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Is Article 21 of the Rome Statute an Impediment to the Development of Sentencing Principles at the International Criminal Court

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IS ARTICLE 21 OF THE ROME STATUTE AN IMPEDIMENT TO THE DEVELOPMENT OF SENTENCING PRINCIPLES AT THE INTERNATIONAL CRIMINAL COURT?

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Abstract

Nine individuals have been convicted of various offences at the International Criminal Court (ICC) since 2002. While the ICC has issued hundreds of decisions on procedural and substantive matters, sentencing of those found guilty of offences of war crimes, crimes against humanity, genocide and offences against the administration of justice, has been very much an afterthought. This is largely because the Rome Statute provides limited guidance for the Court in its sentencing matters. Rationales for sentencing focusing on principles to guide the sentencing process are not provided in the Statute. Article 21 of the Rome Statute, titled "Applicable Law', provides a process by which the ICC is to determine the law to apply to any issue before it. The ICC, in its sentencing decisions, has simply ignored the provisions of Article 21, and has stated, without analysis, the principles of sentencing it considers should apply in its sentencing decisions. In failing to follow the approach obligated by Article 21, the Court fails its legal obligation on two fronts. First, it fails to analytically determine if it can ever consider rationales for punishment through the adoption of principles of sentencing. Second, it fails to analyze which principles of sentence should apply for sentencing matters before the ICC. This article focuses on the first issue- how the Court, through the application of Article 21 (Applicable Law), can consider principles of sentence in its determination of sentences to apply to each case before it. It argues that the Court is obliged to follow the three-step process set out in Article 21 to determine that issue. It further argues that a proper analytical approach utilizing Article 21(1)(c) of the Rome Statute can give the Court legitimate legal authority to consider which principles of sentence should apply to matters before it. The article concludes that failure to follow the dictates of Article 21 can lead to an erosion of confidence in the Court and its decisions. In a time when the

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ICC is under increased scrutiny, its legitimacy as an institution is crucial to its survival. A proper application of Article 21, as set out in this article, can greatly assist the court in enhancing its legitimacy in the international community

The International Criminal Court (ICC) has its statutory underpinnings in a treaty agreed to in Rome on July 17, 1998. Known as the Rome Statute, the treaty contains provisions defining offenses within

the jurisdiction of the court, the legal rules that apply in the determination of a case before the court, the procedural processes to be undertaken, from investigation through prosecution to sentencing, and the processes by which appeals are to be undertaken.[1]

As an international treaty, all recognized sources of international law would generally apply to the Rome Statute. These sources of international law are the sources set out in Article 38 of the Statute of the International Court of Justice (IJC),[2] and include treaties, customary international law, general principles of law recognized by civilized nations, and the judicial decisions and writings of highly qualified publicists as secondary sources of international law.[3] However, the drafters of the Rome Statute were more particular as to the sources of law that should apply to the Rome Statute, and the manner in which they should apply.

The drafters adopted Article 21 of the Rome Statute, which sets out how the ICC is to determine the law to apply to matters that come before it. It contains mandatory language requiring the court to adhere to a three-step hierarchical process to determine the law applicable to any situation, both substantive and procedural, that comes before the Court. The ICC generally references Article 21 when outlining the articles of the Rome Statute that the court uses in its decision-making process for a case.

While the ICC has generally adhered to the strictures of Article 21, there are times when it has strayed beyond those strictures in order to reach its decision.[4] While some writers have applauded this more expansive approach by the Court, others have been critical of the Court's

1. Rome Statute of the International Criminal Court, July 27, 1998, 2187 U.N.T.S. 3, https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf [https://perma.cc/NDR3-KTBU] [hereinafter Rome Statute].

2. Statute of the International Court of Justice, June 26, 1945, U.N. Charter annex, https://treaties.un.org/doc/Publication/CTC/uncharter.pdf [https://perma.cc/U9BA-88YY] [hereinafter ICJ Statute].

3. *Id.* art. 38.

4. *See, e.g.*, Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2705, Decision on the Defense Request to Reconsider the "Order on Numbering of Evidence" of 12 May 2010, ¶ 15 (Mar. 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_03026.PDF [https://perma.cc/8Z7V-PNWK]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2727-Red, Redacted Decision on the Prosecutor's Application to Admit Rebuttal Evidence from Witness, ¶ 41 (Apr. 28, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05473.PDF [https://perma.cc/7P66-VKFV]; Prosecutor v. Nourain, ICC-02/05-03/09-410, Decision on the Defense Request for a Temporary Stay of Proceedings (Oct. 26, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_09218.PDF [https://perma.cc/ZDP9-8U87]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-3040-Anx, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case, ¶ 59 (June 11, 2013), https://www.icc-cpi.int/RelatedRecords/CR2013_04193.PDF [https://perma.cc/SEJ3-VFF4].

failure to adhere to its legislative mandate.[5] In the area of sentencing, however, the Court has simply ignored the requirements of Article 21 of the Rome Statute when considering which principles to apply to the sentencing process, and has adopted sentencing principles and imposed sentences with no consideration whether such comply with the provisions of Article 21. The Court has also made no determination if the principles that it does espouse are consistent with the purpose and principles of the Rome Statute.

This Article argues that, other than a superficial overview of certain words in the Preamble to the Rome Statute, the ICC to date has provided no analysis of its authority to even consider sentencing principles, nor what principles in particular would apply to ICC sentencing. The principles applied at the sentencing stage of any prosecution are important. The trial process does not provide the Court the opportunity to overtly express the individual or collective view of the acts committed, the importance of their prosecution to the international community, and why it is necessary to sanction that activity through the punishment process. It is left to the sentencing process to perform that function. A court performs these functions by focusing on the rationales reflected in the principles for the imposition of the punishments for the particular accused. As D'Ascoli has emphasized:

> Goals of punishment are essential to any system of criminal justice in so far as they determine the character of the legal system and its effectiveness, the severity of sentences and the process of their execution . . . [the] absence of penological [justifications in the Statutes of the ad hoc Tribunals and of the ICC] . . . weakens attempts by those institutions to exercise principles of criminal justice in a rationally founded and accepted way. To determine the appropriate goals of international sentencing is therefore of vital importance for the system of international justice . . . international justice might pursue different strategies of prosecution depending on which purpose of sentencing is considered . . . most important.[6]

In the international criminal law context, these rationales are the connection between the nature of the acts committed, their effects on the individuals as victims of these actions, and their impact on the larger community, both particular communities and the global community.

5. Joseph Powderly, *The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 498 (Carsten Stahn ed., 2015); Gilbert Bitti, *Article 21 and the Hierarchy of Sources of Law before the ICC*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 443 (Carsten Stahn ed., 2015).

6. SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW 33–34 (2011).

These rationales for the imposition of a sentence should reflect the values that are held most sacred by the system, values which are recognized and accepted by the community at large. These rationales also influence the type and quantum of the particular sentence that should be imposed for the perpetration of particular offenses.[7] By this process, a court justifies, or at least attempts to justify, any deprivation of liberty that results from the sentencing process.[8] The rationales, as reflected through the principles for sentencing, perform these vital functions in the international criminal law process, and are essential to the sustained legitimacy of international criminal law.

However, the Rome Statute makes no reference to the principles that are to apply at sentencing in Part 7 of the Statute, which addresses sentencing. Nor is it addressed in Chapter 7 of the Rules of Procedure and Evidence.[9] The Court, in its sentencing decisions to date, has not addressed these lacunae in the Rome Statute and the Rules of Procedure and Evidence, but has, just in a perfunctory manner, decided that certain principles should apply to the sentencing process.

This is a serious defect in the analytical reasoning of the Court. This Article argues that before the Court can even consider which principles of sentencing might apply to a particular case before it, it must address what legislative authority the Court has to do so. This Article explores whether pursuant to the Applicable Law provisions of Article 21 of the Rome Statute, the Court has legal authority to consider what principles of sentencing should apply for violations of crimes within the jurisdiction of the ICC. Is there an analytical process the Court can undertake to consider principles of sentencing, or must the signatories to the Rome Statute seek an amendment to Part 7 to include principles of sentencing within its provisions? This Article attempts to answer this question by exploring the application of the provisions of Article 21 as they apply to

7. *See* Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 195, 224 (2006) (arguing that in order to decide what punishment to impose and the amount of that punishment it must first be established what is the justification for punishment and why is this justification appropriate in this case. That decision gives credence to the imposition of the punishment, and that determination, they suggest, will also have some influence on the type and quantum of the penalty to be imposed. They argue that a sentence may well be different depending if the justification for it is because of rehabilitative principles versus retributive principles. The mechanism by which the actual type and quantum of sentence is imposed is for them a distinct aspect of the process—it is the 'method of sentencing.').

