THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:
A COMMENTARY

VOLUME II

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The Statute and General International Law

wisely limited itself to listing, not the applicable rules, but the sources of law the Court should take into consideration in order to discover those rules. This was the origin of the famous Article 38 of the Statute of the PCIJ, which resurfaced in 1945, with only minor drafting changes, in the Statute of the ICJ.

Whereas the Statutes of the ICTY and the ICTR are silent as to the applicable law, the International Law Commission's 1994 Draft Statute for an International Criminal Court, on the one hand, enumerated the 'crimes within the jurisdiction of the Court'3 and, on the other hand, in Article 33 under the title 'Applicable Law', simply indicated the sources to which the Court should refer in making its decisions. Professor James Crawford, principal artisan of the draft, notes that the treatment of the applicable law, as anticipated in Article 28,4 is simplicity itself. ... No doubt, to say that the applicable rules, whether derived from treaties, general international law or national law, are to be applied is not to say very much. But the way in which treaties and rules and principles of international law are applied under Article 36 [sic: 38] of the Statute of the International Court is now fairly understood, and there was little point in seeking to elaborate them in one particular context'.5

The drafters of the Statute of the ICC were not so modest. Certainly, they took up the idea underlying Draft Article 33 and transposed it into Article 21, which sets out the Applicable Law as follows:

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,

4 Art. 33 in the first project of 1993. This disposition, evidently based on Art. 38 of the Statute of the ICJ, was drafted as follows: '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', ibid., 51.
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age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Nevertheless, not only have the negotiators strewn the Statute with provisions elucidating (or complicating) this pivotal article, but at the same time they have thrown themselves into an adventurous attempt at codification of the crimes within the jurisdiction of the Court under Article 5 of its Statute.

For this reason, the system of sources to which the Statute refers is extremely complex, sometimes even uncertain, and the order of precedence between the different provisions is equally ambiguous. One may, thus, predict that the judges will interpret the text, at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them.

II. A Tissue of Imperfectly Defined Sources

Endowed with its own legal personality, the International Criminal Court corresponds perfectly to the classical definition of an international organization. It is clearly a 'collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States'.

As with all international organizations, the Court is endowed with 'special tasks', which it is invited to fulfil by applying its own Statute as well as a series of norms of widely varying origins referred to expressly in the Statute, but which it would have been obliged to apply even in the absence of such reference. Being 'a new legal order of international law', it is called on to apply both its 'proper law', of which Statute is the 'supreme norm', and the rules referred to therein, whether they form part of its proper law (A) or are external to it (B).

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6 Cf. Arts. 9, 10, 21, 22(3), 80, 88, 103, 106, and 107.
7 See Arts. 6 to 8.
8 Cf. Art. 4 of the Statute.
11 European Court of Justice, Case 26/62, Van Gend en Loos, Rec. IX, p. 23.
A. The 'Proper Law' of the ICC

Article 21 of the Statute\(^{13}\) lists four possible sources of the law to be applied by the Court which are proper to it and complete each other: the Statute itself, the Elements of Crimes, the Rules of Procedure and Evidence, and, more ambiguously, the case law of the Court.

1. The Statute

Its nature is threefold.

In the first place, the Statute is the constitutive instrument of the international organization forming the Court. In this regard, it contains provisions concerning:

(1) the 'Establishment of the Court' (Part 1), including its relationship with the United Nations, which will be the subject of a Headquarters Agreement prepared by the Preparatory Commission,\(^ {14}\) approved by the Assembly of States Parties and concluded by the President of the Court on its behalf (Article 2); its seat, the status of which will be specified in an agreement concluded in the same way\(^ {15}\) (Article 3); its legal personality; and its status and powers on the territory of States, whether or not Parties, which must also be the subject of future 'special agreements' (Article 4);\(^ {16}\)

(2) the structure of the institution and its mode of operation (Part IV, 'Composition and Administration of the Court', Part XI, 'Assembly of States Parties', and Part XII, 'Financing');

(3) as well as the 'Final Clauses' (Part XIII).\(^ {18}\)

As a constitutive instrument, the Statute is a 'treaty of a particular type',\(^ {19}\) being both an agreement between the States Parties and the 'constitution' of the organization, pinnacle of the hierarchy of applicable norms.\(^ {20}\)

The Statute is equally a code of criminal procedure determining the jurisdiction of the Court (Part 2) and setting out the system of investigation and prosecution

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13 Text supra.
15 See ibid., para. 5(d); the Preparatory Commission is only required to prepare the 'basic principles' of the Headquarters Agreement.
16 See Chs. 4.1 to 4.3 above.
17 In this respect, the Statute is completed by the Financial Regulations and Rules prepared by the Preparatory Commission (see Resolution F of the Final Act of the Rome Conference, supra, note 14, para. 5(e)) and adopted by the Assembly of States Parties (Art. 113), see Ch. 10 above. The Structure of the Court is dealt with in Section 2.
18 See Chs. 3 above and 46 below.
20 See infra, III.A.
(Part 5), trial procedure (Part 6), the penalties and their enforcement (Parts 7 and 10), appeal against the decisions of the Court and their revision (Part 8). Due to the international nature of the Court, its Statute also lays down, in great detail, the obligations of States concerning cooperation and judicial assistance (Part 9).

Finally, the Statute contains some elements of a veritable criminal code since it defines three of the crimes within the jurisdiction of the Court (Articles 6 to 8) and reiterates 'General Principles of Criminal Law' (Part 3).21

This last point was not self-evident. True, it was undoubtedly necessary to define the jurisdiction of the Court and to respect the requirements of the *nullum crimen sine lege* principle as in all criminal proceedings, as recalled in Article 11(2) of the Universal Declaration of Human Rights. However, there was no need to go into such great detail, or even to set out the substantial rules applicable.

It is also true that the Statutes of previous international criminal tribunals set out certain elements of definition of the crimes within their jurisdiction. However, Article 6 of the Charter of the Nuremberg Tribunal, and the corresponding provisions of the Statutes of the *ad hoc* Tribunals,22 contain incriminations of a reasonably general nature and the judges of the Nuremberg and Tokyo Tribunals, on the one hand, and the Hague and Arusha Tribunals on the other, have adapted perfectly well to the relative concision of the substantive provisions of their respective Statutes. Paradoxically, as time passes, they are becoming increasingly detailed, even punctilious:23 it was legitimate that the London Agreement, being a revolutionary innovation, strove to define crimes which, while not 'invented', were set out for the first time in the international sphere;24 it was less so that Resolutions 827 (1993) and 955 (1994) flesh out (not without some divergence),25 and clarify definitions to which previous practice, both international and national, had conferred indisputable customary status (even if this is only partially true concerning crimes against humanity). It is, assuredly, even more questionable

21 As has been noted (cf. P.-M. Dupuy, 'Normes internationales pénales et droit impératif (jus cogens)' in H. Ascensio, E. Decaux, and A. Pellet, *Droit international pénal* (2000) 75), other general principles of international criminal law are set out in other sections of the Statute (cf. Art. 20 on the *ne bis in idem* rule or Art. 66 on the presumption of innocence).

22 ICTY, Arts. 2 to 5; ICTR, Arts. 2 to 4.

23 W. Schabas notes that Art. 6(b) of the 1945 London Agreement defined war crimes in 73 words; Arts. 2 and 3 of the Statute of the ICTY does the same in 239 words; and Art. 8 of the Rome Statute in . . . 1,594 words! ('Follow Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute', 20 *HRLJ* (1999) 157–166, at 163).

24 Appropriately, the Nuremberg Tribunal considered that the crimes summarily defined in Art. 6 of its Statute were 'general principles of law recognized by civilised nations' (see text in *AJIL* (1947) at 217 et seq.; see also Q. Wright, 'The Law of the Nuremberg Trial', ibid., at 54–55 and 58–59; or A. Pellet, 'Le projet de Statut de Cour criminelle internationale permanente', in *Hector Gros Espiell Libor Amicorum* (1997) Vol. II, pp. 1060–1061).

25 See H. Ascensio, 'Les Tribunaux *ad hoc* pour l'ex-Yougoslavie et pour le Rwanda', in Ascensio, Decaux, and Pellet (eds.), *supra* note 21, at 723 (crimes against humanity) and 724–725 (war crimes).
that Articles 6 to 8 of the Rome Statute, far from being an ‘instantaneous image’ of the present state of this evolution, to which the case law of the two *ad hoc* Tribunals have given a decisive impetus, should freeze the definitions into laborious compromise formulations which, in some respects, are a step backwards compared with the case law and customary law itself.

This is not the appropriate chapter to comment on the substantive articles of the Statute relating to the definition of the crimes within the Court’s jurisdiction. It suffices to observe that, under the pretext that this exercise was rendered necessary by the criminal law principle of ‘legality’ of crimes and misdemeanours, the negotiators have mechanically transposed an internal legal principle to the international sphere. At the same time:

1. they have implicitly relied on a definition of ‘legality’ which, while it may correspond to the concept as understood by criminal lawyers, is hardly appropriate to the particularities of international law, an essential part of which is customary;
2. they have frozen customary definitions in a process of rapid evolution; and
3. they have shown a mistrust for the judge that is reflected in a large number of other provisions of the Statute.

The ILC, conversely, had taken great care not to proceed in this way. It preferred simply to refer to the applicable treaties in the Statute because, as the Commission explained, it is not the Statute’s ‘function to define new crimes. Nor is it the function of the Statute authoritatively to codify crimes under general international law’. It is true that, in the minds of several of its members, this function should have been filled by the Code of Crimes against the Peace and the Security of Mankind, the draft of which it would adopt, after close to fifty years work—suspended from 1954 to 1981 while awaiting a definition of aggression—on second reading in 1996. However, badly conceived, badly ‘sold’, and badly received,
the Draft Code was not thought to be susceptible of application by the Court, whether by the Rome Conference, the Preparatory Committee or even, in truth, the ILC itself.\(^\text{35}\)

Indeed, the Commission chose a completely different approach in its projects of 1993 and 1994, one of the most striking aspects of which was that 'it has broken the nexus between an international criminal court and the Draft Code of Crimes, thereby disposing of the argument that the draft code cannot be concluded without a court and that a court cannot be implemented without the code'.\(^\text{36}\) While Article 20 of the final project included, among the crimes within the jurisdiction of the Court, '(a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict' and '(d) crimes against humanity', the ILC, trusting the judges to implement established customary norms, did not think it necessary to wall them in with new definitions.\(^\text{37}\)

The reason invoked most frequently in favour of the approach retained in the Statute is the need to respect the *nullum crimen sine lege* principle. The so-called problem being 'that the elements of the offenses arising out of “general international law” is often too vague'.\(^\text{38}\) The result of a veritable brainwashing operation led by criminal lawyers, with the self-interested support of the United States, this argument is unacceptable.

