal systems. The chance of finding the best possible approach to a legal problem admittedly increases if as many legal orders as possible are under scrutiny. But reasonable solutions can be found by looking at a few examples.¹⁴⁴ Moreover, it makes the critique of eurocentrism less appropriate. The procedural system of the ICC has been developed on the basis of

¹³⁹Gradoni et al. 2013, p 68 and p 70.

¹⁴⁰Gallant 1999, p 710. See also Sect. 2.3.1.1.

¹⁴¹Kamardi 2009, p. 124; Safferling 2012, p. 126; Staker 2010, p. 203. Similar for general international law, Bothe 1976, p. 291. Critical but eventually endorsing this approach for procedural law altogether, Gradoni et al. 2013, p. 71.

¹⁴²For an enumeration of examples, see Staker 2010, p. 203.

¹⁴³Most distinctively, see *Prosecutor v. Kupreškić et al.* (Judgment), ICTY (Trial Chamber), decision of 14 January 2000, para 738; *Prosecutor v. Mucić et al.* (Judgment), ICTY (Appeals Chamber), decision of 20 February 2001, para 412. On the approach adopted in these decisions, see also Staker 2010, p. 202. A similar approach seems to have guided the ICC judges when adopting the so-called ‘control of the crime’ theory in the *Luganga* case. The ICC Pre-Trial Chamber, while referring to the acceptance of the theory in “numerous legal systems”, did not explicitly mention whether its adoption of this theory was actually based on the establishment of a general principle. It rather seems to have adopted the approach that it considered most adequate among the approaches found at the national level, thus using domestic law rather as a source of inspiration than a legal source in the strict sense, see *Prosecutor v. Lubanga* (Decision on the Confirmation of Charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 322 et seq. The ICC Trial Chamber in its very first judgment, has accepted this jurisprudence, see *Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber I), decision of 14 March 2012, para 1018. For a critical assessment, see however the *Separate Opinion of Judge Adrian Fulford* annexed to this judgement, para 10 et seq. Judge Fulford rejects the ‘control of the crime theory’, *inter alia* in view of the methodological approach applied by the Pre-Trial Chamber and by the Trial Chamber majority.

¹⁴⁴Bothe 1976, p. 290 et seq.

the common law system and the civil law system. It is thus justifiable and often even indispensable to look at these systems to gain a better understanding of the ICC provisions that ultimately have arisen thereof.¹⁴⁵

It should, however, be noted that many issues of procedural law have not been regulated from the outset even in domestic systems. A look at the domestic approaches on the admissibility of illegally gained evidence will reveal that the topic of this research is an illustrative example for a procedural issue which, in domestic orders, has mostly been solved through the development of legal doctrine and case law. In order to find solutions for the international level, it seems reasonable to look at these developments. With the case law of the ICC growing, a gradual autonomisation will become possible in the future.¹⁴⁶

At the same time, it should be kept in mind that such a comparative approach cannot consist of a simple transposition. National solutions cannot simply be transferred to the international level because international criminal proceedings are different from national proceedings in many respects. The most important difference for the daily judicial practice is without doubt the lack of enforcement abilities of international courts and tribunals. In contrast to domestic courts, international criminal institutions cannot rely on a distinct branch of executive power at the international level that would enforce their decisions. They are completely dependent on the cooperation of states, which is often difficult to achieve.¹⁴⁷ One might also refer to the subject matter of trials before international criminal institutions. These institutions only have jurisdiction over crimes of a particular gravity,¹⁴⁸ whereas the procedural law of domestic states generally applies to crimes of any kind. Further differences pertain to the logistical challenges international prosecution is confronted with, to the broader participation of victims, as well as to the lapse of time since the commission of the crimes. The recourse to domestic law must therefore be subject to an adaptation of procedural solutions to the specific demands of international criminal justice.¹⁴⁹

In conclusion, domestic law can be used to determine the content of the sources of international law such as customary law and general principles of law, as well as to construct the consistency rule of Article 21(3) of the ICC Statute. Since these sources of international law will often be of limited use, the most pragmatic approach is to draw from national solutions as models and sources of inspiration.

¹⁴⁵See also Gradoni et al. 2013, p. 70, who consider it difficult to interpret the rules of international criminal procedure “*entirely independently from the legal-cultural setting and mental habits that shaped them.*”

¹⁴⁶See also Gradoni et al. 2013, p. 70, who, while acknowledging the necessity to turn to domestic law at this point of the development, already detect a beginning autonomization.