8. *See* ANTONY DUFF & DAVID GARLAND, *Thinking About Punishment*, *in* A READER ON PUNISHMENT 1, 2 (1994) (arguing that the failure to justify the deprivation of liberty would result in that deprivation of liberty being considered morally wrong).

9. Int'l Criminal Court [ICC], RULES OF PROCEDURE AND EVIDENCE, ICC-PIOS-LT-03-004/19 (2019), https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf [https://perma.cc/M43N-D6QM].

sentencing, and concludes that Article 21(1)(c), properly utilized, allows the Court to consider the principles of sentencing to apply to its sentencing decisions.

In essence the Court must look to "general principles of law derived . . . from national laws of legal systems of the world"[10] in order to attain authority to even consider principles of sentencing. Once that authority is determined, the Court can then consider which principles of sentencing should apply to any case before it. The analysis the Court should undertake is set out in this Article. While arguably long and detailed in its approach, it is the position here that this analysis is one that must be undertaken if the ICC is to properly apply the provisions of the Rome Statute to its sentencing decisions.

To develop this analysis, it is first necessary to canvas the provisions of the Rome Statute, and in particular the provisions of Article 21 of that statute, and how these provisions operate. It is then necessary to determine if, using these provisions, there is room for the ICC to adopt appropriate sentencing principles to guide its sentencing decisions. Finally, once that is determined, the ICC can then explore which principles best fit with the sentencing approach it should adopt.

I. THE STRUCTURE OF THE ROME STATUTE

The Rome Statute creates a treaty-based court. That is, a State party must agree to be bound by the treaty, either through signature, ratification, accession, or by some other agreed means.[11] Many of the State parties to the Rome Statute had a role to play in negotiating the content of the treaty, and all those bound by the treaty are only so bound by their consent.[12] The Rome Statute, which created the International Criminal Court, is a more complete Code for the investigation, charging, trial, sentencing and release of those who have been the subject of the Court's jurisdiction than any other international statute in the area of

10. Rome Statute, *supra* note 1, art. 21(1)(c).

11. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 75–89 (2000).

12. The only exception to this general principle is when a reference is made to the ICC by a Resolution of the Security Council. Article 13(b) authorizes the ICC to exercise jurisdiction with respect to a crime under its jurisdiction when such is referred by the Security Council under the authority of Chapter VII of the Charter of the United Nations. *See* Rome Statute, *supra* note 1, art. 13(b). In such a circumstance, the referred State may not be a signatory to the Rome Statute, yet, by the operation of Article 13(b), the ICC will still exercise jurisdiction over the non-signatory State. There are presently two situations in which matters have been referred to the ICC by a Resolution of the Security Council where the State in which the crimes are alleged to have occurred was not a signatory to the Rome Statute. The first is the situation in Sudan, referred to the ICC by Resolution of the Security Council in March, 2005. *See* S.C. Res. 1593 (Mar. 31, 2005). The second is the situation in Libya, referred to the ICC by Resolution of the Security Council in February, 2011. *See* S.C. Res. 1970 (Feb. 26, 2011). The ICC has taken up both cases, and both matters are presently in the process of being dealt with by the Court.

international criminal law.[13] Divided into thirteen (13) Parts, the Rome Statute contains detailed articles on Jurisdiction, Admissibility and Applicable Law,[14] General Principles of Law,[15] Investigation and Prosecution,[16] and The Trial.[17] The Rome Statute also has, through the Assembly of State Parties, adopted a detailed analysis of the Elements of Crimes, which, pursuant to Article 9 of the Rome Statute, are to assist the Court in its interpretation of the crimes under the Court's jurisdiction.[18] A set of Rules of Procedure and Evidence have also been adopted by these State Parties, consisting of two hundred and twenty-five (225) rules setting out in detail how the Court should proceed in dealing with various matters.[19]

Sentencing is addressed in Part 7 of the Rome Statute, and consists of only four sections of a very general nature. Sentencing is also addressed in Chapter 7 of the Rules of Procedure and Evidence and consists of only four rules. Despite this limited focus on sentencing, the sentencing provisions of the Rome Statute and the Rules of Procedure and Evidence are more detailed than in any other statute establishing an international tribunal for the prosecution of international crimes.[20] Yet these sentencing provisions fail to address the justifications for sentencing, to consider the hierarchy of offenses, or to provide any detailed guidance for the factors to be considered in the determination of the type and quantum of sentence.[21] The Rome Statute provides minimal guidance with respect to when life imprisonment should be imposed, when a fine should be considered, and little guidance as to when and if restitution and reparations to victims should be imposed. This is in stark contrast to many of the other provisions of the Rome Statute which are very detailed in nature and provide clear guidance to the Court.[22]

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13. *See* Adrian Hole, *The Sentencing Provisions of the International Criminal Court*, 1 INT'L. J. PUN. SENT'G. 37, 68 (2005); Shahram Dana, *Beyond Retroactivity To Realizing Justice: A Theory of the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 920 (2009); KENNETH GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 331–37 (2009); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 552–53 (2010).

14. Rome Statute, *supra* note 1, arts. 5–21.

15. *Id.* arts. 22–33.

16. *Id.* arts. 53–61.

17. *Id.* arts. 62–76.

18. *Id.* art. 9.

19. *Id.* art. 51.

20. Dana, *supra* note 13, at 920.

21. *See* Rome Statute, *supra* note 1, pt. 7 (Penalties).

22. *See* Rome Statute, *supra* note 1, pt. 2 (Jurisdiction, Admissibility and Applicable Law), pt. 3 (General Principles of Criminal Law), pt. 5 (Investigation and Prosecution), and pt. 6 (The Trial).

It is therefore left to the ICC to attempt to determine, if it can, the justifications for the imposition of the particular sentence. It is also left to the ICC to determine, if it can, what role any justifications of sentencing should play in the sentencing process, how they might work in combination with other factors, such as offense types, to attract more severe sentences, or how they might influence the decision to impose a fixed term of imprisonment versus a life sentence. Furthermore, the ICC is left to determine, if it can, how these justifications should combine with the various factors set out in Article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence to determine the appropriate sentence.

II. WHAT IS ARTICLE 21 OF THE ROME STATUTE

Article 21 of the Rome Statute states:

> The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[23]

Unless specifically set out in a treaty or convention, the law applicable to an issue in international law has to be gleaned from the recognized

23. Rome Statute, *supra* note 1, art. 21.

sources of international law.[24] As mentioned earlier, these recognized sources of international law are those sources set out in Article 38 of the Statute of the International Court of Justice,[25] and include: treaties, customary international law, general principles of law recognized by civilized nations, and judicial decisions and the writings of highly qualified publicists, as secondary sources of international law.[26] International criminal law, as a specific category of international law, relies on these recognized sources of international law.[27] These principal sources of international law are treated as equal in importance as there is nothing in the wording of the ICJ statute, or in customary international law, to give priority to either of the first three sources of international law.[28] The drafters of the Rome Statute have gone some steps further in their attempts to delineate the applicable law that applies to all matters before the ICC. Not willing to rely on the recognized sources of international law as set out in the Statute of the International Court of Justice, the parties to the Rome Statute set out in Article 21 a hierarchical order to determine the law that shall be applied specifically to determinations by the ICC.[29]

Article 21 commences with the words "The Court shall apply . . . ."[30] The word 'shall' is mandatory in nature and means that the ICC is required to follow the order set out in the Statute.[31] That order is to first consider the words of the Rome Statute, then the words of the Elements

24. Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 117, 117 (Malcolm D. Evans ed., 2d ed. 2006); David Kennedy, *The Sources of International Law*, 2 AM. J. INT'L L. & POL'Y 1 (1987).

25. ICJ Statute, *supra* note 2, art. 38.

26. *See generally* MALCOLM N SHAW, INTERNATIONAL LAW 71 (6th ed., 2008); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 13–25 (2008) (finding these sources of international law have been recognized by customary international law as the sources of international law).