As has been impeccably demonstrated by Professor Condorelli, this position is 'fondamentalement incorrecte . . . puisqu’elle se base sur une mauvaise compréhension de la signification exacte du principe en question', which 'n’implique nullement qu’en l’absence d’une disposition détaillée de droit international, définissant comme crime international un comportement très précisément identifié, la répression ne pourrait pas être légitimement exercée, que ce soit par un tribunal international ou par le juge national'.\(^\text{[Plour que le principe *nullum crimen* soit scrupuleusement observé, il n’est absolument pas nécessaire que la norme internationale prévoyant et/ou organisant la répression du crime définisse jusqu’au dernier détail la *figura criminis* et la peine à appliquer. Il suffit de constater, dans ce but, que l’auteur de l’acte en question était bien soumis, lors du}

\(^\text{35}\) In its report on the work of its 48th session, the ILC limits itself to evoking the possible ‘incorporation of the Code in the statute of an international criminal court’ without taking a position on this point (\textit{ILC}(1996), Vol. II/2, p. 17, paras. 47–48).

\(^\text{36}\) Crawford, \textit{supra} note 5, at 152.

\(^\text{37}\) Draft Art. 20 also accorded the Court jurisdiction with respect to ‘crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern’.

tempus delicti, à des normes juridiques claires et accessibles—qu'elles soient internes et/ou internationales—établissant ante factum une telle définition'.

There can be no doubt that the legal systems of all 'civilized nations', consider the crimes within the jurisdiction of the Court as such; '[d]e ce seul fait, le principe nullum crimen est parfaitement respecté, que l'auteur soit soumis à la répression dans son propre pays ou dans n'importe quel autre pays, ou encore au plan international'.

In addition, and this appears equally from Article 11(2) of the Universal Declaration of Human Rights, international law may be a source of legality for the purposes of applying the nullum crimen principle; the customary law consolidation of the definition of the four 'grand crimes' was certainly sufficient to ensure its respect. Custom is a source of international law to the same extent as treaties and is just as apt to constitute the indispensable lex. Finally, as the European Court of Human Rights has stated, the principle of legality in criminal matters 'cannot be read as outlawing the gradual codification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.

By ceding to American pressure, by not trusting the judges to interpret and apply international law in its present state and such as it is evolving, by freezing it in a sometimes daring but often inadequate and regressive text, the authors of the Statute have limited the chances of making the Court an efficient instrument in the struggle against the crimes it is supposed to repress, 'the most serious crimes of
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Concern to the international community as a whole. Unfortunately, men's criminal imagination appears unlimited and, by enclosing the definition of the crimes in narrow, punctilious formulations, they have forbidden the judges in advance to suppress future malevolent inventions of the human spirit; all the more so, and this is undoubtedly the most serious weakness of the Statute, because, in practice, they have excluded any realistic prospect of amendment. 44

2. The 'Elements of Crimes'

The 'Elements of Crimes' worsen these disadvantages.

Under the terms of Article 21 of the Statute, 'The Court shall apply in the first place', as well as the Statute, the 'Elements of Crimes' 45 provided for in Article 9:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:
   (a) Any State Party;
   (b) The judges acting by an absolute majority;
   (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Included in the Statute at the last minute due to the insistence of the United States, 46 this provision is a regrettable concession made to that country by the majority of States participating in the Rome Conference, 'dans un effort de préserver le dialogue avec les Américains et d'éviter que leur opposition au Statut se transformât, aprè s la Confé rence, en 'opposition active' à la Cour, c'est-à-dire en véritables campagne de dénigrement de l'institution'. 47

It is likely that the American delegation held some hope that this proposal would prevent the adoption of the Statute right from the first session of the

44 See Ch. 3, II above.
45 The original French language version of Art. 21 of the Statute omitted the 'éléments des crimes'; they were only reintroduced by the 'corrections' made on 10 November 1998 (cf. document C.N.502.1998.TREATIES-3 and 8 (Depository Notifications); on the problems raised by these corrections, see Ch. 3 above.
46 The concept of Elements of Crimes, introduced by the United States during the last session of the Preparatory Committee in March 1998 does not appear in its Draft Statute (Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998).
47 M. Politi, 'Le Statut de Rome de la Cour pénale internationale: Le point de vue d'un négociateur', 103 RGDIP (1999) 845. English translation: 'In an effort to keep the dialogue with the Americans open and to avoid their opposition to the Statute being transformed, after the Conference, into "active opposition" to the Court, through a veritable campaign to denigrate the institution.'
Conference. If such were the case, its hopes were dashed since only the principle of their existence was decided in Rome. Moreover, their acceptance by the 'like-minded' was accompanied by a certain number of precautions. The final compromise consisted 'd'une part à préciser dans l'article 9 que les éléments étaient destinés à jouer une simple fonction d'aide à la Cour dans l'interprétation et l'application des articles sur la définition des crimes, et devaient être conformes en tout cas au Statut; d'autre part à remettre l'élaboration des éléments à la Commission préparatoire, sans retarder l'adoption du Statut'. Resolution F, annexed to the Final Act, instructs the Commission to prepare proposals for Elements of Crimes the draft texts of which were to be finalized before 30 June 2000, which was done.

According to their promoters, the Elements of Crimes would be of a nature to 'give teeth to the concept of nullum crimen sine lege'. 'This reflects a most extreme and distorted interpretation of the scope of the rule'.

It goes without saying that the reasons underlying the criticism of the excessive detail of the statutory definitions of the crimes are of even greater force faced with the introduction of the concept of Elements of Crimes into international criminal law. 'The approach seems derived from United States federal criminal legislation, which is obsessively codified and contains detailed definitions of offenses. The concept was quite strange for most delegations, whose legal systems have functioned well enough without such detailed "elements". They trust their judges to understand terms like "murder" and "robbery" without too much need of elaboration or legislative instruction'. One can make the same remark concerning the ad hoc Tribunals: their judges have adapted perfectly well to the absence of any definition of Elements of Crimes in the law they are required to apply; they derive them, as necessary, in the exercise of their natural duty to apply their respective Statutes.

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46 Ibid. English translation: 'on the one hand, in specifying in Article 9 that the elements were meant to play a simple role of assisting the Court in the interpretation and application of the Articles defining the crimes and, in any case, must be in conformity with the Statute; and on the other hand, in requiring the Preparatory Commission to develop the elements, without delaying the adoption of the Statute.'
47 A/CONF.183/10, Resolution F, paras. 5(b) and 6.
48 Cf. Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes, PCNICC/2000/INF3/Add.2, 6 July 2000. For an in-depth presentation of this project, see Ch. 11.5 above.
52 Schabas, supra note 23, at 163.
53 See supra, II.A.1.
54 Shabas, supra note 23, at 163.
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The successive drafts of the Elements of Crimes presented by the United States unveil their real intentions. Not only did they hope to restrain judicial freedom of interpretation in the implementation of Articles 6 to 8 of the Statute, which is debatable in itself, but also and especially to further limit the ambit of these provisions, particularly concerning war crimes, which is even more questionable. Thus, even the definition of genocide, despite being firmly entrenched by Article II of the 1948 Convention and unanimously considered to have passed into general international law, would have been modified—restrictively—by the American proposals. Even more significantly, during the first session of the Preparatory Commission, the United States made very restrictive proposals concerning several 'elements' relating to war crimes.

It remains that, globally, the Elements of Crimes adopted on 30 June 2000 seem, at least at first glance, in line with the Statute, to which they do not add much overall. To take only one example, there seems to be little use in specifying, in the first element of the crime of 'genocide by murder', that '[t]he perpetrator killed one or more persons'...

It may well be that, true to their underlying logic, the Elements of Crimes have added some useful precision, but the real question is whether it was necessary to follow that 'logic' in the first place.

Once again, and even more than for the statutory definitions themselves, this logic reveals great suspicion of the judges. It seems to raise a doubt that they are capable of considering, upon their own initiative, that the crime against humanity of sexual slavery implies that '[t]he perpetrator caused [persons] to engage in one or more acts of a sexual nature', or that the perpetrator of a war crime of attacking civilians 'directed an attack'. This is to confuse stating the obvious and legal regulation!

57 According to Schabas (supra note 23, at 163): 'In reality, the principal motivation for the Elements is to limit the scope of war crimes and thereby protect States and their armed forces'.
59 See in particular, Schabas, supra note 23, at 164, or Politi, supra note 47, at 846.
60 See PCNICC/1999/DP.4/Add.2; on this episode, see Schabas, supra note 23.
61 See supra note 50.
62 Ibid., at 6.
64 Ibid., at 23.
True, the judges are simply invited to take inspiration from the Elements of Crimes, designed to 'assist the Court', and their amendment procedure is less drastically unrealistic, than that for the Statute itself, since the initiative is infinitely more liberal and adoption by two-thirds of the members of the Assembly of States Parties suffices. Nevertheless, apart from the fact that this requirement is a non-negligible formality, it remains probable that modifications will always be made ex post facto, to rectify defects or clarify ambiguities in the existing rules.

This raises a problem, however: are the Elements of Crimes 'legal rules'? Yes, if one accepts the reasons officially relied upon in support of their elaboration, but, in that case, amendments will, of necessity, take effect too late to be applied to the concrete case that brought the problem to light. No, if one holds to the letter of Article 9 of the Statute; but, in that case, what is the point, if not to achieve the domination of the judges?