¹⁴⁷For more details on the cooperation of these institutions with states, see Sect. 4.2.

¹⁴⁸See Article 5 of the ICC Statute, Article 1 of the ICTY Statute and Article 1 of the ICTR Statute.

¹⁴⁹Safferling 2012, p. 126; Gradoni et al. 2013, p. 70; Staker 2010, p. 203 et seq. See also *Prosecutor v. Furundžija* (Sentencing judgment), ICTY (Trial Chamber), decision of 10 December 1998, para 178.

This approach will be dominant in this research. Due consideration shall however be given to the contextual differences between domestic and international criminal proceedings.

2.3.2.4 References to Human Rights Treaties and the Jurisprudence of Human Rights Courts

Human rights are crucial for the protection of the rights of the persons involved in a criminal trial, in particular for the protection of the suspect or the accused. This is particularly true for international courts and tribunals that strive to serve as role models for the enforcement of international criminal justice. Quoting a comment made by the UN Secretary-General when the ICTY was established, respect for human rights standards by international criminal courts and tribunals is “axiomatic”.¹⁵⁰

In principle, international criminal courts and tribunals have long recognized this assessment. Their jurisprudence, including that of the ICC, regularly refers both to human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR),¹⁵¹ the European Convention on Human Rights (ECHR),¹⁵² the American Convention on Human Rights (ACHR)¹⁵³ and the African Convention on Human and Peoples Rights (ACHPR, also known as Banjul Charter),¹⁵⁴ and to the decisions and judgments of the respective monitoring bodies.¹⁵⁵ The way in which these conventions and this case law have been made use of has, however, been criticised for its lack of coherence. In fact, the

¹⁵⁰See UNSC, Report of the Secretary-General pursuant to para 2 of the Security Council Resolution 808 (UN Doc. S/225704) (1993), para 106; available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (last visited: October 2013): “It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.”

¹⁵¹International Covenant on Civil and Political Rights, signed on 16 December 1966, entered into force on 23 March 1976, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.asp> (last visited: October 2013).

¹⁵²Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1950, available at http://www.echr.coe.int/Pages/home.asp?p=basitexts&c=#n1359128122487_pointer (last visited: October 2013).

¹⁵³American Convention on Human Rights, signed on 22 November 1969, entered into force on 18 July 1978, available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last visited: October 2013).

¹⁵⁴African Charter on Human and Peoples’ Rights, signed on 27 June 1981, entered into force on 21 October 1986, available at www.achpr.org/instruments/achpr/ (last visited: October 2013).

¹⁵⁵Jackson and Summers 2012, p. 131; Miller 2002, p. 496; Sheppard 2010, p. 49 et seq.; Gradoni et al. 2013, p. 88; Swoboda 2012, p. 98.

judges have only rarely articulated in a clear way how these sources were used and to what extent they were applicable to the case before the respective international criminal tribunal.¹⁵⁶

Of course, the various human rights conventions are not binding as conventional norms upon international criminal institutions,¹⁵⁷ which have not joined the respective conventions as parties and as international organizations, and they usually lack the legal ability to do so.¹⁵⁸ For the ICC, the immediate consequence is that human rights treaties are not “*applicable treaties*” according to Article 21(1)(b) of the ICC Statute.¹⁵⁹ As international institutions, the courts and tribunals are, however, bound where these norms have acquired the status of general international law. The fact that a certain treaty has been ratified by a number of states may play a role in determining a distinct state practice and thus a rule of customary law. And while the jurisprudence of monitoring bodies does not have any binding effect, it can be used through Article 38(1)(d) of the ICJ Statute as persuasive authority, reflecting the existence of such a customary rule. Similarly, human rights standards may be invoked when determining general principles of law.¹⁶⁰ In the case of the ICC, this binding effect is once more clarified by Article 21(1)(b) and (c) of the Statute.

Again, however, the findings filtered out through these two external sources will often not be of much help for the solution of procedural problems. Accordingly, human rights law, too, exercises its impact mostly through the interpretation of the ICC proper law. But in contrast to the law of the *Ad hoc* tribunals, this interpretative exercise is explicitly requested by the above-mentioned consistency rule of Article 21(3) of the ICC Statute. Moreover, the provision confers qualified power upon the Court, thus allowing it to create additional norms and remedies where this is necessary for the abidance by human rights law.¹⁶¹

The applicability of human rights law in the context of international criminal law and more specifically within the legal framework of the ICC can therefore easily be confirmed. The more complicated issues arise from the determination of the content of human rights standards. The phrase “*internationally recognized human rights*” is used not only in Article 21(3) of the ICC Statute but also in the main ICC rule on the exclusion of evidence, namely in Article 69(7) of the Statute. It will be further elucidated in Chap. 4 in the context of the latter provision.

