

CAPÍTULO DÉCIMO

THE EMERGING SYSTEM OF SOURCES OF INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL RESPONSIBILITY

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SUMMARY: I. *Introduction.* II. *The sources of law in the Rome Statute.* III. *The evolution of the sources of international criminal law.* IV. *Arguments for an independent list of sources for international criminal law.* V. *Possible counterarguments.* VI. *It is necessary to have an independent system of sources for international criminal law.* VII. *Conclusion.*

I. INTRODUCTION

The object of this article is to establish that International Criminal Law (ICL) has a separate and independent system of sources of law, which is different and independent from the sources of general international law. At a minimum the list of sources in article 21 of the Statute of the International Criminal Court (ICC Statute or Rome Statute)¹ sets a different and parallel list of sources to those traditionally recognized in article 38 (1) of the Statute of the International Court of Justice (ICJ).

The aim of this study is to prove this independence of sources through five arguments, which will be based on comparative law, historical evolution, judicial interpretation and tendencies in the legal literature. The result will be a series of principles that are exclusively part of ICL. This will be argued in the relevant part of this article.

Additionally, this article will prove that an independent group of sources for ICL, which is distinguished from general international law is not only developing, but is also desirable given the more strict application of the

¹ Rome Statute of the International Criminal Court (adopted July 17th, 1998, entered into force July 1st, 2002), 2187 UNTS 90.

principle of legality in a criminal law setting, where the consequences fall on a person, not merely State liability, as a consequence of international criminal responsibility. The sources of general international law, which are generally more flexible, are not compatible with the demands of ICL.

In part I, the aim is only to describe article 21 of the Rome Statute, which is the basis of this article. This section is mainly descriptive, since it is only necessary to set the stage for the arguments that will be considered later on. However, a comparison with article 38 (1) of the ICJ Statute will also be part of this analysis, to prove that they both work similarly, albeit in different settings.

Part II will offer a historical analysis of the sources of ICL, from the Nuremberg Charter and judgment to the Rome Statute.

Part III will then develop the five arguments in favor of an emerging system of sources for ICL, based on article 21 of the ICC Statute.

Part IV will explore the possible counterarguments as in the legal literature. As stated before, perhaps the independence of the sources for ICL is not fully developed, but it is important to identify any obstacles that could impede this development and to see to what extent the hypothesis of this paper can be proven.

Finally, in part V it will be argued that the sources of ICL should be different and independent from the sources of general international law based on the principle of legality and the distinct features of international criminal liability, as opposed to State responsibility.

II. THE SOURCES OF LAW IN THE ROME STATUTE

Since the case that is being made in this article is that article 21 of the ICC Statute represents an independent catalog of sources of law, which differs from those mentioned in the ICJ Statute it is important to keep its words in mind:

1. The Court shall apply:

- a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise

jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The first paragraph of article 21 mentions three different sources of law for the International Criminal Court (ICC): The Rome Statute itself, the Elements of Crimes and Rules of Procedure and Evidence. The first of these poses no difficulties since it refers to the treaty itself.

However, the Elements of the Crimes and the Rules of Procedure and Evidence are important innovations since there is no precedent of these types of international instruments in general international law.

Article 9 (1) of the Rome Statute explains that the Elements of Crimes are a tool to interpret and apply the crimes that the ICC will adjudicate. The idea behind this instrument is to give the Principle of Legality teeth by describing in great detail each and every element of the international crimes included in this treaty.²

Although this instrument has been criticized for been based on the United States Model Penal Code, in reality this disapproval can be set aside since it has been ratified by two-thirds of the Assembly of States Parties.³ Therefore, regardless of the perceived common law influence, this instrument has large acceptance and it has also helped, together with the ICC Statute, to overcome the criticism of vaguely defined crimes, which was commonplace before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (together *Ad Hoc* Tribunals).⁴

² See Gadirov, Erkin “Elements of Crimes”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck-Hart-Nomos, 2008, pp. 506-509.

³ Rome Statute, art. 9 (1): “[Elements of Crimes] shall be adopted by a two-thirds majority of the members of the Assembly of States Parties”.

⁴ See Fan, Mary “Custom, General Principles and the Great Architect Cassese”, *10 Journal of International Criminal Justice*, 2012, pp. 1068-1070.

On a second level this article mentions “applicable treaties and the principles and rules of international law”. Understanding treaties does not seem to pose any major difficulties. Nevertheless, it could be argued that the treaties that may be used by the ICC are not easily identified. There are some treaties that are also part of ICL, which may be applicable, such as the Torture Convention,⁵ the Forced Disappearance Convention⁶ or the Genocide Convention.⁷ Additionally, regarding due process the International Covenant on Civil and Political Rights, as well as regional human rights treaties may be relevant to the ICC.

However, the other sources of law are not mentioned in article 38 (1) of the ICJ Statute, particularly “principles and rules of international law”. These could be understood as an innovation of the Rome Statute. This will be fully discussed later on, for the moment it is enough to say that there is a split in the legal literature regarding the meaning of this phrase. On one hand, some authors believe that it alludes to customary international law;⁸ on the other hand, other authors believe that this traditional source of general international law was purposely excluded from the ICC Statute.⁹

The inquiry is actually broader in scope: to which principles and rules does the clause refer to?

The 1994 Draft ICC Statute provides some guidance. The commentary to article 33 states: “The expression «principles and rules» of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty”.¹⁰

The wording of article 33 was incorporated *verbatim* into article 21 of the ICC Statute. Additionally, there is no evidence that there was a change

⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on December 10th, 1984, 1465 UNTS 85.

⁶ International Convention for the Protection of All Persons from Enforced Disappearance, adopted on December 20th, 2006, 2715 UNTS.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, entered into force on January 12th, 1951, 78 UNTS 277.

⁸ See Becerra, Manuel, “Las Fuentes del DPI” in Sergio García Ramírez (ed.), *Estudios Jurídicos en Homenaje a Olga Islas de González Mariscal*, vol. II, México, UNAM, 2007, p. 107.

⁹ See Michael Pikis, George, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Martinus Nijhoff Publishers, 2010, p. 81.

¹⁰ Draft Statute for an International Criminal Court with commentaries, *Report of the ILC on the work of its 46th session*, vol. II, YILC, 1994, p. 51.

of heart during the Rome Conference with regard to the meaning of the phrase in question. Therefore, this comment seems to be valid.

In the next part of article 21 we find “general principles of law derived by the Court from national laws of legal systems of the world...” which is a more modern version of the wording used in the ICJ Statute. Furthermore, this new language gives preference to the legal system of the State where the crimes took place (assuming that the Rome Statute gives priority to the territorial principle of adjudication). These principles of law differ from those mentioned in the previous section, in that they find their origin in general international law, while these are found in domestic legal systems.

According to Pellet, the method which must be used to find the principles in different domestic legal systems is through a comparative law study which identifies these principles and then transposing them to the international arena. The first part of this exercise is admittedly superficial since the only goal is to verify the existence of the principle in question and the choice of systems is a mere polling of jurisdictions.¹¹

The next paragraph of article 21 seems to be an attempt to establish a system of precedent. The problem in reaching this conclusion is the use of the word “shall” which implies that the use of previous holdings is optional and subject to the tribunal’s discretion. Since a system of precedent rests on the assumption that previous holdings must be followed, it can be argued that there is no system of precedent. Clearly, this would exclude the use of precedents from other tribunals, which are not even mentioned in this clause. Consequently, the ample and valuable judicial development of ICL by the *Ad Hoc* tribunals could be wasted, unless it is identified as “principles or rules of international law” within the meaning of the commentary of article 33 of the 1994 Draft Statute of the ICC. This is part of an argument for the independence of ICL sources, which will also be further developed in the relevant section.