3. The Rules of Procedure and Evidence

To a lesser degree, the Rules of Procedure and Evidence (hereafter 'RPE') stem from the same mistrust with regard to the Court, due as much to their means of elaboration and adoption as to their complex relationship to the Statute. The most obvious aspect is the way in which the Statute is interlaced with references to the Rules. A note by the Secretariat of the Preparatory Commission dated 26 January 1999 counts no less than 31 articles making express reference, often several times, to the RPE, to which must be added several references decided upon by the Working Groups at the Rome Conference, recommended by the Coordinator concerning Chapter IV, or suggested by certain delegations.

This process is not, as such, completely negative: less rigidly immutable than the Statute, the Rules should be more adaptable to the needs of the Court.

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65 See Ch. 3 above.
66 Art. 9(2); see supra, II.A.2.
67 See ibid.
68 This seems to have been the position, expressed in diplomatic terms by Judge Rosalyn Higgins who, after the adoption of the Statute, considered that in preparing to elaborate the Elements of Crimes, 'States will, in abstracto, and with their particular interests in mind, now embark upon an activity which is at once unusual and perhaps normally the province of the judge' ('The Relationship between the International Criminal Court and the International Court of Justice', in H. A. M. Von Hebel, J. G. Lammers, J. Schukking (eds.), Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos (1999) 168).
69 On the contents of the RPE, see infra Section 6 'International Criminal Proceedings' and, in particular, Ch. 28 below.
70 Arts. 15, 21, 31, 39, 41, 46, 47, 50 to 52, 57, 64, 68 to 72, 76 to 78, 81, 82, 84, 85, 87, 92, 93, 103, 110, and 112.
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Upon closer inspection, however, the reality is less satisfactory and, in any case more complex, because the Statute encroaches largely on the sort of provisions which, traditionally, are of a regulatory nature, especially compared with the precedents of Nuremberg and the two \textit{ad hoc} Tribunals. Here again, the statistics are revelatory: the Statute of the 1945 IMT contained 30 articles (generally brief); those of the ICTY and the ICTR contain 34 and 32 respectively; that of the ICC has 128; the difference results essentially (if not exclusively) from the remarkable accumulation in the latter of provisions of a procedural nature.\textsuperscript{72} In other words, the ‘Statute’ of the ICC is fundamentally hybrid in nature: statute indeed, but also, in large part, rules of procedure. And if, as has been affirmed, ‘[t]he “grey zone” between Statute and Rules, between the “basic” and the “subsidiary”, was given ongoing attention as delegates negotiated the attribution of subjects to each category’,\textsuperscript{73} the ‘basic’ (or that which has been considered as such) has gradually taken on a disproportionate importance compared with the ‘subsidiary’.\textsuperscript{74}

The result is greater rigidity because the statutory provisions of a procedural nature could have been included in the Rules. Undoubtedly, some of these provisions may be amended under the more flexible procedure provided for in Article 122; but the difference is very slight,\textsuperscript{75} and this ‘institutional revision’, far from allowing the rapid adaptation of all the procedural rules if this appears necessary in practice, applies only to a very limited number of articles. The others can only be modified in accordance with Articles 121 or 123, which impose the incredibly high threshold for ratification of modifications of seven-eighths of the States Parties.\textsuperscript{76}

This is rather preoccupying in the light of the experience of the ICTY, the RPE of which were modified eighteen times between 1994 and 2000. While it is true that the drafters of the Rome Statute (and of the RPE of the ICC) had the benefit of the experience acquired by the \textit{ad hoc} Tribunals, this practice shows, above all, the extent to which the judges feel ‘a constant need for adaptation’.\textsuperscript{77} The ICC is likely to feel this just as strongly, if not more so, given its extensive spatial, temporal, and substantive jurisdiction.

\textsuperscript{72} Compare with the Statute of the International Court of Justice (70 articles).
\textsuperscript{74} In a number of cases, the problem is less the different subjects referred to in the Statute than the abusively detailed nature of their treatment. One may wonder, nevertheless, to take just one example, if Art. 74, which enumerates the ‘requirements for the decision’ (in an otherwise fairly clear manner), really needed to be included in the Statute.
\textsuperscript{75} See Ch. 3 above.
\textsuperscript{76} See ibid.
\textsuperscript{77} Ascensio, \textit{supra} note 25, at 717; see also the very interesting considerations developed by C. Jordà and J. de Hemptinne, ‘Le Rôle du juge dans la procédure face aux enjeux de la répression internationale’, in Ascensio, Decaux, and Pellet, \textit{supra} note 21, at 807–821, and in particular at 814–816.
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Even so, not only is the Court's procedure very largely framed by the Statute (i.e. established *ne varietur* in reality), but the RPE also escape judicial control, in accordance, it is true, with the internal legal tradition of most countries, but in contradiction with habitual international practice. This is yet another unfortunate 'victory' of the criminal law approach over the internationalist vision, because that which is legitimate within the national legal system is not necessarily justified on the international plane, where there is no Parliament centralizing the power to make laws (and to adapt them to new needs) and where the concept of 'democracy' has little meaning. In this context, the independence of the 'judiciary' can only be assured by the guarantee of a large degree of judicial autonomy and self-organization.

Yet Article 51(1) and (2) of the ICC Statute grants the Assembly of States Parties power to elaborate and modify the RPE by a two-thirds majority of its members. Even the Regulations of the Court for its routine functioning, which the judges must adopt by an absolute majority after consulting the Prosecutor and the Registrar, must be 'circulated to States Parties for comments'. It is only if within six months there are no objections from a majority of States Parties that they 'remain in force'. Article 52 does not indicate what would happen in case of such objection.

As regards the RPE, the judges only have the power, on the one hand, to propose amendments (by an absolute majority) and, on the other hand, to adopt provisional amendments, 'in urgent cases where the Rules do not provide for a specific situation before the Court', also by an absolute majority. This has the indisputable advantage of allowing the Court to face unforeseen situations but, at the same time, raises another problem: what happens if the next session of the Assembly of

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78 Without mentioning Inter-State courts (cf. Art. 30(1) of the Statute of the ICJ) or those having jurisdiction on human rights matters (cf. Article 26(d) of the Eleventh Protocol to the European Convention), all previous criminal tribunals were given competence to establish their own RPE (cf. Art. 13 of the Statute of the Nuremberg Tribunal or Art. 15 of the Statute of the ICTY).

79 Art. 51: '1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the Assembly of States Parties.
3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the Judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. Under Rule 4(5), of the Draft RPE, 'The Regulations shall be adopted as soon as possible in plenary sessions.'
As early as February 1999, Australia and France had prepared drafts that formed the principal basis for discussions during the following sessions of the Commission. It was interesting to compare them in order to observe their substantial differences and how they were progressively impregnated as they were by common-law and civil-law approaches. It was even more remarkable how the final draft seems to have merged the features of the two approaches into what seems to be a rather harmonious and satisfactory ensemble, which one hopes will turn out to be viable.

The text underlines, once again, the desire of States to find a practical and effective means of action. Rules numbering 225 (covering 100 typed pages) are considered not excessive, given the extent and the novelty of the task with which the ICTY is nearly half as long.\(^{85}\) Even so, as it is a novel enterprise, it is hard to measure in advance the specific needs of which are hard to measure in advance. It might have been more judicious to accord the judges a wider discretion in the implementation of the Statute, especially in view of the complexity of the situation prevailing. Indeed, it is hard to see what role is left to the Regulations, to which text underlines refer only seven times.\(^{86}\)

The Case Law of the Court

Resolution E of the Final Act of the Rome Conference, A/CONF.183/2/Add.1, 17 July 1998, para. 26; 38(2), and 50(3); see also supra note 23, at 162.

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Paragraph 1(c) enjoins the Court to apply 'general principles of law deriving from national laws of legal systems of the world'. This does not grant status as a source of law on such case law; it simply recognizes the eminent and distinguished role of international courts in the formulation of general principles of law.

Paragraph 2 is more disturbing. It authorizes the Court to 'apply principles and rules of law as interpreted in its previous decisions'. In reality, this simply states the obvious.

In fact, this provision reflects a compromise between, on the one hand, the partisans of the rule of stare decisis in accordance with the common-law approach, and, on the other hand, those supporting the civil-law concept that precedent has no compulsory effect. Yet the balance clearly leans in favour of the latter, and the Court may follow the principles laid down in its previous decisions, but are not bound to.

It remains that the inclusion of this express authorization has led a commentator to conclude that, in contrast with Article 59 of the Statute of the ICJ '[t]he inclusion of article 21(2) in the ICC Statute points to an even more positive attitude of the world community in this area. . . . In enabling judges to account their prior holdings, article 21(2) contributes to the development of a consistent and predictable body of international criminal law. This, in turn, serves the principle of legality.90

This analysis is open to criticism, not only because it ignores the nature of the recourse to precedents ('the Court may apply . . .') but also because it offers an inaccurate interpretation of Article 59 of the Statute of the ICJ. This provision, as well as Article 20 of the Rome Statute, applies the principle. Article 21(2) of the ICC Statute is better compared with 38(1)(d) of the Statute of the ICJ. Although its terms differ, Article 21(2) little further: in both provisions, case law is 'a subsidiary means of determination of rules of law'. In addition, Article 59 of the Statute of the ICJ prevented it from relying on its own case law to found decisions,91 in the absence of any express provision in its Statute, the ICTY has also proceeded in a similar manner.92 In the Kupreškić judgment of 14 January 2000, the Court '[c]learly, judicial precedent is not a distinct source of law in international adjudication. . . . Thus it can be said that the Justinian maxim which . . .