At this point, we will address another contentious issue, the problem of transferability. Like domestic law and the law and jurisprudence of the *Ad hoc* tribunals, the validity of the use of human rights standards by the ICC is subject to their

¹⁵⁶Cassese 2003, p. 20 et seq.; Sheppard 2010, p. 49.

¹⁵⁷Gallant 1999, p. 695.

¹⁵⁸Gradoni et al. 2013, p. 81.

¹⁵⁹Fedorova and Sluiter 2009, p. 28; Pellet 2002, p. 1068.

¹⁶⁰On the binding nature of human rights through this indirect mechanism, see Pellet 2002, p. 1068; Gradoni et al. 2013, p. 81; Villiger 1985, p. 197.

¹⁶¹See Sect. 2.3.2.

transferability to the Court's legal framework. Differences clearly exist between the conditions faced by international criminal tribunals and the context of the cases that human rights bodies are concerned with. While the former deal with individual criminal responsibility on an international level, the latter monitor the compliance of states with the requirements of conventions in their behaviour towards individuals.¹⁶²

Closely related to this finding is a peculiarity of human rights regimes which pertains to the nature of human rights as minimum standards.¹⁶³ The addressees of these standards, traditionally states, are usually vested with a certain measure of flexibility in their implementation. The best example would be the "*margin of appreciation doctrine*" developed by the European Court of Human Rights (ECtHR), whereby the Strasbourg organs grant room to manoeuvre to domestic authorities in the fulfilment of their obligations under the ECHR.¹⁶⁴ The role of institutions such as the ECtHR, then, is only to review whether states have not exceeded the limits of their discretion. In comparison, the ICC is involved in criminal law issues as a direct consequence of the power conferred on it to adjudicate criminal matters. Unlike human rights monitoring bodies, it does not rule on the previous exercise of judicial power by a state but rather exercises such power itself. To this extent, the Court bears more similarities with a national criminal court than with a human rights court. Just like any national legal system, the ICC must find distinct solutions that fit into its own legal framework rather than leaving these solutions to other legal systems. Accordingly, the answers found by human rights monitoring bodies may at times not be specific enough to be adequate for the ICC.¹⁶⁵

What is more, the cases before human rights monitoring bodies are generally settled in a national context. As a consequence, the previously mentioned differences between national and international proceedings, such as the different enforcement abilities or the different setting and character of the crimes, are also relevant for the use of human rights law.

These differences call into question an untransformed application of the existing standards and may warrant a reinterpretation of these standards for the purpose of international criminal trials. However, caution is required so as not to use the transferability question to overly restrict the application of human rights protections.¹⁶⁶

This is more than a mere academic question. In its early days, the ICTY, for instance, relied on its uniqueness to justify a reinterpretation of human rights standards. Pointing to the horrific character of the crimes under its jurisdiction, the tribunal held that it was comparable to a military tribunal which often has limited rights of due

¹⁶²Jackson and Summers 2012, p. 132.

¹⁶³For a detailed discussion of the nature of human rights as minimum standards, see Fedorova and Sluiter 2009, p. 9 et seq.

¹⁶⁴On the ECtHR's margin of appreciation doctrine, see Sect. 3.2.2.

¹⁶⁵For a similar comparison between the ICTY and the ECtHR, see McIntyre 2003, p. 200. On the similarity between international tribunals and national courts as opposed to the monitoring bodies of human rights conventions, see Berger 2012, p. 4.