The last paragraph of article 21 sets a rule for interpreting the ICC Statute, which would technically not make it a source of law, but it is linked to the sources already discussed. According to this paragraph, every article of the Rome Statute must be interpreted in line with international human rights and without discrimination. Clearly, the first difficulty with this is which human rights are truly international. It could be argued that regional treaties must be excluded since they are only applicable in a particular terri-

¹¹ See Pellet, Alan, “Applicable Law”, in Cassese, Antonio; Gaeta, Paola, Jones, John R. W. D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1073.

tory and are subject to what is understood as human rights by its members. This would limit the scope of this rule of interpretation to instruments derived from the Universal System of Human Rights such as the Universal Declaration of Human Rights,¹² the International Covenant on Civil and Political Rights,¹³ the International Covenant on Economic, Social and Cultural Rights.¹⁴ However, it could also be reasoned that if a particular right is present in different (if not all) regional treaties this is evidence of its universal recognition.

From the previous thoughts some differences between article 38 (1) of the ICJ Statute and article 21 of the ICC Statute can be recognized:

1. The ICC Statute provides for a hierarchy of the sources of law it lists, which is absent in the ICJ Statute;
2. Customary international law is expressly excluded from the ICC Statute;
3. Article 21 (3) of the ICC Statute provides for a rule of interpretation in line with international human rights and the principle of non-discrimination. On the other hand, the ICJ Statute does not have any rules for interpreting its sources;
4. Principles of law derived from domestic jurisdictions is present in both treaties, but the ICC Statute is more detailed and worded in modern terms;
5. Article 21 (2) of the Rome Statute give more weight to precedents (without properly recognizing the rule of *stare decisis*) than article 38.¹⁵

III. THE EVOLUTION OF THE SOURCES OF INTERNATIONAL CRIMINAL LAW

The object of this part is not to provide a comprehensive analysis of the sources of ICL before international tribunals, but only to show which sources have been considered applicable throughout its evolution from the Nuremberg Tribunal to the *Ad Hoc* Tribunals. It will be argued that there is a growing concern to bring precision to the rules of ICL in line with the Principle of

¹² Universal Declaration of Human Rights, adopted on December 10th, 1948.

¹³ International Covenant on Civil and Political Rights, adopted on December 16th, 1966, entered into force on March 23rd, 1976, 999 UNTS 171.

¹⁴ International Covenant on Economic, Social and Cultural Rights, adopted on December 16th, 1966, entered into force on January 3rd, 1976, 993 UNTS 3.

¹⁵ See Perrin, An Emerging International Criminal Law Tradition, no. 15.

Legality, which drives the international community to clarify which sources of law can be used or excluded in international criminal adjudication.

Hybrid tribunals will be excluded from the present analysis for two reasons. Firstly, since they are partially national, they draw their sources from the particular domestic jurisdiction over which they must adjudicate and the treaties the State is a party to. This distorts the analysis since the applicable law is specific to the situation. Secondly, in the creation of these tribunals there is evidence that the principle of legality plays a big role in the choice of applicable sources of general international law, since there is substantial discussion on the treaties and customary international law which were in place at the time of the events.¹⁶

At the dawn of ICL, in the Nuremberg Charter there was no list or catalogue of applicable sources of law.¹⁷ This was also the case before the Tokyo Tribunal.¹⁸ However, the Nuremberg Tribunal did make some findings regarding the applicable law when it identified the preexistence of crimes against peace. In the section titled “The Law of the Charter” the Nuremberg Tribunal tried to prove by citing different sources of general international law that there was no *ex post facto* application of the law, hence no violation of the principle of legality.

It was urged on behalf of the defendants that a fundamental principle of all law —international and domestic— is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders:

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue,

¹⁶ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, (October 4th, 2000), UN Doc S/2000/915; Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/ 135 (March 16th, 1999), UN Doc A/53/850-S/1999/231.

¹⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal, entered into force on August 8th, 1945), 82 UNTS 280.

¹⁸ Charter for the International Military Tribunal for the Far East, entry into force on April 26th, 1946, TIAS no. 1587.

for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On, this view of the case alone, it would appear that the maxim has no application to, the present facts.¹⁹

This part of the judgment is important to the present discussion for two reasons. Firstly, while the Nuremberg Tribunal stated that the violation of the *nullum crimen sine lege* principle was not something that the defense could argue, it did mention that the crime of aggression was part of general international law at the time of the outbreak of World War II, which ends up been a justification on the importance of the principle of legality. Moreover, despite dismissing the defense allegation, the tribunal did go to great lengths to establish that there was no infringement on the principle of legality.

Secondly, the use of sources to justify the preexistence of crimes against peace could be seen as the recognition of these instruments as part of the ICL in this early stage, notwithstanding the fact that the Nuremberg Charter made no mention of them. Among these sources there are some treaties such as the 1928 Treaty of Paris in which there is an express renunciation to aggression as State policy; the 1907 Hague Convention which prohibits the use of certain methods of war and the Treaty of the League of Nations. There is also mention to other international instruments which could be identified as customary international law when taken as a whole, such as the preamble to the League of Nations, the 1924 Protocol for the Pacific Settlement of International Disputes and the unanimous resolution of the 18th February, 1928, of twenty-one American Republics of the Sixth (Havana) Pan-American Conference which considered aggression to be an international crime. While these last two instruments are not identified by the Nuremberg Tribunal as part of customary international law, it is clear that this is what the judges had in mind when they included them in the discussion.

After Nuremberg there is no other important discussion in ICL until the creation of the ICTY. Article 1 of the ICTY Statute states: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the terri-

¹⁹ Judgment of the Nuremberg International Military Tribunal 1946 (1947), 41 AJIL 172, 224.

tory of the former Yugoslavia since 1991 in accordance with the clauses of the present Statute”.

The phrasing leads to the conclusion that, like the Nuremberg and Tokyo Charters, the sole source of law before the ICTY is its Statute. However, since International Humanitarian Law is mentioned it is necessary to identify its scope. The first interpretation of this was given by the United Nations Secretary-General:

In view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

The Secretary-General went on to list the treaties he considered part of International Humanitarian Law, thus applicable by the ICTY:²⁰

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the Military International Tribunal of 8 August 1945.²¹

Consequently, the first actions of the ICTY were to identify which rules of International Humanitarian Law it could use by stating that they are part of customary international law. The ICTY has devoted considerable work to this endeavor.²²

At the ICTR there was no similar controversy because Rwanda was already party to the treaties that the Tribunal was to apply.²³ This is also what happened in hybrid tribunals, since in these cases the general international

²⁰ Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, S/25704, May 3rd, 1993.

²¹ Nuremberg Judgment, no. 19.

²² See also, Arajärvi, Noora, “The Role of the International Criminal Judge in the Formation of Customary International Law”, *European Journal of Legal Studies*, 2007; Werle, Gerhard, *Principles of International Criminal Law*, TMC-Asser Press, 2005, pp. 50-54.

²³ Arajärvi, *op. cit.*, p. 12.

law that each State was a party to was identified beforehand and included in the statutes there was dispute and no reason to try to establish the scope of rules that could be used by these tribunals. It is important to point out that in the reports which preceded the creation of these tribunals there is a considerable effort to avoid *ex post facto* application of the law, hence the detailed analysis of the treaties and customary international law in force at the relevant time and place.²⁴

Up to this point there is no evidence of an attempt to create a comprehensive list of sources for ICL. There are only three sources that had been mentioned: the statute of the tribunal in question; the International Humanitarian Law treaties and customary international law. The first effort to create a catalogue of sources can be found in article 33 of the 1994 Draft Code for the ICC, which reads: “The Court shall apply:(a) This Statute; (b) Applicable treaties and the principles and rules of general international law; (c) To the extent applicable, any rule of national law”.²⁵

There are two important statements found in the commentaries to the 1994 Draft Code. Firstly, the principles mentioned in (b) refer to Criminal Law principles. This is significant, because it will be argued later on that ICL has its own principles of law, which differ from those developed in general international law. The relevant paragraph states:

The principles and rules of general international law will also be applicable. The expression «principles and rules» of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.²⁶

Secondly, there is another express recognition of the principle of legality. The commentaries to article 33 indicate that national law in (c) was included so that the ICC could apply laws that were known to the accused; this must be read in conjunction with article 39 which expressly includes the principle of legality in the 1994 draft code.²⁷

From this brief historical account of the sources of ICL included in international instruments previous to the ICC, two preliminary conclusions may be reached. On the one hand, even since Nuremberg there is a concern that the principle of legality may be breached. While at first, the concern is

²⁴ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, no. 16; Report of the Group of Experts for Cambodia, no. 16.