87 See infra, II.B.3.
88 'The Court may apply . . .'
89 'The decision of the Court has no binding force except between the parties and in particular case.'
90 McAuliffe deGuzman, supra note 51, at 445.
91 See M. Shahabuddeen, Precedent in the World Court (1996).
92 See e.g. the Judgment of the Appeals Chamber in the Furundžija case of July 2000, to the previous case law of the Tribunal seven times (paras. 100, 119, 123, 153, 173, 175).
Applicable Law

must adjudicate on the strength of the law, not of cases (\textit{non exemplis, sed legibus iudicandum est}) also applies to the Tribunal as to other international criminal courts.\footnote{\textit{Applicable Law}}

In its Judgment of 11 June 1998 in the case concerning the \textit{Land and Maritime Boundary between Cameroon and Nigeria}, the ICJ considered that '[i]t is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause to follow the reasoning and conclusions of earlier cases'.\footnote{ICJ Rep. (1998) at 292, para. 28; the Court responded to this question in the negative (ibid., pp. 294–296, paras. 29–35).} This is the question that Article 21(2) of the Statute invites the ICC to ask.

\textbf{B. The General Sources of the Applicable Law}

However careful the drafting of the Statute and the other texts destined for application by the Court may have been, these instruments, which are the equivalent of codes of criminal law and procedure, could never claim to solve every problem which might arise. In addition, even in those countries where such codes exist, they are anchored in a fine network of legal norms that lay down rules that are intricately interwoven with the codes. Thanks to these supplementary rules, national judges are prepared to face every eventuality and thus avoid any \textit{non liquet}, particularly inappropriate in criminal matters.

In order to reach the same result, Article 21 of the Rome Statute invites the ICC to apply, 'where appropriate':

\begin{itemize}
  \item 'applicable treaties' and
  \item 'the principles and rules of international law, including the established principles of the international law of armed conflicts';
\end{itemize}

and, '[f]ailing that',

\begin{itemize}
  \item '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'.
\end{itemize}

\textbf{1. Applicable Treaties}

Not without precautions ('in the second place' and 'as appropriate'), Article 21(1)(b) of the Statute invites the Court to apply 'applicable treaties' (other than the Statute itself, covered by sub-paragraph (a) of the same provision), without giving any indication as to the instruments concerned.

\footnote{Trial Chamber, 14 January 2000, \textit{Kupreškić}, IT-95-16-T, para. 540.}
The Statute and General International Law

Such a reference was clearly justified in the draft prepared by the ILC, which conferred jurisdiction on the Court not only to try persons accused of one of the four ‘major crimes’ set out in Article 5 of the Rome Statute, but also certain ‘crimes, established under or pursuant to the treaty provisions listed in the Annex’, subject to acceptance by the States Parties. Unsurprisingly, the commentary on draft Article 33, concerning ‘Applicable Law’ specified that ‘in cases of jurisdiction based on treaties under article 20, subparagraph (e), . . . the particular treaty provisions . . . will, subject to the Statute, provide the legal basis for the charge’. On the other hand, the reference to applicable treaties in the text of the Statute may seem less appropriate since the ICC’s jurisdiction is limited to the crimes defined therein.

The reference to treaties among the sources of the law to be applied by the Court was seldom raised during the preparatory debates. It was, however, accepted without difficulty and appeared, in its current wording and without square brackets, in the Draft Statute annexed to the final Report of the Preparatory Committee of the Rome Statute in 1998. Nor does it seem to have been questioned by any delegation during the Conference.

That is not to say that it is clearly indispensable, or even useful.

According to one commentator, ‘[t]reaties may be relevant for two purposes. First, a particular treaty may have direct bearing on a case. For example, the International Covenant on Civil and Political Rights is relevant to determining the international human rights of the accused. Second, widely ratified treaties may be viewed as evidence of the “rules and principles of international law”. In this regard, for example, the Genocide Convention, along with its travaux, and the Hague and Geneva Conventions may be relevant to the determination of an issue before the Court’. This is not very convincing.

In neither of these two cases are the treaties in question applicable as such. Although it is true that the 1966 Covenant (or the 1907 and 1949 Conventions) may be relevant in determining the principles to be applied by the Court, the latter will be seen as principles and rules of general international law, and not as conventional norms. The ICTY has proceeded in this manner on several occasions. For example, it considered that the definition in the 1984 Convention

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95 Draft Art. 20(c); see YILC (1994) Vol. II/2, p. 38.
96 Draft Art. 21; ibid., at 41.
97 Ibid., at 51.
98 Art. 20(1)(b); A/CONF.183/2/Add.1 (14 April 1998) p. 46.
99 McAuliffe deGuzman, supra note 51, at 440.
100 See infra, II.B.2.
Applicable Law

reflects the customary concept of torture. It also relied on the wording of the 1948 Convention to reject the need for State organization as a constitutive element of the crime of genocide.

It is difficult to imagine, however, a situation in which the Court would have to apply a treaty other than its Statute, unless two or more States agreed to accord it some specific jurisdiction or to require the application of particular principles. In any case, it is most unlikely, given that the Court has only been granted limited subject-matter jurisdiction, that it would be obliged, or even able, to apply such agreements.

There is, however, an exception to this general principle. It is a consequence of the unfortunate drafting of Article 8(2)(a) of the Statute, which defines war crimes, in particular, as '[g]rave breaches of the Geneva Conventions of 12 August 1949'. This provision reproduces the terms of Article 2 of the ICTY Statute, which have led the Tribunal to apply these instruments directly in order to determine, for example, the nature of protected property within the framework of Article 2 of its Statute, or the characteristics of the protected persons. This is regrettable for a number of reasons.

In the first place, Article 8(2)(a) (and the corresponding provisions of the ICTY and ICTR Statutes, for that matter), rewrites common Article 3 of the Geneva Conventions. This could prove embarrassing for the Court if these


106 Trial Chamber I, 14 December 1999, Jelić, IT-95-10-T, para. 100; for the use of the travaux of the Convention, see the decision of the ICTR on 6 December 1999, Rutaganda, ICTR-96-3-T, para. 374.

107 Trial Chamber II, 13 September 1996, Rajoš case, IT-95-12-R61, Review of Indictment Pursuant to Rule 61, para. 8-9; or Trial Chamber, 14 January 2000, Kupreskić, IT-95-16-T, para. 536: in this case the Chamber held, ex abundante cautela, that the 1977 Protocols I and II are applicable by the Chamber in the circumstances of the case because '[i]n 1993, both Croatia and Bosnia and Herzegovina had ratified Protocols I and II ...'. This conception, which opens the way to an 'à la carte' jurisdiction, is extremely debatable.

109 On the most unusual treatment of human rights treaties by the ad hoc Tribunals, see infra, III.B.

110 See infra, note 109.

111 And of Art. 4 of the Statute of the ICTR.


113 Trial Chamber, 16 November 1998, Čelibić (Delalić and others) case, IT-96-21-T, para. 271 (application of Art. 4 of Convention IV).
drafting divergences lead to different solutions according to whether it applies its Statute or the Conventions.109 Secondly, the express reference to the 1949 Convention only serves to underline the absence of any reference to the 1977 Protocols, even though some of their provisions also state well-established rules which, in some cases, are even more pertinent to the nature of contemporary conflicts. Finally, and most importantly, rather than being a step forward, the express reference to the Geneva Conventions is a step back compared with the London and Tokyo Statutes of the International Military Tribunals, which did not refer to any text in particular: 'conventionalizing' the incrimination gives the false impression that the right to pursue criminals depends on the ratification of the treaty in question. The universal character of the crime and its customary definition are thus weakened.110

As for the reference to 'applicable treaties' in Article 21 of the Rome Statute, the reference to the 1949 Conventions, pointless and open to criticism, stems from the eminently debatable criminal law vision, according to which only written law is of a nature to assure respect for the nullum crimen principle. This is not correct;111 if it were, the Nuremberg Judgment would be void for fundamental error of law.112

2. The Principles and Rules of International Law

Article 21(1)(b) of the ICC Statute invites the Court to apply 'the principles and rules of international law, including the established principles of the international law of armed conflict', subject to the same conditions as for treaties, i.e. 'in the second place' and 'where appropriate'. This reference is certainly less inappropriate than in the case of treaties.

The sibylline drafting of this provision nonetheless gives cause for perplexity. Why use such an indirect expression when a simple reference to international custom would have sufficed? Why refer to 'principles and rules', when both are placed on the same footing? Why, above all, make special reference to the 'established principles [and not rules?] of the international law of armed conflict', when they undoubtedly form part of the 'principles of international law'?

109 It is true that the priority of the statutory dispositions is not in doubt (see infra, II.A).

110 Furthermore, this is a recognition of the failure of the control mechanism in the Geneva Conventions (cf. Arts. 143 et seq. of Convention IV), which one should be trying to reinvigorate rather than to replace completely. For a comparable criticism of Art. 2 of the Statute of the ICTY, see A. Pellet, 'Le Tribunal criminel international pour l'ex-Yougoslavie—Poudre aux yeux ou avancée décisive?', RGDIP(1994) 7, at 34-37.

111 See supra, II.A.1.

112 The applicable law was only set out (summarily) in its Statute; but, as the IMT firmly declared, the crimes which it was charged with punishing were already criminal under the general principles of law, which sufficed to ensure respect for the nullum crimen principle (see supra note 24).
The travaux, to the extent they are accessible, give no clear indication of the response to these questions; even less so, given that Article 21 as a whole rarely retained the attention of the negotiators:

(1) The reference to the 'principles and rules of general international law' figured in the ILC Draft, but the expression was not dwelt upon in the commentary, according to which:

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 (sic: why criminal law, given that the Article related to international law?), whether found in criminal forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.\(^\text{113}\)

(2) The additional specification (if it is one) relating to the 'established principles of the law of armed conflicts' was included, between square brackets, in the Draft Statute for the International Criminal Court annexed to the report of the Preparatory Committee.\(^\text{114}\)

(3) The suppression of the adjective 'general' in the first paragraph of the sentence and the addition of 'international' in the second occurred during the Rome Conference, without any clear explanation of the purpose of these modifications.

It may be that the letter of Article 21(1)(b) of the Statute should not be accorded an unmerited importance. In reality, there is little doubt that this provision refers, exclusively, to customary international law, of which the 'established principles of the international law of armed conflict' clearly form an integral part.