27. CASSESE, *supra* note 26, at 14.

28. Thirlway, *supra* note 24, at 119.

29. *See* Gerhard Hafner & Christina Binder, *The Interpretation of Article 21(3) ICC Statute*, 9 AUSTRIAN REV. INT'L EUR. L. 163, 165 (2004); Gudrun Hochmayr, *Applicable Law in Practice and Theory: Interpreting Article 21 of the Rome Statute*, 12 J. INT'L CRIM. JUST. 655 (2014).

30. *See* Rome Statute, *supra* note 1, art. 21.

31. Robert Cryer has argued that the establishment of this hierarchical procedure was intended by the negotiating States to provide a "high level of [S]tate control over the interpretative mandate granted to the court." Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12 NEW CRIM. L. REV. 390, 391 (2009). This is in keeping with the enhanced degree of mistrust which the negotiating States had towards the judges on the international tribunals, in that there was a perception that if there was not some attempt to confine the interpretative musings of such judges, judicial activism might run rampant, contrary to the expressed wishes of those States who would become signatories to the Rome Treaty. *See* David Hunt, *The International Criminal Court: High Hopes, "Creative Ambiguity" and the Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56 (2004); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 163 (1999).

of Crimes and lastly the Rules of Procedure and Evidence to determine if within them the applicable law can be determined.[32]

If the words of the Statute, Elements of Crime and Rules of Procedure and Evidence are not clear, leaving gaps in the legislative structure, then Article 21 mandates that the Court proceed to stage two of the process. This is to apply applicable treaties and the principles and rules of international law. If the application of stage two does not yield results, then the Statute requires that the Court proceed on to stage three. Stage three requires that the Court apply general principles of law derived by the Court from national laws of the legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.

Finally, whatever interpretation is gleaned from this process, at whatever stage it is determined, must pass through the sieve which is Article 21(3) of the Statute, which requires that the application and interpretation of law must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[33]

Most decisions of the Pre-Trial, Trial and Appeal Chambers of the ICC have acknowledged that the wording of Article 21 mandates this hierarchical approach to the application of any applicable law.[34] The case

32. There is no indication in the Article itself that there is any priority to the three listed provisions. However, Article 51, paragraph 5 of the Rome Statute states that, "in the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail." *See* Rome Statute, *supra* note 1, art. 51(5). Furthermore, Article 9, paragraph 3 of the Statute states that, "the elements of crimes and amendments there to shall be consistent with this Statute." *Id.* art. 9(3). This suggests as well that the Rome Statute would prevail in the event of a conflict, as no inconsistency can exist between the two. *See* Margaret de Guzman, *Applicable Law*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 705 (Otto Triffterer ed., 2d ed. 2008).

33. *See* Rome Statute, *supra* note 1, art. 21(3). *See* Hafner & Binder, *supra* note 29, at 164; Daniel Sheppard, *The International Criminal Court and Internationally Recognized Human Rights: Understanding Article 21(3) of the Rome Statute*, 10 INT'L CRIM. L. REV. 43, 46 (2010); Stephen Bailey, *Article 21(3) of the Rome Statute: A Plea for Clarity*, 14 INT'L CRIM. L. REV. 513, 522 (2014).

34. This strict approach has pervaded most of the decisions of the ICC since its earliest days. One of the first decisions to consider the effect of the wording of the first criteria in Article 21 was the case of Situation in the Democratic Republic of Congo, Case No. ICC-01-04-168, Judgment on the Prosecutor's Application for Extraordinary Review, ¶¶ 33–34 (July 13, 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01806.PDF [https://perma.cc/53JY-F9LQ] [hereinafter Situation in the DRC]. The issue in that case was whether the Rome Statute included within its legislative structure all the provisions respecting appeals, or whether there was a lacunae in the legislation that would permit the utilization of other aspects of Article 21. The Court referenced the plain meaning of the words of the Rome Statue on the issue of appeals and

of *Prosecutor v. Al Bashir*,[35] summarized the approach that the ICC has taken and continues to take to the interpretation of Article 21. It states

> . . . according to Article 21(1)(a) of the Statute, the Court must apply "in the first place" the statute, the elements of crimes and the Rules . . . . those other sources of law provided for in paragraphs 1(b) and 1(c) of article 21 of the Statute can only be applied when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute.[36]

Article 21 pervades the entire decision-making process of the ICC, as it applies to every decision of the Court in which legal interpretation is at issue.

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concluded that the wording was clear and definitive on the issue. It left no room for any consideration of other potential rights of appeal. (see in particular paragraphs 33, 34 and 35 of the decision). The Court took a similar approach in determining if the doctrine of "abuse of process" can be considered by the Court. *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on Appeal of Prosecutor, ¶ 29 (Oct. 21, 2008), https://www.icc-cpi.int/Court Records /CR2008_05884.PDF [https://perma.cc/UN8X-D23A]. However, in a few cases judges of the Pre-Trial and Trial Chambers have ventured beyond the strict hierarchical approach set out in Article 21 and have referenced decisions of the ICTY, the ICTR and domestic jurisdictions to support their interpretation of the particular legislative provision. *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2705, Decision on the Defence Request to Reconsider the "Order on Numbering of Evidence" of 12 May 2010, ¶¶ 16–17 (Mar. 30, 2011), https://www.icc-cpi.int/CourtRecords /CR2011_03026.PDF [https://perma.cc/L93E-A8QM]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2727-Red, [Redacted] Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness, ¶ 41 (Apr. 28, 2011), https://www.icc-cpi.int/CourtRecords/CR2011 _05473.PDF [https://perma.cc/DT3G-QF3C]. Robert Cryer has also noted that there are occasions when the Court has strayed from the strict adherence to the hierarchical source requirement found in Article 21, and has referenced not only the jurisprudence of the ICTR and the ICTY and to decisions of the ICJ, but has also referred to academic writings as well. *See* Cryer, *supra* note 31, at 404; *see also* Robert Cryer, *The Definitions of International Crimes in the al-Bashir Arrest Decision*, 7 J. INT'L CRIM. JUST. 283 (2009).

35. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [https://perma.cc/6Q6P-6A82].

36. *Id.* ¶ 126.

III. STEP ONE AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT)

A. *The Textual Interpretation and the Influence of the VCLT*

The first stage of the process is the interpretative stage, in which "a court or other legal tribunal has to determine the meaning of legal language in a way sufficiently precise to make a decision in the case and to provide a justification for the decision. . . ."[37] It is to be distinguished from the gap filling process, set out in stages two and three of Article 21(1). Bitti describes the gap filling process in this way:

> . . . a gap in the Statute may be defined as an 'objective' which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules, thus obliging the judge to resort to the second or third source of law-in that order- to give effect to the objective.[38]

In applying the interpretative process outlined in Article 21(1)(a), the Court must consider first the words of the Statute, the words of the Elements of Crime and the words of the Rules of Procedure and Evidence. In determining the meaning to be ascribed to the text of the Statute, Elements of Crime, and the Rules of Procedure and Evidence, the Court, from its earliest decisions, has acknowledged the applicability of Articles 31 and 32 of the VCLT.[39] These two Articles set out the approach courts take to the interpretation of treaty provisions.[40] That approach focuses on the text of the treaty, looking at the words in their ordinary meaning, within their own context and in light of the object and purpose of the treaty. The approach does not single out one interpretative principle as being superior to any other, but as Grover notes, has resulted in the development of three schools of interpretation, which are not necessarily

37. Zenon Bankowski et al., *On Method and Methodology*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 9, 13 (D. Neil MacCormack & Robert S. Summers eds., 1991).

38. Bitti, *supra* note 5, at 426.

39. Vienna Convention on the Law of Treaties art. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. *See* Situation in the DRC, Case No. ICC-01-04-168, Judgment on the Prosecutor's Application for Extraordinary Review, ¶¶ 33-34 (July 13, 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01806.PDF; Prosecutor v. Katanga, Case No. ICC-01/04-01/07-521, Judgment on the Appeal, ¶ 16 (May 27, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_03078.PDF [https://perma.cc/NLK3-FWS7].