²⁵ Draft Statute with commentaries, no. 10, p. 51.

²⁶ *Ibidem*, p. 51.

²⁷ *Ibidem*, pp. 51-52, 55 and 56.

to avoid any *ex post facto* application of the law, this is linked to the sources of ICL, because then the tribunals focus on identifying the applicable law at the time.

On the other hand, tribunals accept that treaties and customary international law are part of the sources of ICL, but with the 1994 draft code this comes to a halt. This international instrument is significant because it provides for the first time a list of sources for ICL, but it is also important to note that custom is no longer considered a source in this field.

IV. ARGUMENTS FOR AN INDEPENDENT LIST OF SOURCES FOR INTERNATIONAL CRIMINAL LAW

1. *Customary international law is no longer a source of international criminal law*

Customary international law had a central role in the development of ICL, but it has disappeared from the list of sources in article 21 of the Rome Statute. The rejection of this traditional source of general international law is important because it is evidence that the ICC has its own set of sources which differs from article 38 (1) of the ICJ Statute. Additionally, abandoning customary international law is a consequence of a growing concern for precision in the law, especially in criminal law, which is a tenet of the principle of legality. This is further evidence that ICL has become a mature legal system, which is one of the consequences of the Rome Statute.

When ICL sources were very scarce customary international law played a fundamental role in the development of this field. Then international criminal tribunals had little more than a statute to guide them, this source of law was essential in filling gaps and resolving the legal issues which came up. This is more evident before the ICTY that had to use customary international law to find elements of crimes and their meaning²⁸ and rules regarding individual criminal responsibility.²⁹

²⁸ See Mettraux, *Guénauël, International Crimes and Ad Hoc Tribunals*, Oxford University Press, 2005, pp. 7-14; Fan, *op. cit.*, pp. 1066 y 1067; Perrin, *op. cit.*, pp. 48-51; Also see Nerlich, Volker, "The Status of ICTY and ICTR precedent in proceedings before de ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Koninklijke Brill, 2009, pp. 308 y 309. Ad Hoc Tribunals depended on customary law for the identification of substantive criminal law issues, particularly definitions of crimes. This was less frequent in procedural law because most rules were contained in the Rules of Procedure and Evidence.

²⁹ See Damgaard, Ciara, *Individual Criminal Responsibility for Core International Crimes*, Springer, 2008, pp. 39-42. Describing the core issue of joint criminal enterprise.

However, with the creation of the ICC this all changed. The 1994 Draft Code established a catalogue of sources for the first time and it also eliminated customary international law from this list. The discussion regarding sources of law at the Rome Conference centered on the application of national law at the ICC. While there is no official record on the reason why customary international law was not included in the list, part of the academic literature states that this source was considered too vague for criminal law purposes.³⁰

Another part of the legal literature insists that customary international law is included in the broad phrasing of article 21 (1) (b) which mentions “principles and rules of international law”. According to this view, customary international law clearly fits into this description, therefore it was implicitly included.³¹

While this might seem true at first glance, these authors fail to explain why custom was excluded given its widespread use in general international law and ICL. They also do not consider the fact that the drafters were concerned with the vagueness of the sources of ICL and the explicit inclusion of the principle of legality in articles 22 to 24 of the Rome Statute, which runs counter to the vagueness of customary international law.

Conversely, the legal literature recognizes that several rules of customary international law which were scattered in different international instruments and in the *ad hoc* tribunals case-law were incorporated into the ICC Statute.³² Moreover, the *ad hoc* tribunals have accepted that the Rome Statute is the reflection of customary international law in several issues of substantive and procedural law even before the treaty came into force.³³ This

³⁰ See McAuliffe de Guzmán, Margaret, “Applicable Law—Article 21”, in Triffterer, Otto, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck-Hart-Nomos, 2008, p. 707.

³¹ McAuliffe, *op. cit.*, p. 707; Pellet, *op. cit.*, pp. 1070-1072; Becerra, *op. cit.*; Nerlich, “The Status of ICTY and ICTR precedent in proceedings before de ICC”, no. 27, p. 313.

³² See Werle, *op. cit.*, p. 45; See also Schlütter, Birgit, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, 2010, pp. 216-218; *Milošević case* (Decision on motion for judgement of acquittal), ICTY-02-54-T, June 16th, 2004. Where it was noted that in regard to deportation and forced transfer there is no concurrence between the Rome Statute and customary law.

³³ See *Protais Žigiranyirazo vs. The Prosecutor case*, (Decision On Protais Zigiranyirazo’s Motion For Damages), ICTR-2001-73-AR73, June 18th, 2012. Regarding damages in case of acquittal; *Furundzija case* (Judgment), ICTY-95-17/1-T, December 10th, 1998). Regarding the difference between complicity and other forms of criminal liability; *Tadić case* (Appeals Judgment) ICTY-94-1-A, July 15th, 1999. Affirming that discriminatory intent is no longer part of crimes against humanity.

“codification” helped avoid the vagueness concerns, but is also meant that the use of customary international law in ICL would now be limited. In other words, many of these rules can now be found directly in the Rome Statute, so there is no need to use ambiguous sources of law. While there has also been a restatement of these rules, this can be explained because they were considered incompatible with the new system before the ICC.

The only times the ICC has mentioned it in its decisions it has done so to avoid the vagueness of some of the Rome Statute’s imprecise wording. In the *Katanga and Ngudjolo* confirmation of charges the Pre-Trial Chamber had to determine the meaning of “other inhuman acts” in article 7 (1) (k) which deals with crimes against humanity. The Chamber held that due to the vagueness of the phrase, and with due regard to the Principle of Legality, these acts should be limited to those already identified in customary international law or international human rights law. Thus it stated:

In the view of the Chamber, in accordance with article 7(1) (k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.³⁴

Additionally, contrary to what the majority of the literature has stated the phrase “principles and rules of international law” has not been held to include customary international law by the ICC. So far the Court has held that this phrase refers to the case-law of the *ad hoc* tribunals. In the same *Katanga and Ngudjolo* decision, despite the previously cited *dictum* the Chamber used ICTY cases to give meaning to “other inhuman acts”.³⁵

In other cases where the ICC has mentioned customary international law its position is not entirely clear. The trend seems to be the use of *ad hoc* tribunals’ case-law in combination with customary international law. In other words, the ICC will cite both sources without distinguishing one from the other or whether they are primary or secondary sources of law. One example can be found in the *Lubanga* confirmation of charges:

³⁴ *Katanga and Ngudjolo case* (Decision on the confirmation of charges) ICC-01/04-01/07, September 30th, 2008.

³⁵ *Katanga and Ngudjolo case* (Decision on the confirmation of charges), no. 33, and footnotes; see also Nerlich *op. cit.*, p. 313. This includes criminal law principles that have already been identified by the *Ad Hoc* Tribunals. The use of these criteria will depend on the persuasiveness of the reasoning.

The Chamber notes that in the judgement rendered on 19 December 2005 in the case of Democratic Republic of Congo v. Uganda, the International Court of Justice (ICJ) observed that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.³⁶

This paragraph is confusing since it basically says that the Hague Regulations are part of customary international law, but this would seem like an unnecessary statement since they could be considered part of international law of armed conflict which is directly applicable according to article 21 (1) (b) of the ICC Statute. The paragraph is also puzzling since it is not clear whether the Chamber considered customary international law or the case-law of the ICJ applicable.

Another example of this lack of clarity can be found in the *Ruto et al* confirmation of charges before the Pre-Trial Chamber II. In answer to the defense argument that other tribunals had not recognized indirect participation the Chamber answered:

The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law. But even then, applying a customary rule of international law only «where appropriate» limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a).³⁷

The wording does not clearly mention whether customary international law is part of the “principles and rules of international law” or whether only the *ad hoc* tribunals’ case-law is included in this phrase. In any case, the Chamber applied the ICC Statute directly, so the point became moot.