If the word 'custom' was excluded, it is most likely due to the fact that the criminal lawyers, whose influence increased during drafting of the Statute, opposed it in the name of an erroneous conception of the principle of the legality of offences and punishment.\(^\text{115}\) Thus, according to Professor Blakesley, '[e]ssentially, the problem is that the elements of the offenses arising out of "general international law" are often too vague. Their definition does not provide the elements required by international criminal and human rights law'.\(^\text{116}\) This radically conservative and State-oriented conception\(^\text{117}\) has exerted a purely 'terminological' influence,

\(^{113}\) 'YILC (1994) Vol. II/2, p. 51. The ILC here confuses the general principles of international law (which are of a customary nature) and the general principles of law mentioned in Art. 38(1)(c) of the Statute of the ICJ, see infra, II.B.3.

\(^{114}\) A/CONF.183/2/Add.1 (14 April 1998) p. 46.

\(^{115}\) See supra, II.A.1.

\(^{116}\) 'Comparing the Ad hoc Tribunal for Crimes against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court Prepared by the International Law Commission', International Review of Penal Law, 1st and 2nd semesters (1996) 148; see also McAuliffe deGuzman, supra note 51, at 442.

\(^{117}\) See supra, II.A.1.
however, as it is clearly indispensable that judges be able to resort to ‘international custom, as evidence of a general practice accepted as law’, in cases where the Statute is silent.

There is little doubt, for that matter, that the Court would assuredly have had the right to refer to international custom even in the absence of any express reference. This has been the firm practice of the ad hoc Tribunals for the former Yugoslavia and Rwanda. As the ICTY has demonstrated: ‘Indeed, any time the Statute does not regulate a specific matter..., it falls to the International Tribunal to draw upon (i) rules of customary international law...’. Thus for example, in Tadić, the ICTY derived the principal customary rules of international law governing internal armed conflicts and, in Kupreskić, it relied upon a customary rule prohibiting reprisals against civilians, the existence of which it had, in classical manner, established by examining both State practice and opinio juris.

Is it necessary to make a distinction between ‘principles’ of international law on the one hand, and ‘rules’ on the other? Undoubtedly not, at least with regard to their nature: in both cases, they are customary norms. One may thus consider that the double reference is a verbal tic, a ‘ready-made’ expression meant to refer to custom. It remains that under international criminal law, the appropriateness of reliance on ‘principles’ (except as an aid to interpretation of ‘rules’) is open to question. Upon a more rigorous inspection, the word ‘rules’ has a more precise connotation and implies a higher degree of determinacy than the term ‘principles’; and the nullum crimen principle could be breached by the undiscerning application of the latter if they were to be relied upon to found a conviction.

For the same reason, the expression ‘established principles of the international law of armed conflicts’ should not be taken at face value. In any case, it neither restrains, nor sheds any new light upon the law to be applied by the Court. There is no doubt that these principles form part of customary international law and, here again, they could only be applied by a criminal court if they are sufficiently certain to respect the requirements of the principle of legality.

118 Statue of the International Court of Justice, Art. 38(1)(b).
119 Curiously, Art. 31(3) (‘Grounds for excluding criminal responsibility’) also expressly authorizes the Court to ‘consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21’.
120 Trial Chamber, 14 January 2000, Kupreskić, IT-95-16-T, para. 591.
121 Appeals Chamber, 2 October 1995, IT-94-1-AR72, paras. 96-127.
122 Trial Chamber, 14 January 2000, IT-95-16-T, paras. 521-535.
123 As a general rule, the Statute makes abusive recourse to the word ‘principles’—Art. 21 alone uses it at least five times, with different meanings: only that made in para. 1(c) was necessary (see (c) infra). The use of the term ‘standards’ (in association with ‘internationally recognized norms’), in para. 1(c), adds to the confusion; for another use of the word ‘standard’ in the Statute, see e.g. Art. 106(1): ‘The enforcement of a sentence of imprisonment... shall be consistent with widely accepted international standards governing treatment of prisoners’. In both cases, the French text is less problematic: ‘standards’ being translated by ‘règles’ (rules).
3. The General Principles of Law

The situation is different for the 'general principles of law' referred to in Article 21(1)(c) of the Statute.

It is not correct to say that their inclusion as a source of law distinct from the principles of international law referred to in the preceding sub-section 'gives rise to some confusion'. These are, in fact, two distinct sources of public international law: the principles of international law are customary norms covered by Article 38(b) of the Statute of the International Court of Justice, whereas 'general principles of law' are a 'third source' covered by section (c) of the above provision under the title 'general principles of law recognized by civilized nations'. The latter are a distinct source of rules of international law, generally seen as the common basis of the national laws of all States.

In fact, Article 21 of the ICC Statute defines them better and more precisely than Article 38 of the Statute of the ICJ since it indicates that these principles are 'derived by the Court from national laws of legal systems of the world', which dispels all uncertainty as to their nature and clearly differentiates them from the general principles of international law.

Indeed, the general principles of law require a triple mental operation: a comparison between national systems, the search for common 'principles', and their transposition to the international sphere. The definition in Article 21 brings this out clearly by referring to the necessary role played in their application by the interpreter or the international court (the ICC in this case). Furthermore, the drafters of the Statute quite correctly made reference not to national laws as such, but to the 'national laws of legal systems of the world'. This implies that it is not necessary to make a systematic comparison of all national legal systems, but only to ensure, by 'polling', that the norms in question are effectively found in the 'principal legal systems of the world'. These can probably be reduced to a small

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124 McAuliffe de Guzman, supra note 51, at 440.
125 The expression 'civilized nations' is now obsolete: it refers to all States, regardless of the doubts one may have concerning the 'civilized' nature of some of them. In its French translation, Art. 21(1)(c) of the Statute seems to refer to a source other than that mentioned in Art. 38(1)(c) of the Statute of the ICJ because it refers to 'general principles of the law' (principes généraux du droit) whereas the Court applies 'general principles of law' (principes généraux de droit). The French text is clearly erroneous.
127 The French text is clearer; it refers to 'les lois nationales représentant les différents systèmes juridiques du monde' ('the national laws it would have been preferable to speak of 'national law' representing the different legal systems of the world').
128 See also the joint separate opinion of Judge McDonald and Judge Vohrah in ICTY, Appeals Chamber, 7 October 1997, Erdemović, para. 57.
129 Cf. Art. 9 of the Statute of the ICJ.
number in the contemporary world: the family of civil-law countries, the com-
mon law, and, perhaps, Islamic law.\footnote{130}

However, this test is not sufficient. The principle thus discovered must be able to
be transposed to the international legal order. This is not a simple question of
logic: 'transposability' constitutes an element of the very definition of 'general
principles of law'.\footnote{131} Indeed, as ICTY case law has acknowledged, 'domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings'.\footnote{132} The Statute of the ICC also takes this definitional element into due consideration by specifying that the Court can apply the general principles of law 'provided that those principles are not inconsistent with... international law and internationally recognized norms and standards'.\footnote{133}

However, Article 21(1)(c) adds a supplementary element to the definition of the
general principles of law that the Court is invited to apply in the absence of any
relevant provision in the Statute, applicable treaties and customary rules. It adds
that the national laws of legal systems of the world from which the Court must
deduce those principles, include, 'as appropriate, the national laws of States that
would normally exercise jurisdiction over the crime'.

This provision is inherited from Article 33 of the 1994 ILC Draft which, in an
infinitely more debatable (and rather esoteric) manner, invited the Court to apply
'(c) to the extent applicable, any rule of national law'.\footnote{134}

Criticized even within the Commission, this reference to national law was the
subject of fairly animated debates during drafting of the Statute, less between States having different legal traditions than between those basing their position on

\footnote{130} The Statute itself is largely the result of a globally convincing attempt to reconcile the different
legal systems; cf. P. Kirsch, 'The Development of the Rome Statute', in R. S. Lee (ed.), The

\footnote{131} See Daillier and Pellet, supra note 127, at 226, or Simma and Paulus, supra note 127, at 63.

\footnote{132} Appeals Chamber, 29 October 1997, Blažić, IT-95-14-AR108bis, para. 23. In the Tadić case, the
Appeals Chamber endorsed the view that the requirement that a tribunal must be established by
law is a general principle of law (2 October 1995, IT-94-1-AR72, para. 42), but considered that it
could not purely and simply be transposed to the international sphere due to the absence of any sepa-
ration of powers in international society (para. 43).

\footnote{133} Although the principle, as stated, must be approved, it remains open to criticism: on the one
hand, the introduction of the curious concept of 'norms and standards' is unfortunate (see supra note
124); on the other hand, as drafted, the text gives the impression that these 'norms and standards',
albeit 'internationally recognized' are distinct from international law as such, which is obviously inex-
act.