40. It is recognized that Articles 31 and 32 of the VCLT are part of customary international law relating to the interpretation of treaties. *See* AUST, *supra* note 11, at 11; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L COMP. L. Q. 279, 293 (2005).

mutually exclusive.[41] These three interpretive approaches of word in a treaty are: the textual approach, the drafter's intent approach, and the object and purpose approach.[42] While the strict hierarchical nature for the determination of applicable law set out in Article 21 would cast doubt on the use of provisions of any treaty, such as the VCLT, at stage one of the interpretative process. Hochmayr offers an explanation to such a concern which is compelling. He notes that as the Rome Statute does not contain a set of systematic rules for the interpretation of the meaning of its own words, Article 21(1)(b) can be used to apply applicable treaties to determine such meanings.[43] The VCLT, as the preeminent interpretative treaty, could be utilized by the ICC for that purpose. Hochmayr also correctly argues that as the rules of interpretation in the VCLT are also a part of customary international law, they would also be considered 'principles and rules of international law' as set out in Article 21(1)(b) of the Rome Statute.[44]

The ICC has, for the most part, applied the textual approach to the interpretation of the words of the Rome Statute.[45] Powderly has argued that this approach to Article 21 "conceives of the judicial function as a mechanical and (crucially) manageable process in which the text of the statute is omniscient."[46] Indeed, the Court has jealously guarded the mandate given to it by the framers of the Rome Statute as set out in Article 21 to confine any analysis of the applicable law principally to stage one of the three stage process to determine the meaning of the various provisions.[47] It is recognized that in a few decisions the ICC has adopted a more expansive approach to the words in the Statute, Elements of Crime, and the Rules. In the 2011 decision of the *Prosecutor v. Thomas*

41. LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 43 (2014). *See also* Prosecutor v. Gombo, Case No. ICC-01-05/01/08-3343, Trial Chamber III Judgment, ¶ 77 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [https://perma.cc/WH2U-GNRP] (agreeing with the Trial Chamber II's approach of applying the provisional elements of ordinary meaning, context, object, and purpose, together and at the same time, instead of in an order or individually).

42. GROVER, *supra* note 41.

43. Hochmayr, *supra* note 29, at 667.

44. *Id. See* Prosecutor v. Gombo, Case No. ICC-01-05/01/08-3343, Trial Chamber III Judgment, ¶ 76 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [https://perma.cc/6B5M-M7SJ].

45. *See, e.g.*, Situation in the DRC, Case No. ICC-01-04-168, Judgment on the Prosecutor's Application for Extraordinary Review (July 13, 2006), https://www.legal-tools.org/doc/a60023/pdf/ [https://perma.cc/8AJQ-LZU8]; Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_ 05172.PDF; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-1486, Judgement on the Appeal of the Prosecutor (Oct. 21, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05884.PDF [https://perma.cc/8R8G-NXN8], among others.

46. Powderly, *supra* note 5, at 447.

47. Hochmayr, *supra* note 29, at 662.

Lubanga Dyilo, the majority concluded that it had inherent authority to change its evidentiary rulings after they had been made, referencing in part Article 64 (2) of the Rome Statute (fairness of the trial), while also referencing decisions of the ad hoc tribunals to support its position.[48] And, in the *Decision on the Confirmation of Charges in Prosecutor v. Lubanga Dyilo*, the Pre-Trial Chamber effectively ignored the provisions of Article 21(1) of the Rome Statute, adopting the control of the crime theory in relation to co-perpetrators under Article 25 of the Statute.[49] No such compliance occurred in that case. Bitti notes a few other cases in which the Court has been willing to stretch its analysis beyond the strict requirements of Article 21.[50] However, there is no evidence of any attempt by the Court to systematically circumvent the strict textual interpretation that it has traditionally applied in interpreting the words of the Rome Statute, the Elements of Crimes, or the Rules. Indeed, in a more recent unnamed judgment, Judge Morrison essentially refused to consider the interpretation provide by the *ad hoc* tribunals that concluded that seizure of assets must relate to assets obtained by the crimes committed.[51] Judge Morrison follows the dictates of Article 21(1)(a), analyzed the words of the Statute and the Rules, and concluded that assets subject to seizure do not have to be related to the crimes committed in order to be seized.[52]

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48. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2705, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ¶ 15 (Mar. 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_03026.PDF [https://perma.cc/2C58-7QHW]. The minority took the established approach as outlined in Article 21(1)(a), focusing only on the words of the Rome Statute and Rules of Procedure and Evidence to reach the same conclusion. See Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2707, Separate Opinion of Judge Blattmann to the Decision on the defense request to reconsider the "Order on numbering of evidence" of 12 May 2010 (Mar. 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_03071.PDF [https://perma.cc/P9QA-AYLG].

49. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF [https://perma.cc/3EQE-Q7GV]. *See also* Powderly, *supra* note 5, at 467–68; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute, ¶ 1 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF [https://perma.cc/UWM5-KL7V]. Judge Fulford in dissent specifically stated that the acceptance of this theory did not accord with the interpretative structure of Article 21. *Id.* ¶¶ 6–12. He notes that in order to consider domestic law sources, compliance must be made with Article 21(1)(c) of the Rome Statute. *Id.* ¶ 10.

50. *See* Bitti, *supra* note 5, at 415–21.

51. Prosecutor v. [Redacted], Case No. ICC-ACRed-01/16, Judgment on the Appeal of the Prosecutor Against the Decision of [Redacted], ¶¶ 5–7 (Feb. 15, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_01145.PDF [https://perma.cc/Z7UH-3SQ9].

52. *Id.* ¶¶ 62–63; See also other examples of such stricter interpretation of the process for interpretation in Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-277, Decision on Prosecution's Application for Preservation of Evidence (July 27, 2015), https://www.icc-

The Court has also recognized, albeit with some apparent caution, the application of Article 31(3)(c) of the VCLT in the interpretative process.[53] Styled by McLachlan as the 'neglected son' of treaty interpretation, Article 31(3)(c) has received renewed life following its resurrection in the case of *Case Concerning Oil Platforms*[54] where it was recognized as an important interpretative tool to be used by a court in any interpretative process.[55] Article 31(3)(c) references the use of "any relevant rules of international law applicable in the relations between the parties" as potential guides to interpretation to be taken into account in the interpretative process.[56] This would include custom, general principles of international law, and where applicable, other treaties.[57]

However, the Court was also quick to state that it must not use the concept of treaty interpretation to replace applicable law.[58] This again inputs a word of caution so that the court does not exceed the parameters of what the framers of the Statute envisioned.

Bitti and Hockmayr both take the position that the Court must be careful not to ignore the words of the Rome Statute, as in their view the intention of the drafters should be given priority.[59] Powderly takes a more liberal approach, arguing that the Court needs to remove what he calls the "corseting of the interpretative function" of the Court.[60] While it is legitimate for the ICC to utilize the provisions of Article 31(3)(c) in its interpretative process, it should not expand its interpretative efforts beyond Article 21(1)(a) of the Rome Statute and Articles 31 of the VCLT in order to fulfill its interpretative function, as it has done in some cases.[61] To do so would be to ignore the intent of the framers of the Rome Statute in setting out this strict hierarchical structure for the determination of applicable law. This is not fatal to the determination of sentencing principles at the ICC. The Court need not stray outside the words of the

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cpi.int/CourtRecords/CR2016_02356.PDF [https://perma.cc/LWW6-MF82] (interpreting the language of Article 56(1)(a) Rome Statute); Prosecutor v. Gombo, *supra* note 44 (strictly interpreting the phrase, "as a result of" in Article 28(a) of the Rome Statute).

53. VCLT, *supra* note 39, art. 31(3)(c).

54. *See* Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6).

55. McLachlan, *supra* note 40, at 289.

56. VCLT, *supra* note 39, art. 31(3)(c); GROVER, *supra* note 41, at 61.

57. McLachlan, *supra* note 40, at 290. In the earlier decision of Prosecutor v. Ruto, the Trial Chamber also recognized the influence of Article 31(3)(c) in the interpretative process. Prosecutor v. Ruto, Case No. ICC-01/09-01/11-777, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 102 (June 18, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_04536.PDF [https://perma.cc/TP6Q-ENHT]. However, the court was not willing to subsume the authority of Article 21 within the broader interpretation of Article 31(3)(c) of the VCLT. Rather, it wished to preserve the hierarchical structure of Article 21.

58. Iran v. U.S., 2003 I.C.J. 182, ¶ 41.

59. Bitti, *supra* note 5, at 443; Hochmayr, *supra* note 29, at 462–63.

60. Powderly, *supra* note 5, at 444.

61. *See* Bitti, *supra* note 5, at 415–21.

Statute, and utilize inventive sources in the interpretative process, as if this was the only way principles of sentencing can be applied at the sentencing phase of the adjudicative process. While there are recognized gaps in the Statute and Rules with respect to the justifications for sentencing, the Court can follow stages two and three of Article 21 to determine what justifications should apply.