Perhaps the confusion over the use of case-law or customary international law has been resolved in more recent decisions, where the ICC has preferred to use the *ad hoc* tribunals’ case-law rather than to invoke a rule of customary international law.³⁸

³⁶ *Lubanga case* (Decision on the confirmation of charges), ICC-01/04-01/06, January 29th, 2007.

³⁷ *Ruto, et al case* (Decision on the confirmation of charges), ICC -01/09-01/11, January 23rd, 2012.

³⁸ Schabas, William, “Customary Law or «Judge-Made» Law: Judicial Creativity at the UN Criminal Tribunals” in Doria, José, Gasser, Hans-Peter and Bassiouni, M. Cherif (eds.)

While customary international law had a key role in the development of ICL, especially before the ICTY,³⁹ it is unquestionable that it was not included as a source of law for the ICC, and in the best case its use is confusing. On the contrary, the principle of legality was included in the Rome Statute, which would seem to indicate that this traditional source of general international law has no room in modern ICL. The use of sources that promote vagueness seems to be in the past.

This argument is analogous to Lord Cockburn's dissent in the Scottish case of *Greenhuff*.⁴⁰ Lord Cockburn argued that there was a point in time where Scottish criminal law was still developing so it was necessary for judges to fill gaps left by Parliament. This practice known as the Declaratory Power was at odds with the principle of legality because it allowed the High Court of Justiciary to "declare" the existence of new crimes, in an overt case of judge-made law. However, Lord Cockburn believed that at the time of the decision in 1838 the Scottish legal system had matured enough and it was no longer up to the judiciary to mend the legislature's omissions which was permissible when the legal system was not yet fully in place; especially when this meant violating the principle of legality.⁴¹

This same argument can be used in ICL. Perhaps there was a time, as late as the establishment of the *ad hoc* tribunals where the law had to be developed through customary international law. However, that time has passed and it is no longer acceptable to use vague sources of law once the Rome Statute came into force. The ICC Statute would signal the maturity of ICL in the analogy with Lord Cockburn's dissent.

2. *International criminal law has its own general principles*

The argument that will be made in this section is that there is a difference between the general principles of law in general international law and in ICL.

The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko, Martinus Nijhoff Publishers, 2009, p. 78.

³⁹ Göran Sluiter, Alexander Zahar, *International Criminal Law*, Oxford University Press, 2008, p. 88. The use of customary law was commonly used in the time period from the Nuremberg Trial to the creation of the *Ad Hoc* Tribunals.

⁴⁰ Bernard Greenhuff case (1838) 2 Swin. Cited in Gane, C. H. W y Stoddart, C.N., *Casebook on Scottish Criminal Law*, 2nd ed., W. Green-Sweet & Maxwell, 1991, pp. 9-22.

⁴¹ See Dondé Matute, Javier, *Principio de legalidad penal: perspectivas de derecho nacional e internacional*, 2nd ed., México, Porrúa, 2009, pp. 1-7.

The legal literature on the subject has identified general principles of law which apply to general international law. For example Ian Brownlie mentions among these “consent, reciprocity, equality among states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas”.⁴²

Shaw, based on international decisions, mentions the obligation to repair a damage caused, changes in sovereignty to affect private rights, the acceptance of indirect evidence, *res judicata*, estoppel, among others.⁴³

These general principles of general international law are all related to the interaction among States and the eventuality of establishing State responsibility. Virally points out that these general principles are born out of customary international law and treaties.⁴⁴ Consequently, it is not surprising that they deal with the dealings of States, without taking individuals into account. In other words, the previous general principles are not applicable to ICL which regulates with the conduct of individuals and the eventuality of establishing individual criminal responsibility. Perhaps some of the principles mentioned by Shaw could be applied to individuals, but not in a criminal law context, but as part of the law of reparations; in any case outside the ICL context.

Therefore, it is not surprising that the academic literature in ICL has identified certain general principles which are more proper in a criminal law setting. For example, Cassese mentions the following: the principle of legality, the principle of specificity, presumption of innocence, equality of arms, command responsibility, among others.⁴⁵ This author further explains that these general principles have been transferred from national jurisdictions,⁴⁶ where criminal law has a more advanced level of development. General principles in general international law developed in that particular context;⁴⁷

⁴² See Brownlie, Ian, *Principles of Public International Law*, 6th ed., Oxford University Press, 2003, p. 18.

⁴³ See, Shaw, Malcolm, *International Law*, 5th ed., Cambridge, 2003, pp. 95-97.

⁴⁴ Virally, Michel, “Fuentes del derecho internacional”, in Sorensen, Max (ed.), *Manual de derecho internacional público*, México, Fondo de Cultura Económica, 1994.

⁴⁵ See Cassese, Antonio, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, p. 20.

⁴⁶ See Cassese, Antonio, “The contribution of the International Criminal Tribunal for the former Yugoslavia to ascertain of general principles of law recognized by the community of nations”, in Yee, Sienho and Tieya, Wang (eds.), *International Law in the Post-Cold War World* (Routledge Studies in International Law), 2001, pp. 43-55.

⁴⁷ See Cassese, *International Criminal Law*, *cit.*, pp. 20 and 21. Where it is shown that in the early decisions of the ICTY the use of general principles derived entirely from domestic criminal law.

therefore, even if some sources between both systems interlope, as is the case with treaty law, the categories of applicable principles differ.⁴⁸

Additionally, part III of the ICC Statute is entitled “General Principles of Criminal Law” and its content coincides with Cassese’s classification. It includes the principle of legality,⁴⁹ individual criminal responsibility (and a list of all forms of criminal liability before the ICC),⁵⁰ exclusion of jurisdiction over persons under 18,⁵¹ irrelevance of official capacity,⁵² command responsibility,⁵³ non-applicability of statute of limitations⁵⁴ and superior orders,⁵⁵ to mention some which are representative of ICL. This part also includes mental elements,⁵⁶ defenses⁵⁷ and mistake of fact and mistake of law.⁵⁸

Kai Ambos mentions that the Principle of Legality and *ne bis in idem* are principles of criminal law included in the ICC Statute.⁵⁹ While the other dispositions are rules of criminal liability, which are usually identified in national legal systems with the “General Part of Criminal Law”, especially in civil law countries and codified legal systems.⁶⁰ Following Ambos’s reasoning one might also include the rules on fraudulent *res judicata* that is a concept that originated in ICL.⁶¹

In any case, it is not the object of this study to make a list of general principles of ICL, only to point out the difference between these and those applicable in general international law. Having established this it is easy to reach the conclusion that the principles of law referred to in article 21 of the Rome Statute are only those that are applicable in a punitive context.

In this regard, Damgaard lists several international instruments which are not part of treaty law which may be included as part of the applicable law of the ICC: The Nuremberg Principles, the 1996 Draft Code on

⁴⁸ Cassese, *International Criminal Law, cit.*, p. 21.

⁴⁹ Rome Statute, no. 1, arts. 22-24.

⁵⁰ *Ibidem*, art. 25

⁵¹ *Ibidem*, art. 26.

⁵² *Ibidem*, art. 27.

⁵³ *Ibidem*, art. 28.

⁵⁴ *Ibidem*, art. 29.

⁵⁵ *Ibidem*, art. 33.

⁵⁶ *Ibidem*, art. 30.

⁵⁷ *Ibidem*, art. 31.

⁵⁸ *Ibidem*, art. 32.

⁵⁹ See Ambos, Kai, “General Principles of Criminal Law In The Rome Statute”, *10 Criminal Law Forum*, 1999, pp. 2-6.

⁶⁰ *Ibidem*, p. 6. Also see Degan, Vladimir-Djuro, “On the Sources of International Criminal Law”, *Chinese Journal of International Law*, 2005, pp. 52-62.