¹⁶⁶For an overview of the different positions on the issue, see Damaška 2012, p. 612.

process.¹⁶⁷ This comparison with a military tribunal has naturally drawn intensive criticism since one of the basic arguments continuously raised against military jurisdiction has been its deplorable lack of compliance with human rights standards.¹⁶⁸

In fact, an extensive detachment by international criminal tribunals from the established interpretation of human rights standards bears the risk of a relativisation of the rights of individuals in international criminal proceedings and puts at risk the legitimacy of international criminal justice institutions.¹⁶⁹ If international criminal tribunals do not fully abide by the basic requirements of human rights law, they will not be able to credibly advocate the sanctity of human rights within the international community.¹⁷⁰ It would be highly contradictory if, while arguing for human rights protection during their proceedings, at the same time, these tribunals themselves were not respecting human rights standards for defendants.¹⁷¹ The gravity of the crimes in particular cannot be used as a generally applicable argument to outweigh such fundamental protections. Otherwise, given the horrific character of the crimes under the jurisdiction of international criminal tribunals, the rights of a suspect or an accused person would always be outbalanced.¹⁷²

As a consequence, while a contextual interpretation of human rights standards is necessary in light of their specific setting, the basic boundaries set by human rights law must be guaranteed at all times. Today, all of the existing international courts and tribunals seem to accept these findings. The view prevails that the procedural rules of these institutions must be tested in view of their compliance with human rights law and not the other way around. Ultimately, this view was incorporated in the establishment of a superior standard of human rights law in Article 21(3) of the ICC Statute.¹⁷³

Ultimately, a reinterpretation beyond the limits of human rights law will not be necessary to give consideration to the particularities of the ICC system. Human rights as minimum guarantees are not static concepts. As we have seen, they usually grant room to manoeuvre to those who implement them. They establish mandatory directives only very rarely.¹⁷⁴ In most instances, an interpretation for the purposes of international criminal proceedings will thus be possible without deferring from the flexible concepts provided for by the different human rights regimes.¹⁷⁵

Finally, it should be noted that taking into consideration the structural differences of the ICC legal regime might not only warrant a restrictive interpretation of

¹⁶⁷*Prosecutor v. Tadić* (Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses), ICTY (Trial Chamber), decision of 10 August 1995, para 28.

¹⁶⁸Swoboda 2012, p. 87 et seq.

¹⁶⁹Swoboda 2012, p. 93.

¹⁷⁰Similar, Edwards 2001, p. 334.

¹⁷¹Jackson and Summers 2012, p. 119; McIntyre 2003, p. 194.

¹⁷²Torres Chedraui 2010, p. 228.

¹⁷³Gradoni et al. 2013, p. 93. On the superior status of Article 21(3) of the ICC, see Sect. 2.3.1.2.

¹⁷⁴Gradoni et al. 2013, p. 85.

¹⁷⁵Altogether, Damaška 2012, p. 614 et seq.

human rights. These differences may at times even suggest a more generous interpretation. Examples would pertain to the specific difficulties for the defence arising from the lack of state cooperation or to the additional challenges that the defence faces due to the regime of increased victim participation.¹⁷⁶

In conclusion, human rights standards are unequivocally applicable in proceedings before the International Criminal Court, as demonstrated in particular by Article 21(3) of the ICC Statute. The application of these standards, however, requires the consideration of the contextual differences between the legal frameworks. At the same time, the assessment of the transferability of solutions must be conducted cautiously so as not to exceed the limits set by human rights law.

2.4 Conclusion and Outlook

In order to fill the legislative gaps that arise at the ICC with respect to procedural issues, it is permissible to invoke, within limits, a number of texts and authorities outside of the proper law of the ICC. This includes the statutes and the jurisprudence of the *Ad hoc* tribunals, domestic law, and, finally, human rights treaties and the jurisprudence of their monitoring bodies. These may be taken into account either as legal sources or as sources of inspiration for the interpretation of the ICC legal framework.

It is without question that, from a methodological perspective, it is not obvious that the law and jurisprudence of other legal systems are used for the understanding of the legal instruments of an international court. It must however be recognized that at the present stage, strict reliance on positive law is not possible. Once a broader range of issues has been settled at the international level, and in particular by the ICC itself, comparative analyses will become less important and references to the Court's own precedents will more often be sufficient. At this point, however, the development of adequate solutions for procedural questions, such as in the present research, makes comparative analyses indispensable. Thus, in order to create a basis for the subsequent analysis of the admissibility of illicitly obtained evidence at the ICC, the basics of a number of external approaches to this issue will be elucidated in the next chapter.

References

- Ambos K (2002) On the rationale of punishment at the domestic and international level. In: Marc Henzelin M, Roth R (eds) *Le Droit Pénal à l'Épreuve de l'Internationalisation*. Bruylant, Paris, pp 305–323
- Arsanjani M (1999) The Rome Statute of the International Criminal Court. *The American Journal of International Law* 93:22–43
- Bantekas I (2006) Reflections on some sources and methods of international criminal and humanitarian law. *Int Crim Law Rev* 6:121–136

¹⁷⁶Fedorova and Sluiter 2009, p. 41.