B. *The Attempt to Apply a Textual Approach to Sentencing at the ICC*

The first two decisions of the ICC on sentencing simply recite some of the words of Preamble, the words of Article 78 of the Statute and the words of Rule 145 and then look at the aggravating and mitigating factors and impose what was considered the appropriate sentence.[62] The focus of the sentencing decision is that of proportionality. The appeal decision that followed the sentencing decision outlined the provisions of the Statute and Rules that apply to sentencing and stated that together with the Preamble to the Statue, the Statue and Rules "establish a comprehensive scheme for the determination and imposition of a sentence."[63] The Appeals Chamber stated further what they must do.

> The Appeals Chamber considers that the above provisions indicate that, in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors it considers relevant. Therefore, the Trial Chamber's determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person.[64]

Proportionality is measured by the degree of harm caused by the crime coupled with the culpability of the perpetrator and is reflected in the length of sentence imposed.[65] The Appeals Chamber recognized that the factors set out in Article 78 of the Rome Statute combined with the factors annunciated in Rule 145 of the Rules of Evidence and Procedure are the factors for consideration in this proportionality exercise.[66] The Appeals

62. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence (July 10, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF [https://perma.cc/989H-LF7D] (The Trial Chamber issued its sentencing decision.); Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-3122 A 4 A 6, Judgment on the Appeals of the Prosecutor and Defendant, ¶ 25 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09849.PDF [https://perma.cc/NEE9-U44F] (The Appeals Chamber issued an appeal decision in response to appeals filed by both the Prosecutor and the Defendant, Mr. Dyilo.).

63. Prosecutor v. Dyilo, Case No. ICC -01/04-01/06-3122 A 4 A 6, Judgment on the Appeals of the Prosecutor and Mr. Dyilo, ¶ 32 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09849.PDF [https://perma.cc/DNS3-77FF].

64. *Id.* ¶ 34.

65. *Id.*

66. *Id.*

Chamber declined to determine how the factors in the two sections should interact to reach the sentencing conclusion.[67] The Appeals Chamber analyzes the Trial Chambers' decision on the sentence imposed based on the analysis of the various aggravating and mitigating factors considered by the Trial Chamber.[68] It concludes no error on the part of the Trial Chamber in the imposition of the sentence.[69] No attempt is made by either the Trial Chamber or the Appeals Chamber to explain the purpose of the sentencing process, or the principles that should apply to the sentencing process.

Commencing with the third sentencing decision of *Prosecutor v. Germain Katanga*,[70] the ICC imported into the sentencing decisions certain principles which were to apply at the sentencing stage.[71] The analysis used to adopt such principles is limited, if not non-existent, and does not comply with the mandatory provisions of Article 21. The Court concludes that the role of sentencing is to express society's condemnation of the act and the actor, deterrence, and to a lesser extent, rehabilitation.[72] The Court finds no justification for the first and third criteria within the wording of the Rome Statute and makes no effort to justify its use through an analysis of the words of the statute. The Court references the Preamble to the Rome Statute to justify the use of deterrence as a justification for such sentences.[73] It quotes a portion only of the Preamble to justify. It states:

> . . . in accordance with the Preamble, "the most serious crimes of concern to the international community as a whole must not go unpunished" and State parties are "determined to put an end to impunity for the perpetrators of [the most serious] crimes and thus contribute to the prevention of such crimes."[74]

Contrary to the Court's conclusion, King and LaRosa[75] have argued that the wording of the preamble supports the goal of retribution at the ICC. Schabas suggests something different. It is his position that the section of the Preamble which states that one of the purposes of the ICC

67. *Id.* ¶ 66.

68. *Id.*

69. Prosecutor v. Dyilo, *supra* note 62, ¶ 32.

70. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3484, Decision on Sentence (May 23, 2014).

71. *Id.* ¶¶ 25–35.

72. *Id.* ¶ 38.

73. *Id.* ¶ 37.

74. *Id.*

75. Faiza P King & Anne-Marie La Rosa, *Penalties Under the ICC Statute, in* 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 311, 312–13 (Flavia Lattanzi & William Schabas eds., 1999)

is to put an end to impunity for those persons who commit such heinous crimes will 'contribute to the prevention of such crimes' signals at least that the existence of the Court will have some deterrent effect.[76] However, Schabas is quick to recognize that such a position set out in the Preamble is far from conclusive that the Statute recognizes that deterrence is an aim or purpose of sentencing at the ICC.[77] In some ways the Court appears to follow the position put forward by Schabas in that it concludes that the punitive aspect of the sentence as a deterrent principle is not in the length of the sentence to be imposed but rather in its "inevitability."[78]

The Courts' position on sentencing continues in a similar mode for the other sentencing cases it has decided. In *Prosecutor v. Jean-Pierre Bemba Gombo*[79] the Trial Chamber at paragraph 10 of its decision repeats the comments made in the *Katanga* decision that the wording of the Preamble indicates that the primary objectives of punishment at the ICC is both retribution and deterrence.[80] Rehabilitation is to play a lesser role in the sentencing process.[81] However, no analysis is offered as to why rehabilitation is a principle for consideration in sentencing. In *Prosecutor v. Ahmad Al Faqi Al Mahdi*[82] the same reasoning is used to adopt the principles of retribution, deterrence and rehabilitation.[83]

However, in the Trial Chamber sentencing decision of 22 March 2017 of *Prosecutor v. Jean-Pierre Bemba Gombo et al.*[84] the Trial Chamber limits the purpose of sentencing to retribution and deterrence, to the exclusion of rehabilitation.[85] It is possible that as the Trial Chamber was

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76. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 314 (2007).

77. *Id.*

78. Prosecutor v Katanga, *supra* note 70, ¶ 38.

79. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3399, Decision on Sentence (June 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF [https://perma.cc/2DGX-TUGH].

80. *Id.* ¶ 10; Mr. Gombo was subsequently acquitted of all charges by the Appeals Chamber decision of 8 June 2018. *See* Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Red, Judgment on Appeal, ¶ 199 (June 8, 2018).

81. *Id.* ¶ 11.

82. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [https://perma.cc/8V5K-SAXM].

83. *Id.* ¶¶ 66–67.

84. Prosecutor v. Gombo et al., Case No. ICC-01/05-01/13-2123, Decision on Sentence (Mar. 22, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_01420.PDF [https://perma.cc/PZ7C-SJPR].

85. *Id.* ¶ 19. The Trial Chamber, in re-sentencing three of the five individuals following the Appeals Chamber decision on sentencing issues, again states that the two principles of sentence to apply to offenses against the administration of justice are retribution and deterrence. See

dealing with Article 70 crimes–offenses against the administration of justice–the Trial Chamber saw such offenses as not requiring a consideration of a rehabilitative component. However, it does appear incongruous that for the more heinous offenses of war crimes, crimes against humanity and genocide, rehabilitation can be considered as an ancillary factor in sentencing. While the Trial Chamber in this case does follow the textual approach with respect to the purposes of sentencing, it does not do so with respect to the adoption of a sentencing option of a suspended sentence contrary to the clear wording of Article 76 of the Rome Statute.[86] The Appeals Chamber overturned the Trial Chamber's decision on this point, and did so by reference to the textual interpretation of the Rome Statute.[87] The Appeals Chamber was not prepared to go beyond the words of the Statute, and in so doing also followed the provisions of Article 21 of the Rome Statute.[88] The 2019 sentencing decision in *Prosecutor v. Bosco Ntaganda*[89] follows the same approach as the previous trial decisions of *Prosecutor v. Jean-Pierre Bemba Gombo et al.*[90] and *Prosecutor v. Ahmad Al Faqi Al Mahdi.*[91]

The analysis presented above shows two things. The first is that for some purposes of sentencing, the Court is prepared to undertake a very limited and thin textual approach to adopt the purposes of sentence of retribution and deterrence. It is arguable that the words of the Preamble relied on by the Court does not support its position. The second is that when it wishes, the Court abandons a textual approach and simply does not apply any approach in adopting the rehabilitative purpose to sentencing at the ICC. The Court fails to provide any detailed analysis, which can and should be applied to reach the proper conclusion. As will be argued, the provisions of Article 21 does not preclude the ICC from the analytical approach needed to adopt appropriate sentencing principles.

Prosecutor v. Gombo et al., Case No. ICC-01/05-01/13-2312, Decision on Re-Sentencing, ¶¶ 18, 139 (Sept. 17, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04355.PDF [https://perma.cc/XV4S-GBWH].