⁶¹ See Rome Statute, no. 1, art. 20.

Crimes Against Peace and Security of Mankind, Control Council Law No. 10, United Nations resolutions and reports of the International Law Commission.⁶² These could be some of the rules and principles of international law that are included in article 21 of the Rome Statute. In the last two sources mentioned by Damgaard, one would have to assume that these are only relevant if they are part of ICL, such as the *ad hoc* tribunals' statutes. Pre-Trial Chamber I has already endorsed this reasoning.⁶³

The difference in the general principles applicable in general international law and ICL makes sense because they deal with different issues. The difference in the general principles applicable in each field can be attributed to the difference between State responsibility and individual responsibility in general international law.⁶⁴ While there may be an area of overlap where a certain act carries State and criminal responsibility as in the cases of torture, forced disappearance and genocide, when these acts are adjudicated the jurisdiction of the tribunals differ and also the general principles which are used.

3. *The International Criminal Law Statute has its own rules of interpretation*

Criminal law is different from other branches of the law, including general international law in that it has its own rules of interpretation. One of the tenets of the principle of legality is the strict interpretation of the law (*lex stricta*), which is recognized by the Rome Statute in article 22 (2): "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted".

This characteristic of Criminal Law is not only present in ICL, but in all legal systems (although the way it is applied may vary).⁶⁵ However, it is

⁶² See Damgaard, *op. cit.*, pp. 48-50.

⁶³ See *Lubanga case*, (Decision on the Prosecutor's Application for a warrant of arrest, article 58), ICC-01/04-01/06, February 10th, 2006.

⁶⁴ Schlütter, Birgit, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, 2010, p. 291. The wording of article 21 leads to the conclusion that the intent of the drafters was to allow ICL to develop on the basis of principles, which would exclude customary international law. While some States wanted to exclude judicial discretion altogether on the premise that it would be at odds with the Principle of Legality, the majority preferred for the judges to develop the general principles.

⁶⁵ For a comparative study on the Principle of Legality see Dondé, "Principio de Legalidad Penal", *cit.*

also interesting to note that the Rome Statute is the only treaty, including human rights treaties, which mentions expressly this aspect of the principle of legality. Nevertheless, strict interpretation has been recognized by the European Court of Human Rights holding in *S.W. vs UK*, when interpreting the content of article 7 of the European Convention on Human Rights:

Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision (art. 7) and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.⁶⁶

As seen, the European Court had to derive this aspect of the principle of legality from article 7, while the Rome Statute clearly provides for this rule of interpretation. However, the point is not to underscore the novelty of this treaty, but to continue to point out differences between general international law and ICL. As the European Court stated, the strict construction of the criminal law is necessary in any punitive setting. Therefore, this is a feature which is unique to Criminal Law in general and ICL in particular.

Additionally, the Rome Statute includes another rule of interpretation which is not part of general international law, included in article 21 (3) which was cited previously. As stated, this article includes two characteristics: firstly, the ICC Statute must be interpreted in a way compatible with international human rights and in a way which is not discriminatory. This section was the object of debate at the Rome conference. In particular, the delegations argued over the extent of the term "gender"; however, they all seemed to agree that human rights and non-discrimination, generally, should guide the ICC in the application of the law.⁶⁷

Alain Pellet would disagree with the meaning of article 21 (3). This author believes that this section creates a supra-legal hierarchy with international human rights law at the top, followed by the Rome Statute and the other sources of law included in article 21. This would make it an *ius cogens* norm, although Pellet does not use this term.⁶⁸

⁶⁶ *S.W. v. UK* (1995) ECHR A335-B.

⁶⁷ See McAuliffe, *op. cit.*, p. 712.

⁶⁸ See Pellet, *op. cit.*, pp. 1079-1082; But see, Hafner, Gerhard and Binder, Christina, "The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed", *9 Austrian Review of International and European Law*, 2004.

However, the ICC, in the few cases where this clause has been expressly used, has agreed that this is a rule of interpretation, and it has added that it is not a tool to fill gaps in the Rome Statute, but to apply its provisions. In the particular case, the Appeals Chamber held that the doctrine of abuse of process is not part of the treaty and article 21 (3) is not a means to incorporate it into the existing legal framework.⁶⁹

Consequently, there are two rules of interpretation that are exclusive to ICL or, at a minimum, not part of general international law: the strict construction of the criminal law (*lex stricta*) and the *pro persona* reading of article 21 (3).

It is noteworthy to comment that these are not the only rules of interpretation that the ICC can use. It has used the rules set out in the Vienna Convention on the Law of Treaties, which in article 31 mentions that treaties should be interpreted according to their ordinary meaning, their context and their object and purpose. In the *Lubanga* sentencing judgement, Trial Chamber I, following the Appeals Chamber's previous decisions, provided a summary of the rule:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The particular subsection of the law read as a whole in conjunction with the section of an enactment in its entirety defines the context of a given legislative provision. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.⁷⁰

Hence, as a treaty, the ICC Statute must be interpreted according to the applicable rules of the Vienna Convention; which should be said, do not differ from general rules to be applied to any international instrument, so they are not alien to ICL.⁷¹

The International Law Commission in its work on fragmentation of International Law has explained the interplay between these rules of interpretation. While particular fields of International Law have their own rules of interpretation, the Vienna Convention applies generally to all, but must

⁶⁹ *Lubanga case* (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-01/04-01/06 (OA4), December 14th, 2006.

⁷⁰ *Lubanga case* (Judgment Pursuant to article 74 of the Statute), ICC-01/04-01/06-2842, March 14th, 2012.

⁷¹ Perrin, *op. cit.*, p. 36.

be overridden by the particular dispositions regarding treaty construction. It follows that ICL is an especial or autonomous regime with at least two particular rules of interpretation, and the general rules regarding treaties can supplement these.⁷²

On the other hand, the rules, which are specific to ICL, do not apply to general international law. While it could be argued that the pro persona interpretation of article 21 (3) can be used in other fields of general international law, so far it has been meant to apply only to ICL. Likewise, while international human rights law⁷³ and international humanitarian law⁷⁴ include many non-discrimination provisions, they do not refer to rules of interpretation as in the Rome Statute. They are prohibitions that are part of the catalogue of rights contained in the relevant treaties.

In the case of the strict construction rule this is made more evident. Since ICL is the punitive branch of general international law it is expected that affecting an individual should be kept at a minimum, only when necessary. In particular this is done through the principle of legality and the inclusion of article 22 (2) in the Rome Statute.⁷⁵

⁷² “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, International Law Commission”, *Yearbook of the International Law Commission*, vol. II, 2006. Special (“self-contained”) regimes as *lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime (“Self-contained regime”) and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

⁷³ See International Covenant on Civil and Political Rights (adopted December 16th, 1966) 99 U.N.T.S. 171, art. 26; American Convention on Human Rights, (entered into force July 18th, 1978), OAS Treaty Series no. 36, 1144 UNTS 123, art. 1.

⁷⁴ All four Geneva Conventions of 1949 include provisions against discrimination, see Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (entered into force October 21st, 1950), 75 UNTS 31, arts. 3, 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (entered into force October 21st, 1950), 75 UNTS 85, arts. 3, 12; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, (entered into force October 21st, 1950), 75 UNTS 135, arts. 3, 16; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, (entered into force October 21st, 1950), 75 UNTS 287, arts. 3, 13. *Cf.* Montoya Ramos, Isabel, “Las mujeres en los conflictos armados: civiles, combatientes y transgresoras”, in Montoya Ramos, Isabel (ed.), *Las mujeres en los conflictos armados. El papel del derecho internacional humanitario*, México, SCJN-Fontamara, 2014.

⁷⁵ *Lubanga case* (Judgment Pursuant to article 74 of the Statute), Van den Wyngaert dissenting opinion, ICC-01/04-01/06-2842, March 14th, 2012. Article 22 (2) overrides the rules of interpretation mentioned in the Vienna Convention.