- Berger M (2012) The right to silence in The Hague international criminal courts. *Univ San Franc Law Rev* 47:1–54
- Bitti G (2009) Article 21 of the Statute of the International Criminal Court and the treatment of the sources of law in the jurisprudence of the ICC. In: Carsten S, Goran S (eds) *The emerging practice of the International Criminal Court*. Martinus Nijhoff Publishers, Leiden, pp 285–304
- Bothe M (1976) Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 36:280–299
- Burghardt B (2011) Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung – von der Rechtsvergleichung als Mittel der Rechtsfindung zur diskursiv-vermittelnden Rechtsvergleichung. In: Beck S, Burchard C, Fateh-Moghadam F (eds) *Strafrechtsvergleichung als Problem und Lösung*. Nomos, Baden-Baden, pp 235–254
- Burghardt B, Geneuss J (2009) Der Präsident und sein Gericht. *Zeitschrift für Internationale Strafrechtsdogmatik* 4:126–142
- Cassese A (2003) The influence of the European Court of Human Rights on international criminal tribunals—some methodological remarks. In: Bergsmo A, Eide A (eds) *Human rights and criminal justice for the downtrodden: essays in honour of Asbjørn Eide*. Martinus Nijhoff Publishers, Leiden, pp 19–52
- Cassese A (2005) *International law*, 2nd edn. Oxford University Press, Oxford
- Cassese A (2008) *International criminal law*, 2nd edn. Oxford University Press, Oxford
- Curat P (2007) L'Interprétation du Statut de Rome. *Revue québécoise de droit international* 2:137–163
- Damaška M (2009) Problematic features of international criminal procedure. In: Cassese A (ed) *The Oxford companion to international criminal justice*. Oxford University Press, Oxford, pp 175–186
- Damaška M (2012) Reflections on fairness in international criminal justice. *J Int Crim Justice* 10:611–620
- Douglas L (2006) The didactic trial: filtering history and memory into the courtroom. *Eur Rev* 14:513–522
- Edwards G (2001) International human rights law challenges to the new International Criminal Court: the search and seizure right to privacy. *Yale J Int Law* 26:323–412
- Fedorova M, Sluiter G (2009) Human rights as minimum standards in international criminal proceedings. *Hum Rights Int Leg Discourse* 3:9–56
- Gallant K (1999) Individual human rights in a new international organization: the Rome Statute of the International Criminal Court. In: Bassiouni C (ed) *International criminal law, Volume II: procedural and enforcement mechanisms*, 2nd edn. Transnational Publishers, New York, pp 693–723
- Gosnell C (2010) Admissibility of evidence. In: Khan A, Buisman C, Gosnell C (eds) *Principles of evidence in international criminal justice*. Oxford University Press, Oxford, pp 375–442
- Gradoni L, Lewis D, Mégret F, Nouwen S, Ohlin J (2013) General framework of international criminal justice. In: Sluiter G, Friman H, Linton S, Zappalà S, Vasiliev S (eds) *International criminal procedure: principles and rules*. Oxford University Press, Oxford, pp 39–130
- Gray R (2004) Evidence before the ICC. In: McGoldrick D, Rowe P, Donnelly E (eds) *The permanent international criminal court: legal and policy issues*. Hart Publishing, Oxford, pp 287–314
- Grover L (2010) A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court. *European Journal of International Law* 21:543–583
- Hafner G, Binder C (2004) The interpretation of Article 21(3) ICC statute opinion reviewed. *Austrian Rev Int Eur Law* 9:163–190
- Ipsen K, Epping V, Heintschel von Heinegg W (2004) *Völkerrecht*, 5th edn. C.H.Beck, Munich
- Jackson J, Summers S (2012) *The internationalisation of criminal evidence: beyond the common law and civil law traditions*. Cambridge University Press, Cambridge
- Jäger H (1995) Markoverbrechen als Gegenstand des Völkerstrafrechts. In: Hankel G, Stuby G (eds) *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*. Hamburger Edition, Hamburg, pp 325–354
- Kamardi C (2009) Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips. Springer, Berlin