\footnote{134} IILC(1994) Vol. II/2, p. 51. It is true that, as indicated in the commentary (ibid.) the problem
was posed in slightly different terms since some of the treaties mentioned in the annex (which estab-
lished the jurisdiction of the Court, see supra note 98) 'explicitly [envisaged] that the crimes to which
the treaty refers are none the less crimes under national law'; this justification is not convincing, for all
that.
Applicable Law

criminal law doctrine and those favourable to a more 'internationalist' approach.\textsuperscript{135} The Draft Statute tabled by the Preparatory Committee in April 1998 presented another alternative 'with regard to the hierarchically third source of law for the Court, either general principles of law derived by the Court from national laws or specific national laws from specific states as listed'.\textsuperscript{136} These were, in order, the State on the territory of which the crime was (principally) committed, that of the accused's nationality or that where the latter is imprisoned.\textsuperscript{137}

These are the States, globally and without artificial hierarchy, which are the object of the expression finally retained: 'States that would normally exercise jurisdiction over the crime'. One might well question the appropriateness of such a reference: general principles of law must, by definition, be included in the main legal systems of the world, without regard to any particular State. However, the specificity of criminal law and the requirements of the \textit{nullum crimen} principle justify this directive to the Court. In any case, since the Court cannot allow itself a detailed comparative study of the laws of all the States in the world, it seems legitimate that it give priority to the legal systems with which the defendant is familiar\textsuperscript{138}—given that it has a wide discretionary power in this respect ('as appropriate').\textsuperscript{139}

In his separate and dissenting opinion in the \textit{Erdemović} case before the ICTY, Judge Cassese made a most detailed study of 'the extent to which an international criminal court may or should draw upon national law concepts and transpose these concepts into international criminal proceedings'.\textsuperscript{140} His fundamental argument is that 'legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings'.\textsuperscript{141} There are three fundamental reasons for this:

(1) 'Firstly, the traditional attitude of international courts to national-law notions suggests that one should explore all the means available at the international level before turning to national law'.\textsuperscript{142}

(2) Secondly, international criminal law results from a combination of civil law and common law systems. 'This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of

\textsuperscript{136} Ibid., at 67.
\textsuperscript{137} A/CONF.183/2/Add. 1, p. 47.
\textsuperscript{138} This system brings to mind the directions set out in Arts. 24 and 23, respectively, of the Statutes of the ICTY and ICTR, which invite the \textit{ad hoc} Tribunals to 'have recourse to the general practice regarding prison sentences in the courts' of, respectively, former Yugoslavia and Rwanda.
\textsuperscript{139} See also McAuliffe de Guzman, \textit{supra} note 51, at 444.
\textsuperscript{140} Appeals Chamber, 7 October 1997, IT-96-22-A, para. 2.
\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid., para. 3.
each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems.\footnote{Ibid., para. 4.}

(3) Thirdly, [i]nternational trials exhibit a number of features that differentiate them from national criminal proceedings.\footnote{Ibid., para. 5.}

This reasoning is absolutely convincing.\footnote{See Simma and Paulus, supra note 127, at 67.} It also justifies the reference in Article 21 of the Statute, not to national laws as such, but to the general principles of law which are derived from them, as globally envisaged.

Thus there is never any question of purely and simply applying the law of any State; for which one may give thanks. As has been pointed out, '[t]he application as such of national law before an international tribunal is very problematic for a variety of reasons, not least the variation and possible inconsistency of relevant domestic norms with regard to the same international situation. Reference to national legal concepts via, for example, general principles of law, on the other hand, is accepted international practice'.\footnote{Shaw, supra note 136, 66.} This provides a marginal but useful safety net that can help judges to fill any deficiency in treaty or customary law which may become apparent.

III. The Ambiguous Organization of the Hierarchy of Applicable Norms

Apart from the omission of academic writings as a 'subsidiary means for the determination of rules of law', Article 21 of the Statute is actually very similar, overall, to Article 38 of the Statute of the ICJ. In any case, it reiterates the three direct sources: treaties, custom, and the general principles of law. It differs fundamentally, however, by defining, in a relatively precise manner, the hierarchy between the different sources it sets out.

Under general international law, the harmonization of incompatible norms is ensured by the application of very general principles of law (translated in particular by the maxims specialia generalibus derogant and lex posterior priori derogatur). It is not, however, regulated by the Statute of the ICJ, as Article 38 places the three 'principal sources' to which it refers on an equal footing. The result is that, before the ICJ, a treaty-based rule cannot prevail over a customary norm (or vice versa) on the sole basis of the source of the rule.\footnote{The only clear exception concerns academic writings and judicial decisions, which Art. 38(1)(c) defines as 'subsidiary means for the determination of rules of law'; as, indeed, they are not sources of}
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Article 21 of the ICC Statute is completely different in this respect. It gives the judges apparently clear instructions concerning the application of the different sources of applicable law it enumerates: the Statute occupies the summit of the hierarchy it creates and the other sources are placed in hierarchical relationships that appear both relatively simple and logical. This clarity is deceptive: this formal hierarchy created between the sources of applicable law is overlaid by another substantial hierarchy between the applicable norms: some are superior to others, not by reason of their formal source, but due to their subject-matter or their verifiable substance.

It is necessary, therefore, to study the hierarchy of sources defined by the Statute separately from that of the norms to which it refers in Article 21(3), which seems to create a sort of international ‘super- legality’ in favour of international human rights law in general.

A. The Hierarchy of the Sources of Applicable Law

The Statute clearly places itself at the pinnacle of the ‘pyramid’ of both the ‘proper law’ of the ICC and the sources of general international law set out in its Article 21.

Article 21(1) directs the Court to apply, ‘(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence’.

Although the last two elements thus appear to be placed on an equal footing with the first, Articles 50, 51, for the Elements of Crimes, and 51, for the RPE, dissipate this ambiguity.

Under Article 51(4), ‘[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute’. The Regulations of the Court, for their part, can only be adopted ‘in accordance with this Statute and the Rules of Procedure and Evidence’. As regards procedural matters, the equation is thus simple: Statute > RPE > Regulations of the Court.

Without saying that the Court must interpret the Rules and Regulations in conformity with the Statute and that if any of them appear irreconcilable with statutory norms, the latter would prevail.

The situation is similar for the Elements of Crimes and amendments thereto, as Article 9(3) of the Statute specifies that ‘they shall be consistent with this Statute’.

In the latter case, at least, one may wonder whether it is really a question of the hierarchy of sources or simply a problem of interpretation, since the Elements of

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international law. Art. 21(2) of the Statute of the ICC must be interpreted in the same way, see supra, II.A.4.

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Crimes are only destined to ‘assist the Court in the interpretation and application of articles 6, 7 and 8’. 148

As for the case law of the Court, 149 it is also envisaged solely as a subsidiary means at the disposal of the Court, which it is not bound to follow. 150 It may thus be considered that the case law of the Court is, in some way, ‘extra-hierarchical’, and for a good reason: although it is referred to in Article 21, it is not a source of the law to be applied by the Court. 151

Article 21 also stipulates the superiority of the Statute compared with the other sources of law which the Court may apply.

This is witnessed by the enumeration of the sources itself: ‘in the first place . . . ’, the Statute; 152 ‘in the second place’, and only ‘where appropriate’, treaties and the principles and rules of international law; and, ‘failing that’, general principles of law. In addition, the latter source is only available ‘provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards’, which is another, fairly redundant, way of saying the same thing.

This orderly and hierarchical enumeration does not, however, solve all the problems. In particular, nothing in the drafting of Article 21 (b) indicates any priority of treaties over customary norms. This is a classic problem of general international law, the answer to which requires recourse to the traditional adages which permit the harmonization of incompatible norms by reference to their date of formation and degree of generality. 153

Subject to this reserve, the equation here, as for that concerning the proper law of the ICC, 154 is clear: Statute > [treaties = principles and rules of international law] > general principles of law.

This superiority of the Statute, compared with all the other sources of applicable law, is justifiable. It would have been the same even if it had not been laid down expressly.

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148 For another utilization of the expression ‘application and interpretation’ of law, see Art. 21(3) itself, see also infra, III.B. The Statute gives no indication as to the hierarchical relationship that may exist between the Elements of Crimes and the RPE—it is true that the problem is fairly artificial, as the two instruments focus on different matters.

149 The case law of other courts and tribunals is ignored by Art. 21, although it is covered by Art. 38(1)(d) of the Statute of the ICJ.

150 Cf. the different drafting of paragraphs 2 (‘The Court may apply . . . ’) and 1 (‘The Court shall apply . . .’) of Art. 21.

151 On this point, see supra, II.A.4.

152 As well as the Elements of Crimes (assuming that they can be considered to be real sources of the law to be applied by the Court) and the RPE which, according to a textual interpretation of Art. 21, seem to have the same superiority as the Statute itself. This is justified by the adage specialia generalibus derogant.

153 See supra, III.

154 See supra, III.A.
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As the constitutive instrument of an international organization, the Statute is a multilateral treaty 'having certain special characteristics', including that of being the 'supreme norm' of a subject of international law endowed with its own legal personality. It is common to speak of a 'constitution'. Even if the analogy with municipal law is deceptive in many ways, it has the merit of placing the accent on the superiority of the treaty creating the organization, from which it takes its existence, over all the other sources of its proper law. Indeed, it is clearly as an 'issue of constitutionality' that the Appeals Chamber of the ICTY treated the contention of the Appellant in the Tadić case that the establishment of the Tribunal was invalid under the Charter of the United Nations.

Many constitutive acts seek to entrench their superiority over other treaties concluded by Member States by various means. The Statute of the ICC does not contain any such provisions. Nevertheless Article 21 satisfies the same aims and was adopted in the same spirit: while it clearly does not oblige States Parties not to conclude incompatible treaties, it requires the Court, in the exercise of its jurisdiction, to give the Statute priority over all other rules, albeit treaty-based.

In addition, the particularity of the judicial function constitutes a supplementary argument in favour of the superiority of the Statute over all other rules. Indeed, endowed with limited jurisdiction, the Court cannot 'depart from the terms of the Statute' and can only act within its framework, which both confers and limits the Court's jurisdiction.

B. An International 'Super-Legality'?

Article 21(3) constitutes certainly the most perplexing aspect of the rules laid down by the Statute with respect to the applicable law. Indeed, besides the hierarchy of formal sources set out in the first paragraph, it seems to introduce (or recognize?) a hierarchy between the norms to be applied by the Court: certain rules are given (or recognized as having?) an intrinsic superiority stemming not from their source, but their subject-matter.

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155 See supra, II.A.1.
157 Such a treaty 'serves as a constitutional framework' for the organization it creates (ICTY, Appeals Chamber, 2 October 1995, Tadić, IT-94-1-AR72, para. 28).
158 Ibid., at 21, paras. 26–48.
160 Which could have had some practical interest, notably concerning the obligation of cooperation with the Court, the respect for which could be threatened by incompatible agreements concluded by some Member States.
161 See supra note 104.
Under the terms of this provision, indeed, '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. In other words, these 'internationally recognized human rights' take precedence over all other applicable rules.\textsuperscript{163} Despite the laudable intentions underlying this provision, it raises difficult legal problems.

The first is the definition and identification of these 'internationally recognized human rights', neither the formal source(s), nor the substance of which are specified in the Statute, and which do not correspond to a recognized legal category. The Court will have to define them.