86. *See* case cited *supra* note 84, ¶¶ 40–41. This aspect of the decision was later overturned by the Appeals Chamber. *See infra* note 87.

87. Prosecutor v. Gombo et al., Case No. ICC-01/05-01/13-2276, Judgment on Appeals, ¶¶ 73–80 (Mar. 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01639.PDF [https://perma.cc/A2Y7-JXJS].

88. *Id.* at ¶ 79

89. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2442, Sentencing Judgment, ¶¶ 9–11 (Nov. 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06674.PDF [https://perma.cc/XQ6V-GLFQ].

90. *See* case cited *supra* note 84, ¶ 19.

91. *See* case cited *supra* note 82, ¶¶ 66–67.

IV. STEP TWO – TREATIES AND THE PRINCIPLES AND RULES OF INTERNATIONAL LAW

A. *Treaties*

Step Two of Article 21 provides no assistance to the Court in determining if it can consider principles of sentences in its sentencing decisions. Step Two is contained in Article 21(1)(b) and focuses on the application of international law to fill any gaps that occur in the application of the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence. This is in keeping with the general thrust of the Rome Statute as a statute dealing with international matters, rather than a focus on domestic matters.[92] The history of the provision, from the first drafts in 1951 to its final formulation as Article 21 of the Rome Statute is reflective of the focus on the application of international law.[93] The concept of treaties, as one of the principal determinants of international law, is not defined in the statute. The VCLT defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[94] The document known as the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations created at the United Nations conference in Vienna, Austria in 1989, recognizes that a treaty may also be concluded between states and international bodies recognized as such by the international community.[95] The use of the term 'treaty' in Article 21 of the Rome Statute will probably encompass both contexts.[96] What is

92. The earliest drafts of a statute for the development of an international criminal court contained a provision dealing with applicable law, but the references were to international law, international criminal law, and 'where appropriate, national law.' See Committee on International Criminal Jurisdiction, *Draft Statute for an International Criminal Court*, 46 AM. J. INT'L L. SUP 1, 1–11 (1952). Quincy Wright, when commenting on the early drafts of the statute, noted that there was always an international focus to the court, because of its international jurisdiction, while recognizing that in some circumstances there may be a need to reference domestic law. See Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 70 (1952).

93. *See* Ida Caracciolo, *Applicable Law*, *in* ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 211, 211 (Flavia Lattanzi and William Schabas eds., 1999).

94. VCLT, *supra* note 39, art. 2(1)(a).

95. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, art. 2, U.N. Doc. A/CONF.129/15 (Mar. 21, 1986). Article 4 of the Rome Statute does permit the ICC, as an international body, to enter into agreements with other organizations and with states with respect to matters under the jurisdiction of the ICC. *See* Rome Statute, *supra* note 1, art. 4.

96. Vladimir-Djuro Degan has argued that as 'treaties' only bind states or other international persons who agree to be bound by them, it is really those treaty provisions that have

of greater concern is the qualifications placed on the word 'treaties.' The entire subsection is qualified by the phrase 'where appropriate' and the term 'treaties' itself is qualified by the term 'applicable.'[97] Thus in order to even consider treaties, it first must be appropriate to do so, and secondly the treaties of concern must be applicable to the issue of law with which the ICC is grappling. As the focus here is on sentencing, the appropriateness of the treaties for consideration would be those that have any impact on sentencing in international criminal law. Whether a particular treaty is applicable will depend on the sentencing provision of concern at the time of its consideration. In the context of the gaps in the provisions on sentencing in the Rome Statute, any consideration of treaties must relate to the deficiencies noted, in this case the justifications for the imposition of a sentence.

Those instruments for consideration include the Universal Declaration of Human Rights,[98] the European Convention on Human Rights,[99] the International Covenant on Civil and Political Rights,[100] the American Convention on Human Rights,[101] the African Charter on Human and Peoples' Rights,[102] the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,[103] and the Charter of the Fundamental Rights of the European Union.[104] A review of these instruments suggests that Article 16(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[105]

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become part of customary international law that would be applicable as sources of international criminal law. *See* Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT'L L. 45, 50 (2005). Robert Perrin has also recognized the problem of the application of international law treaties and principles to international criminal law, as these treaties and principles relate to states and state relations and thus may not be adaptable to matters relating to individuals. *See* Robert Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367, 376 (2008). However, the term exists, and some meaning must be provided to it.

97. *See* Rome Statute, *supra* note 1, art. 21. There had been some discussion at the preparatory committee stage between the use of the word 'relevant' to qualify treaty, and the use of the word 'applicable.' *See* Caracciolo, *supra* note 93, at 214. The word 'applicable' was finally chosen, but the reasons for the adoption of that word appears to have been lost in the discussion. *See id.*

98. G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948).

99. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

100. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

101. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

102. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

103. Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

104. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2.

105. Convention Against Torture, *supra* note 103, at 116.

Article 5(2) of the American Convention on Human Rights,[106] and Article 5 of the African Charter on Human and Peoples Rights[107] each state that no one is to be subject to "cruel, inhuman or degrading treatment or punishment." While these provisions do not directly assist the Court in the determination of which justifications of punishment are applicable to sentencing at the ICC, they do require the Court to consider in its choice of justifications that their application does not lead to the imposition of any sentence that is cruel, inhuman or degrading.

Article 49(3) of the Charter of Fundamental Rights of the European Union[108] may also have some impact on the selection by the Court of justifications of punishment. That subsection requires that the "severity of a sentence must not be disproportionate to the criminal offense."[109] While this provision is arguably more applicable to the determination of the quantum of sentence, its general requirement could also influence the selection of the justifications of punishment by the ICC. Any justification selected must not be one that could, by its selection alone, lead to the imposition of a sentence which is disproportionate to the offense committed.

Finally, Article 10 of the International Covenant on Civil and Political Rights may also have some indirect application to the sentencing issues at the ICC.[110] In considering the appropriate sentence to be imposed, the ICC would have to be certain that any justifications of punishment must treat all persons to be sentenced with humanity, and must be cognizant that in imposing the appropriate sentence there must exist sufficient flexibility to allow those sentenced to avail of rehabilitative and reformative opportunities.[111] This would not in any way deflect from the primary principles that should be applied at the sentencing stage, but only to recognize that once sentenced, all should be treated in accordance with the requirements of Article 10 of the ICCPR. The Court can sentence for the overriding reasons of deterrence, denunciation or any other

106. American Convention on Human Rights, *supra* note 101, at 146.

107. African Charter on Human and Peoples' Rights, *supra* note 102, at 247.

108. Charter of Fundamental Rights of the European Union, *supra* note 104, art. 49(3).

109. *Id.*

110. ICCPR, *supra* note 98, at 176. Article 10 of the Covenant states in part:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2. [. . . .]
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

111. *See Id.*

appropriate principle. Yet, once incarcerated, the individual can be given access to all programming that will assist in the person's reformation and social rehabilitation without detracting from the principles of sentence.[112]

These human rights instruments would also come into play with the application of Article 21(3) of the Rome Statute. That provision requires that the application and interpretation of law "must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[113] The ICC has, in several cases, recognized that both the interpretation and the application of the law it is to apply must accord with the provisions of Article 21(3) of the Rome Statute.[114]

B. *Principles and Rules of International Law*

There has been some debate in the literature with respect to the meaning to be ascribed to the Rome Statute, Article 21(1)(b) phrase, 'the principles and rules of international law.'[115] Margaret de Guzman has suggested that the 'rules of international law' would traditionally be derived from customary international law.[116] However she is unsure whether the phrase 'principles of international law' refers specifically to customary law, general principles of law derived from domestic law or if it refers to principles derived from 'the international legal conscience, the nature of the international community or natural law'.[117] Ida Caracciolo has concluded that the phrase means customary international law, inclusive of general principles of law as referenced in Article 38 of the Statute of the International Criminal Court.[118] Alain Pellet is emphatic in his view that the phrase principles and rules of international law 'refers

112. ROISIN MULGREW, TOWARDS THE DEVELOPMENT OF THE INTERNATIONAL PENAL SYSTEM, 214–16 (2013). She has argued this very point and has advocated for an international penal system that focuses on rehabilitation/resocialization as its primary goal. *Id.* She recognizes that this is distinct from the justifications for the imposition of a sentence, which could include retribution and deterrence as its justification. *Id.*

113. *See* sources cited *supra* note 33.