- Lister C (2005) What's in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia. *Leiden Journal of International Law* 18:77-92
- McIntyre G (2003) Defining human rights in the arena of international humanitarian law: human rights in the jurisprudence of the ICTY. In: Boas W, Schabas W (eds) *International criminal law: developments in the case law of the ICTY*. Martinus Nijhoff Publishers, Leiden, pp 193-238
- Miller N (2002) An international jurisprudence? The operation of across international tribunals. *Leiden J Int Law* 15:483-526
- Møse E (2005) The ICTR: experiences and challenges. *New Engl J Int Comp Law* 12:1-16
- Nemitz J (2002) *Strafzumessung im, Völkerstrafrecht* edn. Iuscrim, Freiburg
- Nerlich V (2009) The status of ICTY and ICTR precedence in proceedings before the ICC. In: Stahn C, Sluiter G (eds) *The emerging practice of the International Criminal Court*. Martinus Nijhoff Publishers, Leiden, pp 305-326
- Neubacher F (2006) *Strafzwecke und Völkerstrafrecht*. *Neue Juristische Wochenschrift* 14:966-970
- Orie A (2002) Accusatorial versus inquisitorial approach in international criminal proceedings. In: Cassese A, Gaeta P, Jones J (eds) *The Rome Statute of the International Criminal Court: a commentary*, vol 2. Oxford University Press, Oxford, pp 1439-1495
- Pellet A (2002) Applicable law. In: Cassese A, Gaeta P, Jones J (eds) *The Rome Statute of the International Criminal Court: a commentary*, vol 2. Oxford University Press, Oxford, pp 1084
- Safferling C (2012) *International criminal procedure*. Oxford University Press, Oxford
- Schabas W (2003) Interpreting the statutes of the *Ad hoc* tribunals. In: Vohrah LC et al. (eds) *Man's inhumanity to man: essays on international law in honour of Antonio Cassese*. Kluwer International Law, The Hague, pp 847-888
- Schabas W (2010) *The International Criminal Court—a commentary on the Rome Statute*. Oxford University Press, Oxford
- Sheppard D (2010) The International Criminal Court and “Internationally recognized human rights”: understanding Article 21(3) of the Rome Statute. *Int Crim Law Rev* 10:43-71
- Sluiter G (2009) Human rights protection in the ICC pre-trial phase. In: Stahn C, Sluiter G (eds) *The emerging practice of the International Criminal Court*. Martinus Nijhoff Publishers, Leiden, pp 459-476
- Sluiter G (2010) Trends in the development of a unified law of international criminal procedure. In: Stahn C, Van den Herik L (eds) *Future perspectives on international criminal justice*. Asser Press, The Hague, pp 585-599
- Staker C (2010) Interpretive methodologies and the use of precedent in cases before international criminal courts. In: Khan A, Buisman C, Gosnell C (eds) *Principles of evidence in international criminal justice*. Oxford University Press, Oxford, pp 185-213
- Swoboda S (2012) Die Europäische Menschenrechtskonvention in Strafverfahren vor internationalen Gerichten. In: Höland A (ed) *Wirkungen der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im deutschen Recht*. BMW Berliner Wissenschafts-Verlag, Berlin, pp 83-118
- Torres Chedraui A (2010) An analysis of the exclusion of evidence obtained in violation of human rights in light of the jurisprudence of the European Court of Human Rights. *Tilburg Law Rev* 15:205-234
- Triffterer O (2008) (ed) *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, 2nd edn. C.H. Beck et al., Baden-Baden
- Villiger M (1985) *Customary international law and treaties: a study of their interactions and interrelations, with special consideration of the 1969 Vienna convention on the law of treaties*. Martinus Nijhoff Publishers, Leiden
- Werle G (1997) *Menschenrechtsschutz durch Völkerstrafrecht*. *Zeitschrift für die gesamte Strafrechtswissenschaft* 109:808-829
- Werle G (2012) *Völkerstrafrecht*, 3rd edn. Mohr Siebeck, Tübingen
- Young R (2011) “Internationally recognized human rights” before the International Criminal Court. *Int Comp Law Q* 60:189-208
- Zahar A, Sluiter G (2008) *International criminal law: a critical introduction*. Oxford University Press, Oxford

Illicitly Obtained Evidence at the International Criminal
Court

Viebig, P.

2016, XII, 291 p., Hardcover

ISBN: 978-94-6265-092-3

A product of T.M.C. Asser Press