4. *The International Criminal Court has distanced itself from the decisions of the International Court of Justice*

The ICC has used the decisions of the ICJ in some of its own decisions; however, only once to make a substantive finding. In other situations the use of this case-law is only marginal or secondary to other sources. In any case, the importance has diminished over time, and the ICC has recently used its own decisions to support its rulings.

From the first important decision of the ICC the split was made evident. In the *Lubanga confirmation of charges*, the Pre-Trial Chamber I stated that it would use the concept of overall control adopted by the ICTY to establish which degree of connection between the State and an organized armed group is necessary for an armed conflict to be considered international; what is now known as indirect international armed conflict. In essence, the Chamber rejected the effective control test used by the ICJ, which requires a stronger link between the State and the organization.⁷⁶

However, the reasoning is confusing because the Pre-Trial Chamber goes on to cite the ICJ case *Democratic Republic of Congo vs Uganda* to establish the concept of occupied territory. A careful reading of the relevant paragraphs reveals that this case was only used to establish the facts of the conflict, in particular the invasion and occupation of Congolese territory by Uganda. In other words, no substantial legal decision was used.⁷⁷

In other examples, the decisions of the ICJ have only been used in an auxiliary manner, to confirm the existence of well-established rules of general international law such as *compétence de la compétence*,⁷⁸ the use of *travail préparatoire* to interpret treaties⁷⁹ or the importance of State consent.⁸⁰

Moreover, these are early decisions of the ICC and the ICJ decisions have not been used recently;⁸¹ it would seem that the trend is for both tri-

⁷⁶ *Lubanga case* (Decision on the confirmation of charges), no. 35. Also see *Katanga and Ngudjolo case*, (Decision on the confirmation of charges), no. 33.

⁷⁷ *Lubanga cas* (Decision on the confirmation of charges), no. 35.

⁷⁸ See *Bemba case* (Decision on the confirmation of charges) ICC-01/05-01/08 (June 15th, 2009).

⁷⁹ *Bemba case* (Decision on the confirmation of charges), no. 77; also see *Ruto et al case* (Decision on the confirmation of charges), no. 36.

⁸⁰ *Abu Garda case* (Decision on the confirmation of charges), ICC-02/05-02/09, February 8th, 2010.

⁸¹ *Lubanga case* (Judgment Pursuant to article 74 of the Statute), no. 69. The decisions of the Ad Hoc Tribunals are cited to support the proposition that international armed conflicts

bunals to work independently given the difference in the fields they each adjudicate. Consequently, the sources that each tribunal uses will also drift apart.⁸²

Judge Anita Usaka in her dissent in the *Omar Al Bashir* arrest warrant decision considers that it is important for the ICC to distinguish its decisions from those of the ICJ because the first of these tribunals establishes individual criminal responsibility, while the second deals with State responsibility. She even goes further, by questioning the relevance of reports and instruments from quasi-judicial organs that may be called to warn the international community of the commission of international crimes, but with a mandate to establish State responsibility. Even the decisions of the *ad hoc* tribunals, although they also apply ICL cannot be used automatically, since their legal framework and procedures differ from the ICC's.⁸³ Since this dissent is crucial to the position expressed in this article the relevant paragraph will be cited:

...Since the International Court of Justice adjudicates only interstate disputes, its examination of genocide in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide was framed by the matter of state responsibility. In contrast, not only does the Statute provide solely for the criminal responsibility of natural persons, but a proposal to include responsibility for legal persons, including states and corporations, was explicitly rejected during the drafting process.⁸⁴

This opinion is important because even assuming that the ICC has not fully distanced itself from the ICJ, it gives compelling reasons for this separation. The difference between state responsibility and individual criminal responsibility is the premise for a distinct system of sources for ICL and general international law.

may coexist with non-international armed conflicts. The ICJ is only cited as a secondary source.

⁸² See Perrin, *op. cit.*, pp. 77-79. Where the premise for this article is foreshadowed, since it is mentioned that article 21 of the Rome Statute represents a split from the ICJ Statute. Also see Biti, Gilbert, "Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Koninklijke Brill, 2009).

⁸³ *Al Bashir case* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), Anita Usacka separate and partially dissenting opinion, ICC-02/05-01/09, March 4th, 2009.

⁸⁴ *Idem.*

5. *International Criminal Law has an Emerging System of Precedent*

Article 38 of the ICJ Statute mentions that judicial decisions are only an auxiliary source of general international law, which help ascertain the primary sources: treaties, customary international law and general principles of law. Additionally, article 59 states: “The decision of the Court has no binding force except between the parties and in respect of that particular case”, so clearly there is no system of precedents in this field.⁸⁵ While it is common for the ICJ to cite its own decisions there is no obligation to do so.⁸⁶

This sharply contrasts with the position of the ICTY in the *Aleksovski* appeal. As part of its decision the Appeals Chamber had to establish if it was bound to follow its previous decisions, whether the trial chambers had to follow the appeal decisions and whether they were also bound by their own decisions. In short, it had to resolve whether there was a system of precedent before the ICTY.

The Appeals Chamber analyzed the Common Law system of precedent, where in principle courts are bound by previous decisions, although this may change if there are good reasons to do so. Following the criteria of the United States Supreme Court, the Chamber stated that this can happen when the existing rule becomes obsolete; the law has evolved so as to make the existing precedent obsolete or when the decision is not applicable to a new set of facts.⁸⁷ This practice is also present in Civil Law jurisdictions⁸⁸ and before the European Court of Human Rights.⁸⁹ When it addressed the ICJ, the Chamber stated: “Despite the non-operation of the principle of *stare decisis* in relation to the International Court of Justice, its previous decisions are accorded considerable weight. This may be due to their perceived status as authoritative expressions of the law”.⁹⁰ This is an important declaration because it affirms the fact that there is no system of precedent before the ICJ; because the only reason its decisions are commonly cited is because of its authority, not an obligation to do so. Additionally, there are

⁸⁵ Brownlie, *op. cit.*, pp. 19-21 y Shaw, *op. cit.*, pp. 103-105. While these authors sustain that there is no system of precedents in international law they analyze the use of previous decisions.

⁸⁶ Cassese, *op. cit.*, p. 14. The use of precedents will depend on the background of the lawyers in each case.

⁸⁷ *Aleksovski case* (Appeals Judgment), IT-95-14/1-A, March 24th, 2000.

⁸⁸ *Aleksovski case* (Appeals Judgment), no. 86.

⁸⁹ *Idem.*

⁹⁰ *Idem.*

no rules for departing from precedent like those established by the United States Supreme Court before the ICJ.

The Appeals Chamber went on to say that in a Criminal Law context this has to be different. While in other fields the need for “consistency, stability and predictability” justifies following precedent, this is stronger when the liberty of an individual is at stake.⁹¹

While the Chamber acknowledged that the ICTY Statute is silent on the matter it recognized that *stare decisis* is an important component of the right to a fair trial and a logical consequence of the right to appeal and the functions of the Chamber at this stage of the proceedings; which includes correcting errors of law which may have occurred at the trial stage.⁹²

The Chamber concluded that it would only depart from existing precedent exceptionally and after a careful review of the sources.⁹³ Conversely, precedent would be followed when applicable to substantially similar cases.⁹⁴

The trial chambers would then be bound by the legal principles (*ratio decidendi*) enunciated by the Appeals Chamber. The Appeals Chamber has the task of correcting any errors of fact and errors of law which may have taken place during the trial. In Criminal Law, the prosecutor and the accused have a special interest in certainty and predictability in the applicable law. In other words, the right to a fair trial in this context means that the accused must be treated in the same way as others in similar situations.⁹⁵

On the other hand, while the decisions of the Appeals Chamber are binding on itself and the trial chambers, the decisions of the trial chambers have only persuasive authority on each other.⁹⁶

The *Aleksovski* scheme is applicable before the ICC. Like the ICTY and other international criminal tribunals the ICC has a two tier system of chambers (three levels counting the Pre-Trial Chambers)⁹⁷ and the Appeals Chamber also has the task of correcting errors of fact and errors of law.⁹⁸ Therefore the structure that would allow for a system of precedent is also present here.