114. See the excellent analysis of the influence of Article 21(3) of the Rome Statute in the decisions of the ICC discussed in Bitti, *supra* note 5, at 433–36; Powderly, *supra* note 5, at 484–89.

115. *See* Rome Statute, *supra* note 1, art. 21(1)(c); de Guzman, *supra* note 32, at 707–08; Alain Pellet, *Applicable Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1051 (Antonio Cassese et al. eds., 2001) [hereinafter Pellet, *Applicable Law*]; Alain Pellet, *Revisiting the Sources of Applicable Law before the ICC*, in ARCS OF GLOBAL JUSTICE 227 (Margaret M. de Guzman and Diane Marie Amann eds., 2018) [hereinafter Pellet, *Revisiting Applicable Law*]; Caracciolo, *supra* note 93, at 225–27.

116. de Guzman, *supra* note 32, at 707–08.

117. *Id.* at 707.

118. Caracciolo, *supra* note 93, at 227.

exclusively, to customary international law. . . .'[119] Vladimir-Djuro Degan is also of the view that it refers to customary international law.[120] Gudrun Hochmayr, using a more analytical approach, also concludes that '. . . subparagraph (b) of Article 21(1) of the ICC Statute encompass customary international law, but not general principles of law.'[121]

The phrase, in a modified form, appeared in the 1994 Draft Statute of the International Criminal Court compiled by the International Law Commission.[122] It read as follows:

> Article 33
>
> The Court shall apply
>
> . . . .
>
> Applicable treaties and the principles and rules of general international law;

The commentary to the Draft Statute stated:

> The expression "principles and rules" of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.[123]

This wording did not change until the July 11, 1998 Draft of the Report of the Working Group on Applicable Law.[124] Subsection (b) of the article now reads, "In the second place, where appropriate, applicable treaties and the principles and rules of international law [...]."[125] While the word 'general' was removed, a footnote to the change noted that, "It is understood that the term 'international law' means public international

119. Pellet, *Applicable Law*, *supra* note 115, at 1071. In his 2018 update to the original 2001 article, Pellet uses the same phrasing. Pellet, *Applicable Law*, *supra* note 115, at 240.

120. Degan, *supra* note 96, at 80.

121. Hochmayr, *supra* note 29, at 669. The analysis used by Hochmayr relies principally on the fact that in the various attempts at drafting Article 21, the final changes for the entirety of Article 21(1) were made to Article 21(1)(c), in which the general principles of law were included. *Id.* He argues that Article 21(1)(b) remained unchanged. *Id.*

122. Rep. of the Comm'n to the General Assembly on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, [1994] 2 Y.B. of the Int'l L. Comm'n 26-67, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), U.N. Sales No. E.96.V.2 (Part 2).

123. *Id.* at 51.

124. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, *Report of the Working Group on Applicable Law*, U.N. Doc. A/CONF.183/C.1/WGAL/L.2 (July 11, 1998).

125. *Id.* at 2.

law."[126] Although the explanatory note suggests that the phrase was intended to be broad in scope, in view of the comments of noted writers and in view of the wording of Article 21(1)(c), the better position is that the subsection refers to customary international law.

Pellet argues that the use of the words "rules and principles" together is nothing more than a verbal tick, while Caracciolo is much more expansive in her view and concludes it means customary international law, which would also include those principles of international law that have now been accepted as part of customary international law.[127] The ICC in the decision of *Prosecutor v. Jean Pierre Bemba Gombo* concluded that "principles and rules of international law are generally accepted to refer to customary international law."[128] While the Court did not reference any authority to support its position, or go into any analysis, its position is in keeping with the authoritative writers on the subject.

It is important to recognize, however, that while the source of international law may be customary international law,[129] it is the application of that law through the rules and principles developed through that source which is the focus of Article 21(1)(b). Raimondo has recognized this point, noting that

> . . . international courts and tribunals do not apply sources of international law, but the rules and principles derived there from. These rules and principles come into existence in different ways. These ways are the so-called formal sources of international law, notwithstanding that the formation of international law is rather deformalized. . . . Despite their

126. *Id.* at 2, n.2.

127. *See* Pellet, *Applicable Law*, *supra* note 115, at 1071–72; *See* Caracciolo, *supra* note 93, at 227. It is notable that Pellet does not appear to use the phrase "verbal tick" in his 2008 article.

128. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3343, Trial Chamber III Judgment, ¶ 71 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [https://perma.cc/5KEZ-8RWF].

129. Customary international law is generally understood as that which has been accepted by nations of the world. The two criteria associated with the determination whether a particular rule has become part of customary international law are that, first, there is a consistent practice among states that endures over an extended period of time, and second, that such practice is so recognized by states as constituting a practice by which they are bound (*opinion juris*). *See* BRIAN D LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATION 6 (2010). However, there has been much debate in recent years on the effectiveness and validity of these two criteria. *See* Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005); Yudan Tan, *The Identification of Customary Rules in International Criminal Law*, 34(2) UTRECHT J. INT'L EUR. L. 92 (2018). Yet to date they still remain the acknowledged criteria by which customary rules become a part of international law.

> deformalized creation, general principles of law (and custom) are usually studied in the context of the formal sources of international law. This is so because the rules and principles derived therefrom fulfill normative functions in international law.[130]

While the sources are not the focus of Article 21(1)(b), it still has to be determined whether the principles and rules of international law flow from customary international law before they can be applied by the ICC. Otherwise they do not have the authority of law as recognized in international law. In looking at the matter in that light, then customary international law should be considered in determining if there are rules and principles of international law which can be considered applicable law to be relevant to any matter of concern for the Court.

Because international criminal law is still very much in its infancy, there is limited recognition of the development of customary rules with respect to many aspects of international criminal law.[131] This is particularly so in sentencing in international criminal law. The International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have, in addition to the statutory requirements that the Court consider the gravity of the offense and the individual circumstances of the offender,[132] followed certain principles in determining sentences. These principles include retribution, denunciation, deterrence, rehabilitation, for the ICTY general affirmative prevention, and for the SCSL protection of the norms and values of the international community.[133] Although they may have some persuasive value, their use by these tribunals does not make them principles and rules of customary international law. The two criteria of *opinion juris* and state practice are not established by the sentencing practice of these

130. FABIAN RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 36 (2008).

131. *See* Tan, *supra* note 129, at 93–97. There has begun to develop some recognition of the parameters of the three basic offenses that constitute offenses in international criminal law.

132. U.N. Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia art. 24(2) (May 25, 1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [https://perma.cc/4XB7-NU25] [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 23(2), S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Statute of the Special Court for Sierra Leone art. 19(2), January 16, 2002, 2178 U.N.T.S. 137, 151 [hereinafter SCSL Statute].

133. *See* Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Chamber Judgment, ¶ 775 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009), https://www.legal-tools.org/doc/770028/pdf [https://perma.cc/3R65-W8N2]; Prosecutor v. Fofana, Case No. SCSL-04-14-T-796, Judgment on the Sentencing, ¶ 30 (Oct. 9, 2007), http://www.rscsl.org/Documents/Decisions/CDF/796/SCSL-04-14-T-796.pdf [https://perma.cc/6NDJ-RZ2Q].

international tribunals. Indeed, none of the ad hoc tribunals considering genocide, crimes against humanity or war crimes have suggested such is the case.[134]

V. STEP THREE – GENERAL PRINCIPLES OF LAW DERIVED BY THE COURT FROM NATIONAL LAWS OF LEGAL SYSTEMS OF THE WORLD

The concept of 'general principles of law' as constituting part of the law to apply in international disputes has been utilized for a long time by international courts and tribunals to fill legal gaps, interpret legal rules, and to substantiate legal reasoning.[135] The phrase appeared in statutory form in the Statute of the Permanent Court of International Justice (PCIJ) as constituting one of the sources of international law.[136] The wording was repeated in Section 38(1)(c) of the Statute of the International Court of Justice.[137] It states that in applying international law the Court shall apply "general principles of law recognized by civilized nations."[138] There has been a long and unresolved debate whether these principles, now recognized in international law, are considered part of customary law, or whether they have an existence independent of the rules of customary international law.[139] Cheng argues that they are distinct, noting in particular that they only require recognition and not practice, unlike customary international law.[140] The proponent of the wording of Article 38(3) of the Statute of the Permanent Court of International Justice, Lord Phillimore, originally intended that 'the general principles of law as recognized by civilized nations' meant legal maxims that had been accepted *in foro domestico.*[141] While some particular legal maxims have received recognition in decisions of international courts as constituting principles of international law, such principles are not confined to such maxims.[142] Both Cheng and Raimondo provide examples of principles of law that extended beyond legal maxims that have been recognized as

134. The SCSL did not have jurisdiction to consider the crime of genocide, but only crimes against humanity and war crimes. *See* SCSL Statute, *supra* note 132, arts. 3–4.