It is true that this is not complete innovation. On several occasions, the ICTY has enquired into the conformity of the rules it applies 'with internationally recognized human rights instruments',\textsuperscript{164} including the 1966 International Covenant on Human Rights, the 1984 Convention on Torture, or even of the European Convention of 1950.\textsuperscript{165}

According to one author, '[w]hile the original intent behind this paragraph may have been to limit the Court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the Court on these matters. It provides a standard against which all the law applied by the Court should be tested. This is sweeping language, which, as drafted, could apply to all three categories in Article 21'.\textsuperscript{166} Nothing, then, should prevent the Court from refusing to apply an Element of Crimes, a Rule of Procedure and Evidence, or even a provision of its Statute, if its application were considered to infringe an 'internationally recognized human right'.

This clearly goes much further than the ICTY which, in the \textit{Furundžija} case, declared that '[t]he general principle of respect for human dignity ... has become of such paramount importance as to permeate the whole body of international law'.\textsuperscript{167}

One cannot help but think, in this respect, of 'peremptory norms of general international law', as defined in Article 53 of the Vienna Convention on the Law of

\textsuperscript{163} Unless one interprets only Art. 21(3) as laying down a rule of interpretation (cf. M. H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 AJIL (1999) 18). But this would be to neglect the fact that para. 3 expressly lays down a rule relating not only to the interpretation, but also to the application of the law.

\textsuperscript{164} Appeals Chamber, 2 October 1995, \textit{Tadić}, IT-94-1-AR72, para. 45 (relating to the guarantee that a tribunal be 'established by law').


\textsuperscript{166} Arsanjani, supra note 163, at 29.

\textsuperscript{167} Trial Chamber, 10 December 1998, IT-95-17/1-T, para. 183.
Applicable Law

Treaties. Without doubt, Article 21(3) of the Statute does not give the ICC express jurisdiction to declare null the totality of a treaty, or even one of its provisions, which is contrary to 'internationally recognized human rights', although this would be the effect of a breach of *jus cogens* under Article 53 of the Vienna Convention. Nevertheless, it creates a sort of international 'super-legality' by clearly authorizing the Court to hold such a norm to be *ultra vires* and thus inapplicable.

This provision is all the more remarkable because it extends the ambit of this *super-legality* not only to *fundamental* human rights, traditionally quoted as examples of peremptory rules, but to all internationally recognized human rights.

Stranger still is that one of these rules, the principle of non-discrimination, is individualized and emphasized as if it had 'super-super legality'. Indeed, Article 21(3) states that '[t]he application and interpretation of law pursuant to this article must be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

Included in the Draft Statute of April 1998 as one of the options retained by the preparatory Committee, this provision was the subject of lively debate both as to whether details of the motives for discrimination should be included and as to use of the term 'gender' or 'sex'.

Doubtlessly adopted with the best of intentions, this provision could nonetheless have regrettable adverse effects. In particular, despite its excessive length, the list of prohibited discriminations is incomplete; among others, it lacks that based on *sexual* preference, even though, given the jurisdiction of the Court, the sinister precedent of the extermination of homosexuals in the Nazi camps shows that this is a concrete preoccupation. On the contrary, the reference to political or religious opinions could be taken as a pretext to justify 'negationist' or revisionist views. More sober drafting could have avoided these dangers.
Article 21 of the Statute is also silent with regard to *jus cogens*. However, this should not necessarily be interpreted as forbidding the Court from referring to this notion should it feel the need.

The ICTY, for example, did not hesitate to resort to *jus cogens* in a particularly clear way in the *Furundžija* case, in which it held not only that 'the prohibition of torture imposes upon States an obligation *erga omnes*,' but also that '[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'. The Tribunal concluded that 'in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle', and that the principle of universal jurisdiction applies. Equally, in the *Kupreškić* case, the Tribunal affirmed that 'most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character'.

It remains, however, to reflect upon the possible concrete consequences of these considerations, if any. Unless treaties other than the Statute could limit or extend the jurisdiction of the Tribunal (which the case law of the ICTY seems to envisage), or that certain provisions of the Statute are, themselves, contrary to a peremptory norm, it is hard to see what those consequences might be. Indeed, in neither of the above-mentioned cases has the Tribunal drawn any consequences.

### IV. Conclusions

Article 21 of the Statute is not without merit: the hierarchy of sources of the law to be applied by the Court which it seeks to define should guide the judges through the interlaced tissue of sources (which is not the case for Article 38 of the Statute of the ICJ) and it brings useful precision to the definition of general principles of law, notably by differentiating them clearly from principles of international law. In addition, it legitimately asserts the superiority of the Statute. Yet, the combination of this formal hierarchy with another, substantial, hierarchy is perplexing. In any case, the latter seems mainly aimed at giving a clear conscience to the authors of the Statute and should have little concrete impact on the implementation of the applicable law.

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173 Ibid., para. 153.
174 Ibid., paras. 155 and 156.
176 See supra note 105.
Besides, here as elsewhere, the Statute bears the mark of the rush with which it was drafted and the process of compromise, which are ominous for its credibility. Some of the formulae finally retained are open to technical criticism, or incoherent. Others are useless.

But the most serious problem lies elsewhere and concerns the substantial law included in the Statute: being too detailed, it is likely to block necessary evolution, and may even incorporate normative regressions into positive law. It is true that the Statute is at pains to specify that the definitions it retains for the crimes within the jurisdiction of the Court are only 'for the purpose of this Statute', and that Articles 10, 22(3), and 80 leave open the possibility of evolution outside the Statute of the Court:

Article 10
Nothing in this Part [2, Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 22(3)
This article [Nullum crimen sine lege] shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 80
Nothing in this Part [7, Penalties] affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

'Thus, the Statute itself seems to postulate the future existence of two possible regimes or corpora of international criminal law, one established by the Statute and the other laid down in general international criminal law'. This postulate has already been verified since, in the Kupreškić Judgment of 14 January 2000, a Trial Chamber of the ICTY noted that Article 7(1)(h) of the Statute relating to persecution as a crime against humanity 'is not consonant with customary international law'.

True, this is a lesser evil than the possible coexistence of two bodies of concurrent and divergent rules. The real danger is that of 'downward levelling' to a lowest common denominator whereby customary international criminal law, whether existing or in the process of formation, would retract or be limited to the text of the Statute which is already in partial regression compared with the law now in force.

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177 See Cassese, supra note 27, at 157–158.
178 Cf. Articles 6, 7, or 8(2).
179 Cassese, supra note 27, 157 (emphasis added).
180 See supra note 28.
181 Or even three with national law.
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This would not be particularly serious if the applicable law, and notably the Statute itself, had been given sufficient flexibility to allow some hope of rapid adjustment to the needs of international society and the growing conscience of trans-national solidarity. Unfortunately, this is not the case: the rigidity of the rules relating to the amendment and revision of the Statute \(^{182}\) is such that all evolution is impossible in practice. As for modelling the rules through case law, the abusive precision of the statutory rules and the mistrust of the Statute's drafter for the judges is likely to be singularly limiting.

Focal point of the rapid and fascinating development of international criminal law, there is a risk that the Statute will also mark its swansong and be a cause of the Court's stagnation, if not decline.

\(^{182}\) See Ch. 3 above.
I. Introduction

According to Article 119 of the Rome Statute, as corrected in 1998:

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Since the Draft Statute adopted by the International Law Commission in 1994 did not present itself as a treaty, in accordance with the 'standard practice of the Commission' which is 'not to draft final clauses for its draft articles', it did not include a provision concerning the settlement of disputes. However, an annex listed 'Possible clauses of a treaty to accompany the draft Statute'. 'Settlement of disputes' was mentioned among these possible clauses and the Commission explained in this regard:

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1 The correction consisted of adding a second 'may' before 'make recommendations' in the last sentence of para. 2. On these corrections, see Ch. 3 above.
The Court will of course have to determine its own jurisdiction ..., and will accordingly have to deal with any issues of interpretation and application of the Statute which arise in the exercise of that jurisdiction. Consideration will need to be given to ways in which other disputes, with regard to the interpretation and implementation of the Treaty embodying the Statute, arising between States parties, should be resolved.³

II. The Distinction between Disputes Relating to the Court's Judicial Functions and Disputes between States Parties

This embryonic distinction between disputes relating to the judicial functions of the Court and those arising between States Parties was ultimately included in Article 119 of the Statute. This was not, however, without controversy, as witnessed by the final report of the Preparatory Committee which included no less than four options in this respect: one suggesting that there was no need for an article on dispute settlement, two which, with slightly different wordings, provided for exclusive jurisdiction on the part of the ICC itself, and one which presaged the solution eventually adopted.⁴

This last option was challenged by States and NGOs which were anxious not to undermine the authority of the Court and feared that conflicting decisions might be given on the same topic by the ICJ, on the one hand, and the ICC, on the other.⁵ These objections are not very persuasive: while it is certainly necessary that the International Criminal Court itself have full competence to exercise its judicial functions, it is doubtful that a court whose function is 'to exercise its jurisdiction over persons for the most serious crimes of international concern' (Article 1)⁶ would be the proper forum to settle disputes between States concerning, for example, the functioning of the new international organization created by the Statute, or its financing, or the voting powers inside the Assembly of States Parties.

Nonetheless, it remains the case that the distinction between the two classes of disputes mentioned in Article 119 might raise some difficult legal problems.

³ Ibid., p. 70.
⁶ Emphasis added.

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There is, of course, no place for hesitation when the Statute itself confers jurisdiction upon either one or the other mechanism. Thus, Articles 17 to 19 clearly entrust the ICC with deciding on the admissibility of a case or on its jurisdiction in a case. By contrast, Article 46 provides for a decision by the Assembly of States Parties in respect of removal from office of the officials of the Court.