⁹¹ *Idem.*

⁹² *Idem.*

⁹³ *Idem.*

⁹⁴ See Nerlich, “The Status of ICTY and ICTR precedent in proceedings before de ICC”, cit., pp. 310 and 311.

⁹⁵ *Aleksovski case* (Appeals Judgment).

⁹⁶ *Idem.*

⁹⁷ Rome Statute, no. 1, art. 34.

⁹⁸ *Ibidem*, art. 81.

However, what is more important is that there are human rights reasons, concretely due process reasons, to justify a system of precedents in the ICC. Like the *Aleksovski* decision stated, the right to appeal is part of a fair trial. Likewise certainly and predictability are important concerns which merit the implementation of a system of precedent in any criminal proceedings. This is also linked to the principle of legality which among other things seeks to achieve legal certainty.⁹⁹

Moreover, the Rome Statute, unlike the ICTY Statute, in article 21 (2) expressly provides for a system of precedent. A lot has been said about how the use of the word “may”¹⁰⁰ does not establish an obligation to follow previous decisions, which is essential to any system of precedent and how this word was used as a compromise between States that wanted to include a system of precedent and those which opposed this view.¹⁰¹ However, the reasoning in *Aleksovski* refutes this argument. As stated above, there may be convincing reasons for a court to abandon a particular legal principle;¹⁰² therefore the word “may” could be interpreted to mean this possibility.¹⁰³

The *Aleksovski* Chamber considered that ICL is different from other fields of general international law because the liberty of a person is at stake. This is even clearer in the Rome Statute than the ICTY; article 1 states this: “It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute...”. Therefore it would make sense for article 21 (2) to be construed in a way which is compatible with due process concerns.¹⁰⁴ This reading which follows from *Aleksovski* is in line with the principle of legality, the right to appeal and due process in general.¹⁰⁵

⁹⁹ *Sunday Times vs. UK* (1979), 2 EHRR 245. The elements of the Principle of Legality in the European case-law are accessibility and foreseeability.

¹⁰⁰ “Podrá” in the spanish version and “peut” in the french version.

¹⁰¹ See Pellet, *op. cit.*, pp. 1065-1067; Degan, Vladimir-Djuro, “On the Sources of International Criminal Law”, *Chinese Journal of International Law*, 2005, p. 82; McAuliffe, *op. cit.*, p. 711.

¹⁰² Pikis, *op. cit.*, p. 84. Noting that even in Common Law jurisdictions the use of precedent allows for some flexibility as established by the House of Lords.

¹⁰³ Damgaard, *op. cit.*, pp. 46, 50-56. Observing that this clause only recognizes a practice that is present in all of international law.

¹⁰⁴ See Gallant, Kenneth, “International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals”, *Legal Studies Research Paper*, no. 11 and 12, p. 4. The decisions of the ICC are no longer a secondary source of law; they reflect *opinion juris* and are binding on due process issues.

¹⁰⁵ See *Lubanga case* (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)

V. POSSIBLE COUNTERARGUMENTS

While researching for this article three arguments which would contradict the position expressed here were found. Firstly, there is ICL beyond the Rome Statute, so that article 21 is not the sole list of sources in this field. Secondly, there are multiple references to general international law in the ICC Statute and the use of decisions from other courts, especially in the field of human rights to interpret the applicable law of the ICC. These will be explained in turn.

Article 10 of the Rome Statute reads: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. This article alludes to the existence of norms of ICL which can be found outside of the ICC framework. Therefore, it could be argued that article 21 is not the only list of sources for this field.

The phrase “for purposes other than this Statute” could refer to tribunals that adjudicate state responsibility like the ICJ. It could also mean the other international or hybrid tribunals such as the *ad hoc* tribunals and the Special Court for Sierra Leone, although these do have jurisdiction over ICL cases. If this were so, the argument that customary international law has been excluded from ICL, would also be invalid since these other extra ICC sources could include it.¹⁰⁶

However, even if there are other jurisdictions that may adjudicate over international crimes, this does not mean that they will not use the sources listed in article 21 of the Rome Statute. Triffterer believes that this would be the case when using treaties such as the Genocide Convention or the Torture Convention.¹⁰⁷ As seen above, these treaties are part of the applicable law in accordance to the ICC Statute.

According to Triffterer, this clause was included to allow for States to have jurisdiction over any international crimes, including those, which were not included into the Rome Statute. This could be done through traditional jurisdictional criteria or other forms of extraterritorial jurisdiction such as the *aut dedere aut judicare* formula included in several treaties.¹⁰⁸

(a) of the Statute of 3 October 2006), no. 68. Pointing out that respect for due process is an important ingredient in the credibility of the ICC.

¹⁰⁶ See Schlütter, *op. cit.*, p. 290.

¹⁰⁷ Triffterer, Otto, “Article 10” in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck-Hart-Nomos, 2008, p. 532.

¹⁰⁸ *Ibidem*, p. 533.

These other jurisdictions could have a basis other than the sources listed in article 21 and could also apply diverse sources of law. The *ad hoc* tribunals are a good example, since both were created through Security Council resolutions, which are not part of the list of applicable sources in the ICC.¹⁰⁹

Even assuming that customary international law is no longer part of the sources of ICC, it could be claimed that this source could continue to be part of ICL in the other jurisdictions suggested by article 10. In other words, the sources listed in article 21 are only for the ICC, so other jurisdictions would not be excluded from using customary international law.¹¹⁰ This argument has support in the way the Principle of Legality was included into the Rome Statute, article 22 (3) reads: “This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute”.

The second counterargument is linked to the first one. The ICC Statute includes several mentions to general international law, which would imply that all the sources mentioned in article 38 (1) would also be applicable, albeit by reference.¹¹¹ This can refer to three different types of norms: international law of armed conflict, international human rights law or general international law.

If these references mean treaties the counterargument fails because “applicable treaties” are part of the sources listed in article 21. Put differently, these particular scenarios would already be considered by the general rule, which would make these only individual examples of the more general norm.

This counterargument is directed specifically at the contention that customary international law is no longer a source of ICC. The term “International Law” alludes to any source in this field, which would include general international law. The problem with this reasoning is that it assumes that the ICC system of sources is closed, but in truth article 21 mentions several sources which can be found beyond the Rome Statute. The assumption would be that only the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence are the only sources of ICC law. However, this is not the position upheld in this article.

¹⁰⁹ *Ibidem*, p. 533. Mentioning that the Security Council may still create other Ad Hoc Tribunals when it is not possible or convenient to take a situation before the ICC.

¹¹⁰ Bennouna, Mohamed, “The Statute’s Rules on Crimes and Existing or Developing International Law”, in Cassese, Antonio; Gaeta, Paola and Jones, John R. W. D. (eds.), *op. cit.*, p. 1105.

¹¹¹ A word search revealed 26 mentions of “International Law” in the ICC Statute.

Even assuming that these vague references include customary international law, this does not mean that they are part of the ICC system. ICL was not created and developed in a vacuum; it is inevitable that norms from other legal systems or fields of law must be mentioned.

National law has several examples of references to foreign law; however, no one would claim that these norms are part of the legal system of a particular State. Extradition law is a clear example. In extradition proceedings there are several cases where the authorities have to apply foreign law, for example to establish double criminality,¹¹² to determine if a crime is political¹¹³ or military¹¹⁴ in nature, to consider whether amnesties or statutes of limitations apply.¹¹⁵ These are simply references to foreign law, but they do not become part of the legal system of the extraditing State, even when the extraditing authority would need to apply foreign law to determine if the person can be handed over.

This counterargument and its implications are also applicable to Security Council resolutions and the United Nations Charter. According to the Rome Statute, the Security Council may refer a situation to the ICC acting under chapter VII of the United Nations Charter¹¹⁶ and it may defer investigations or prosecutions in the same way.¹¹⁷ As explained in the previous paragraphs these mentions do not mean that the resolutions and the Charter are part of the ICC list of sources. The Rome Statute only recognizes the existence of such power and it channels it through its own mechanisms.¹¹⁸ The ICC drafters could not ignore that the Security Council has the power to create *ad hoc* tribunals, but it would be an exaggeration to suggest that this would make them part of the sources of the tribunal. In any case the United Nations Charter could be considered an applicable treaty in accordance to article 21 of the Rome Statute.