Moreover, in some instances, the Statute provides for cooperation between the Assembly of States Parties, on the one hand, and the UN Security Council. Thus, Article 87(7) provides:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

In a way, this provision constitutes an exception to the 'either/or' guideline in Article 119: it empowers the Court to make findings on all questions relating to cooperation between States and the ICC, yet leaves the last word to the Assembly of States Parties or the Security Council. This is essentially in accordance with the practice followed by the ICTY, which has considered that it is endowed with the inherent power to issue binding orders to States on the basis of Article 29 of its Statute, which imposes upon States a duty to cooperate with the Tribunal, and to 'make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules', but has decided that, as it is not vested with any enforcement power vis-à-vis States, in case of non-compliance, it 'could only report this non-observance to the Security Council'.

However, in many cases there is certainly room for doubt and the drafting of Article 119 is not of such a nature as to help solve the questions that might arise: paragraph 1 is based on a substantial criterion (disputes 'concerning the judicial functions of the Court'), while paragraph 2 lies on a *ratione personae* distinction (disputes 'between two or more States Parties'). However, it must be noted that the first criterion seems to have precedence over the second, since paragraph 2 expressly reserves the competence of the Assembly of States Parties over any disputes other than those mentioned in paragraph 1, which means that, should two or more State Parties have a dispute concerning the judicial functions of the Court, the latter would be competent to rule on the dispute.

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8 Ibid. See also the practice described ibid., para. 34, note 47 and Rules 7 bis, 11, 59, and 61.
If that is so, it would confirm the views of some writers who have suggested that, 'for the most part, the Court is master of its own house'. This assumption also seems to be in accordance with the travaux préparatoires.

The Statute does not contain any provision regarding the legal regime of the decisions made by the Court under Article 119(1). In particular, Article 82, relating to 'Appeal against other decisions' (that is, other than decisions of acquittal or conviction or sentences) does not mention them, nor do the Rules of Procedure and Evidence. However, they should certainly follow the same rules and, if made by a Trial Chamber, be subject to a possibility of appeal by either party, and the decision of the Appeals Chamber on such a dispute would be binding and final.

III. Questions Relating to Article 119(2)

A. The Notion of 'dispute'

It is not very important to discuss the word 'dispute' for the purpose of paragraph 1 of Article 119: it goes without saying that the Court possesses the inherent power to adjudicate on any dispute, issue, or difficulty arising in the exercise of its judicial functions. Such inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

But this is not so in view of paragraph 2. The 'other' disputes between two or more States referred to in this provision must be defined in accordance with general international law, that is, according to the celebrated definition given by the PCIJ in the Mavrommatis case, 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'. Moreover, in its Judgment of 12 December 1996 in the case concerning Oil Platforms, the ICJ explained that, in order to ascertain whether a dispute related 'to the interpretation or application' of a treaty, it could not 'limit itself to noting that one of the Parties maintains that

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9 See e.g. Clark, supra note 5, at 1246. This writer has drawn tentative lists of disputes belonging to each category (at 1243–1245 and 1245–1246), the second one being strikingly briefer than the first.
10 Cf. Neroni Slade and Clark, supra note 5, at 430: 'Our understanding from participating in the drafting process is that, at the least, anything that could be said to have some relationship, however tenuous, to prosecution of an individual or group of individuals on the basis of a concrete complaint of a breach of the Statute would be included in the notion of "judicial functions"'.
12 Preliminary Objection, 1924, Series A, No 2, p. 11; see also e.g. ICJ, Judgment, 12 April 1960, Rights of Passage over Indian Territory, ICJ Reports (1960) 34 or 30 June 1995, East Timor, ICJ Reports (1995) 99, para. 22 (which, more accurately, substitutes 'between parties' for the more restrictive formula of the PCIJ).
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such a dispute exists, and the other denies it', but that it ought to ascertain whether the alleged violations 'do or do not fall within the provisions of the treaty'. The Assembly of States Parties will have to be inspired by these guidelines if and when one or several Parties allege the existence of a dispute relating to the interpretation or application of the Rome Statute between themselves and one or several other Parties.

B. The Previous Attempt by the State Parties to Settle their Disputes through Negotiations

Under Article 119(2), moreover, the Assembly will have to ascertain that negotiations between the concerned States have taken place for at least three months and have failed, before the Assembly may deal with the matter. Besides the existence of a dispute, the Assembly's assessment will have to bear on three different elements, each of which might be questionable:

(1) Did the interested States negotiate?
(2) When did the negotiations begin?
(3) Have they failed?

Answers to all three questions will have to be based largely on judgements of facts in the concrete circumstances. However, the international case law provides some important guidelines, in respect, at least, to question 1. Thus, the parties 'are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification to it'. In such a case, it must be considered that 'a deadlock is reached' and that 'there can therefore be no doubt that the dispute cannot be settled by the diplomatic negotiation'. In such a case, it might be doubted whether the three months delay provided for in Article 119 of the Rome Statute would impede the Assembly of States Parties from being seized before its expiry.

If effective negotiations take place but fail—a situation which is to be determined by the Assembly of States Parties but taking into account the views of the Parties themselves—the Assembly may either 'seek to settle the dispute' itself or 'make

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14 See supra note 5.
16 PCIJ, Matrang case, 1924, Series A, No 2, p. 13; italics in the text.
18 See PCIJ, supra note 16, at 15: 'the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation'.

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recommendations on further means of settlement; but, in both cases, the dispute will have to be examined de novo: the organ in charge of the settlement of the dispute 'cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement'.

C. Other Means of Settlement and the Role of the Assembly of States Parties

If the Assembly of States Parties endeavours to settle the dispute directly, it may act as it deems necessary and, as has been suggested, it could, for example, institute for this aim fact-finding committees or working groups as appropriate subsidiary bodies in accordance with Article 112(4) of the Statute.

If the Assembly of States Parties does not seek to settle the dispute itself, it may recommend any further means of settlement which it deems to be appropriate. This is an indirect reference to Article 33(1) of the UN Charter, according to which: 'The parties to any dispute . . . [2] shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice'.

Similarly, Article 119 of the Statute echoes Article 36(2) of the Charter, by virtue of which, in making recommendations as to the pacific settlement of disputes between Members, the Security Council should also take into consideration that legal disputes should as a general rule be referred by the Parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

It remains the case that, as has been noted, possible reference of a dispute to the ICJ according to Article 119 of the Rome Statute 'does appear very remote'. Indeed, '[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court', which means that the Court would not decide that a case brought before it in accordance with Article 119 is inadmissible for lack of 'exhaustion of previous negotiations' pro-

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19 PCIJ, 1928, Chorzów Factory (Merits), Series A, No 17, p. 51.
20 See Clark, supra note 5, at 1247.
21 Art. 33 is limited to disputes 'the continuance of which is likely to endanger the maintenance of international peace and security'; however, it is usually interpreted as offering a generally accepted (but not definitive) list of the usual means of peaceful settlement of international disputes between States.
vided the three months' delay provided for in this provision is respected or it can be established that negotiations would be useless or impossible.

But, first, the precedent offered by Article 36(2) of the UN Charter is far from encouraging since the Security Council only once—in the Corfu Channel case—recommended to bring the dispute to the International Court of Justice; given the renewed interest in the International Court, the Assembly of States Parties might be less reluctant to make such a recommendation, but it is likely to remain an uncommon occurrence.

Second, in accordance with the usual practice, the Assembly of States Parties can only make recommendations in this respect, which means that whether the Assembly envisages referral to the ICJ or any other means of peaceful settlement, these means will remain purely optional for the Parties who may, or may not, agree to follow the recommendations made by the Assembly. They can either comply with them, or agree on another means of peaceful settlement and they certainly do not have an obligation to reach a settlement.

Third, in any case, a recommendation by the Assembly of States Parties that the parties to a dispute relating to the interpretation or application of the Rome Statute be referred to the ICJ is not binding by itself and, therefore, would not be, by itself, a possible basis of jurisdiction for the International Court under Article 36(1) of its Statute, relating to automatic treaty referral provisions, any more than Article 36(2) of the Charter provides such a basis.

By way of consequence, even if the Assembly of States Parties makes such a recommendation, the ICJ would have jurisdiction only if:

1. the parties to the dispute sign a special agreement referring it to the International Court; or
2. if a pre-existing bilateral or multilateral treaty includes a provision constituting a basis for the jurisdiction of the Court in conformity with Article 36(1) of its Statute; or
3. if the States Parties have both made an optional declaration under Article 36(2) without any relevant reservation.

This, indeed, makes ultra-hazardous any possibility that the ICJ would have its say in disputes concerning the interpretation or application of the Rome Statute and has led some commentators to ask whether the ICC could not request

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25 See supra note 6.
27 Even though this has been regretted, see W. Bourdon, La Cour pénale internationale: Le Statut de Rome (2000) 291.
28 Higgins, supra note 22, at 164.
advisory opinions of the Court on legal questions arising within the scope of its activities, in accordance with Article 96(2) of the United Nations Charter. This is more than dubious: the Court is not an organ of the United Nations or a specialized agency within the definition of the Charter, a condition under this last provision. And, if the General Assembly has authorized the International Atomic Agency to request advisory opinions of the ICJ and if Article 14(5) of the 1993 Convention for the Prohibition and Use of Chemical Weapons empowers the Organization for the Prohibition of Chemical Weapons to request such an opinion, it is debatable whether such provisions are valid and that advisory opinions requested under them would be declared admissible by the Court.

IV. Concluding Remarks

This brief review of the means of settlement of disputes arising in relation to the Statute of the ICC might seem to offer a disappointing prognosis. This feeling must be relativized.

Indeed, a refusal by the States concerned to follow a recommendation made by the Assembly of States Parties to refer a dispute to the ICJ or, more generally, to accept a compulsory solution, or the impossibility of reaching an agreement by other means, would result in deadlock for which neither the Statute nor general international law provides a way out. But this is the general situation under general international law. Moreover, paragraph 1 of Article 119 of the Rome Statute gives sufficient jurisdiction to the ICC itself as to avoid any paralysis in the exercise, by the Court, of its judicial functions. This is not an insignificant achievement.

29 See e.g. Clark, supra note 5, at 1248–1250.
30 See resolution 1146 (XII), 1958.
32 Except if the continuance of the dispute threatens international peace.