The third counterargument can be identified with the concept of cross-fertilization, which is the practice of citing decisions from different regional or international tribunals even when they adjudicate over different types

¹¹² UN Model Treaty on Extradition, UN GA Res 45/116, December 14th, 1990, art. 2.

¹¹³ *Ibidem*, art. 3 a.

¹¹⁴ *Ibidem*, art. 3 c.

¹¹⁵ *Ibidem*, art. 3 e.

¹¹⁶ Rome Statute, no. 1, art. 13 (b).

¹¹⁷ *Ibidem*, art. 16.

¹¹⁸ See *Tadic case* (Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction), ICTY-94-I-A, October 2nd, 1995.

of cases;¹¹⁹ for example, when human rights tribunals cite cases from the ICTY.¹²⁰

The ICC has not been exempt from this practice. There are several examples where the different chambers have looked to human rights tribunals, especially the European Court of Human Rights, to support a particular point of law. This practice is more prevalent regarding due process issues, such as the evidentiary thresholds of the confirmation of charges,¹²¹ the legality of certain evidence when the right to privacy is at stake¹²² or the limits of the right to legal counsel.¹²³

Generally, the ICC has used decisions of the European Court on Human Rights to aid in the interpretation of its own statute. This would lead to the conclusion that it does not operate in isolation from other tribunals as suggested in this article. On the contrary, the independence of the system cannot be upheld if the ICC uses sources that are not recognized by its statute. This is the case with the decisions of other tribunals, since these are not present in article 21 of the ICC Statute.

However, in *Ruto* Pre-Trial Chamber II established a limit to the use of these decisions. These can only be cited when they represent principles or rules of general international law in line with article 21 (1) (a) and only to aid in the interpretation of the Rome Statute and particularly in due process issues. In this same case, the Chamber opted to use previous decisions of the ICC, which may lead to the conclusion that the practice will gradually disappear once more decisions are rendered.¹²⁴

The counterarguments mentioned in this part could disprove the hypothesis presented in this article; however, the hypothesis which was presented has two alternatives. It has been argued that this system exists or that it is in a process of consolidation. In previous sections it was noted that the ICC has not established a clear position on issues such as the use of ICJ decisions or the application of customary international law. In any case, this

¹¹⁹ Cassese, *op. cit.*, p. 45. “This gradual interpenetration and cross fertilization of previously somewhat compartmentalized areas of international law is a significant development: it shows that at least at the normative level the international community is becoming more integrated and –what is even more important– that such values as human rights and the need to promote the development are increasingly permeating various sectors of international law that previously seemed impervious to them”.

¹²⁰ See *Almonacid Arellano et al case* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 154, September 26th, 2006.

¹²¹ *Lubanga case* (Decision on the confirmation of charges), no. 35.

¹²² *Idem*.

¹²³ *Katanga and Ngudjolo case* (Decision on the confirmation of charges), no. 35.

¹²⁴ *Ruto et al case* (Decision on the confirmation of charges), no. 36.

may only mean that the system of sources is not fully developed, hence the second alternative hypothesis is still valid.

VI. IT IS NECESSARY TO HAVE AN INDEPENDENT SYSTEM OF SOURCES FOR INTERNATIONAL CRIMINAL LAW

To this point, five arguments have been presented on the existence of a system of sources for ICL and three arguments against this position. Article 21 of the ICC Statute is the list which comprises this system, according to this opinion. At the beginning of this article two hypothesis were presented, however the first of these may be discarded, since the system is not consolidated. After all, the second hypothesis seems to be proven at this point in time, since an exclusive system of sources of ICL seems to be taking shape. Having established this, in this part it will be held that this trend must continue in light of the principle of legality and the difference between state responsibility and individual responsibility.

A common thread in this study has been the importance that the principle of legality has had in the development of ICL, especially in the search for more precise sources of law. It is important to highlight some of the findings so far to make this point.

In the part where the sources of article 21 of the Rome Statute were addressed it was stressed that one of the reasons why a comprehensive list of sources was included was to provide for a precise description of the international crimes within the subject matter jurisdiction of the ICC.

In the next part, it was noted that even at the beginning of the development of ICL at Nuremberg, there was a concern for the principle of legality; this is especially the case in the Nuremberg Judgment, where the court took great pains to prove that crimes against peace preceded the Charter. This concern was also present during the *Ad Hoc* Tribunal era.

In the part where the five arguments in favor of an independent system of sources was presented it was held that customary international law was excluded from the Rome Statute since it was considered too vague a source of law within a punitive context. Nevertheless, it is probably more interesting to note that when customary international law has been used by the ICC it has been to limit the scope of a particular crime; such is the case of “other inhumane acts” which constitute crimes against humanity.

This interest in the principle of legality is also present in the rules of interpretation. More obviously the rule for strict construction was incorpo-

rated into article 22 (2) of the Rome Statute. Furthermore, article 21 (3) is also important because it provides of interpretation to be in line with international human rights law and the principle of non-discrimination, and is only expressly mentioned in the ICL setting. This makes sense because ICL applies directly to individuals, so unlike general international law, human rights are more relevant.

Likewise, article 21 (2) establishes some elements for a system of precedents. The reason is to give the accused before the ICC more certainty in the proceedings held against them. Certainty for the individuals is also a common element of the principle of legality and this clause.

The principle of legality and, more generally, individual responsibility, put ICL in a different light to the rest of International Law. While other fields, such as international law of armed conflict and international human rights law are also directed towards individuals, they focus on protecting them. ICL is different in that it is not meant to protect individuals, but to establish responsibility for the commission of international crimes (although it is undeniable that these crimes protect human interests). It is the only field where an individual can be held directly responsible for breaches of international law.¹²⁵

The difference between state responsibility and individual responsibility also explains why general principles are different in general international law and ICL. For instance, it would not be possible to apply the principle of legality, the presumption of innocence or the *pro persona* rule to cases of state responsibility.¹²⁶ The sources listed in article 38 (1) of the ICJ Statute are insufficient for the purposes of ICL where a regard for due process is warranted. This was evidenced by the difficulty the *ad hoc* tribunals had in trying to establish their applicable law when all they had was the traditional sources of law envisioned for States, not individuals.¹²⁷

¹²⁵ Also see, *Godínez Cruz case* (Merits), Inter-American Court of Human Rights, Series C, no. 5, January 20th, 1989. “The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible”.

¹²⁶ Perrin, *op. cit.*, pp. 29 and 37. Noting that the mechanisms and triggering forms of processes to establish state responsibility and individual responsibility have been historically very different.

¹²⁷ *Ibidem*, pp. 33-36; Also see, Verhoeven, J., “Article 21 of the Rome Statute and the Ambiguities of Applicable Law”, *XXXIII Netherlands Yearbook of International Law*, 2002, pp. 16-18.

VII. CONCLUSION

This study started with two hypotheses: article 21 of the ICC Statute sets up an independent system of sources for ICL. In the alternative, that the current trend is that the system is in place, but is still developing its independence from general international law.

It has been proven that the system for ICL sources is in place and is different from the traditional sources listed in article 38 (1) of the ICJ Statute. However, it could not be proven that this system is wholly independent. Particularly, the ICC still uses customary international law and decisions from human rights tribunals in its holdings despite the fact that neither are mentioned as part of its applicable law.

Additionally, article 10 of the Rome Statute opens the door for the development of ICL parallel to the ICC and its statute, which could include different sources of law.

Nevertheless, there does seem to be a trend towards greater independence between the sources of law in ICL and general international law. This is the result of the difference between state responsibility and individual responsibility, which results in a greater concern for certainty, respect of the principle of legality and due process when establishing individual responsibility. This in turn, would justify the growing difference between both fields, especially where sources of law are concerned.