135. RAIMONDO, *supra* note 130, at 7.

136. Statute of the Permanent Court of International Justice, 1940 P.C.I.J. (ser. D) No.1, art. 38(3) at 22, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_D/D_01_4e_edition.pdf [hereinafter PCIJ Statute].

137. *See* ICJ Statute, *supra* note 2, art. 38(1)(c).

138. *Id.*

139. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 23–24 (Cambridge Univ. Press, 1953); RAIMONDO, *supra* note 130, at 36–42.

140. *See* PCIJ Statute, *supra* note 136; CHENG, *supra* note 139, at 24.

141. *Id.* RAIMONDO, *supra* note 130, at 19; *see also* Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT'L L. 33, 47–50 (1995) (arguing that "general principles of law" are derived "from the shared legal conscience (*Rechtsbewusstsein*) of the peoples of the world." Simma states that Verdross argued that these general principles of law were anchored in natural law).

142.

principles of law adopted into international law. In particular, Raimondo includes the principles that "courts must be established by law,"[143] "no appeal lies unless conferred by statute,"[144] "the definition of the crime of rape as a general principle of law"[145] and "the impartiality of the judiciary."[146]

Some writers have opined that what is meant by 'general principles of law' in Article 38(3)(c) of the Statute of the ICJ differs from what is meant by the 'general principles of law' in Article 21(1)(c) of the Rome Statute. Schabas implies that the use of the phrase 'general principles of law' in Article 21(1)(c) is not in reference to one of the primary sources of international law, but rather references a process, using a comparative criminal law methodology.[147] He argues that that "the better interpretation is to treat Article 21(1)(c) as an invitation to consult comparative criminal law as a subsidiary source of norms."[148] Powderly too sees that the subsection invites a comparative criminal law analysis. He is more emphatic in his position on the substance of Article 21(1)(c).[149] He states that the general principles of law falling under Article 21(1)(c) are 'not related' to the general principles of law referenced in Article 38(1)(c) of the Statute of the ICJ.[150] While it seems clear that the process envisioned by Article 21(1)(c) invites a comparative criminal law approach to the determination of 'principles of law' accepted by major legal systems of the world, that should not preclude the acceptance of legal principles that have been acknowledged to exist in accordance with Article 38(1)(c) of the Statute of the ICJ.

A comparative law approach may indeed determine that such principles are accepted by the major legal systems of the world. Indeed, Raimondo proposes such an approach to be used to determine if there are principles of law under Article 38(1)(c).[151] It seems, however, only if

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Both Cheng and Raimondo provides numerous examples of the recognition by courts of principles such as *audi alterim partem*, CHENG, *supra* note 139, at 296; *nemo jurex in sua propria causa*, CHENG, *supra* note 139, at 258; *res judicata*, CHENG, *supra* note 139, at 326, RAIMONDO, *supra* note 130, at 104 &146; *nullum crimen nulla poena sine lege*, RAIMONDO, *supra* note 130, at 105–09; *nulla poena sine culpa*, CHENG, *supra* note 139, at 208–12; RAIMONDO, *supra* note 130, at 145; *lex mitior*, RAIMONDO, *supra* note 130, at 140; *favour rei*, RAIMONDO, *supra* note 130, at 140.

143. RAIMONDO, *supra* note 130, at 87–90.

144. *Id.* at 91–93.

145. *Id.* at 133–35, 12–15.

146. *Id.* at 128–30. It should be noted that Raimondo analyzes twenty-nine such examples in his study—the ones noted are but examples of the ones he analyzes.

147. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT 391 (Cambridge Univ. Press, 2010).

148. *Id.* at 393.

149. *See* Powderly, *supra* note 5, at 482.

150. *Id.* at 482–83.

151. RAIMONDO, *supra* note 130, at 45–46.

Schabas and Powderly are confining the concept of 'general principles of law' to their historical roots as proposed by Lord Phillimore, would their position be justified. It is proposed that the better position is that as put forward by Raimondo, that through a comparative law analysis, general principles of law derived from national laws of legal systems of the world can be discovered which could include those principles of law recognized through Article 38(1)(c) of the Statute of the ICJ.

Raimondo analyzes the provisions of Article 21 of the Rome Statute, and argues that the purposes of Article 21(1)(c) is primarily to fill the gaps that exist if the other two approaches to determining the applicable law do not yield results.[152] These principles are ones that are to be determined by the ICC from its analysis of the national laws of the major legal systems of the world. In doing so the plain wording of the section establishes that what is to be considered are not the laws of any particular jurisdiction but rather 'general principles of law' that are derived from a review of the legal systems of the world. This suggests a need for a comparative law analysis utilizing an extrapolation from the major legal systems. Raimondo has described this approach as having a vertical and a horizontal component.[153] The vertical component consists of abstracting these principles from national legal systems.[154] The horizontal component consists of verifying that the majority of nations recognize the legal principle involved.[155] The latter involves a comparative law analysis of the various legal systems to make that determination.[156]

The wording of Article 21(1)(c) refers to national laws of "legal systems of the world." There is no clear guidance from the statute itself as to which legal systems should be the subject of comparison, and indeed how many would suffice. Pellet suggests that the legal systems of the world would include those of the common law, civil law, and "perhaps" Islamic law.[157] The tradition of the ICTY has been to review sufficient jurisdictions to satisfy the presiding court of the existence or otherwise of a particular tradition.[158] The approach of the ICTY has been considered somewhat weak in its application of the appropriate legal systems of the world to provide the basis for a conclusion that there exists either

152. *Id.* at 149–50.

153. *Id.* at 45.

154. *Id.* at 46–50.

155. *Id.* at 50–57.

156. *Id.* Pellet describes the approach in similar terms, although his approach has three steps to it. *See* Pellet, *Applicable Law*, *supra* note 115, at 1073–76.

157. *See* Pellet, *Applicable Law*, *supra* note 115, at 1073–74.

158. *See* Perrin, *supra* note 96, at 373.

customary international law or principles of law that could be relied on by the courts to fill the lacunae in the existing law.[159]

The ICC implicitly addressed the approach to be undertaken in its use of Article 21(1)(c) in one of its earliest decisions in an appeal of a pre-trial matter. The issue was the power of review on appeal where the Rome Statute itself did not specifically address the right to appeal Pre-Trial Chamber decisions on ancillary matters.[160] The Appeals Chamber addressed the approach the Prosecutor had proposed to deal with this lacuna through the use of Article 21(1)(c). The Court concluded that there was no principle of law emanating from the legal systems of the world that supported the prosecution's position. The importance of the decision, however, is not in its particular finding but in its process and method of analysis. Although the Court did not specifically adopt the conclusion proposed by the prosecutor, by applying that approach and dismissing the prosecutor's argument, the Court has implicitly acknowledged that this approach is a possible way to analyze a case involving an Article 21(1)(c) analysis. However, it appears that the court did take a rather strict approach, suggesting that all countries of a particular tradition should be canvassed. At paragraph 27 Judge Pikis for the court stated with reference to the practice of states of the Romano-Germanic tradition. The Appeals Chamber cannot confirm that legislation of the countries enumerated above reflects a uniform rule finding application in all States having the Romano-Germanic system of justice.[161]

If that is the approach to be followed, then the reference to all states of the Romano-Germanic tradition sets an almost impossible standard that has to be met before the Court could conclude there are general

159. *See* Perrin, *supra* note 96, at 382, 399. Perrin has also postulated that the approach may represent a departure from the stricter approach envisaged through the application of Article 38(1)(c) of the ICJ, towards a less stringent and more discretionary position of the modern international criminal law tribunal. This more liberal discretionary position, taken especially by the judges of the ICTY is both a reflection of the recognition by the judges of that tribunal that as an emerging branch of international law, international criminal law must take some latitude in responding to the atrocities with which it is mandated to consider, while at the same time providing some principled approach to filling the gaps with the existing legislation it must interpret. Perrin suggests it is a struggle between concerns for the application of humanitarian law and the need to be fair to the accused. *See also* Degan, *supra* note 96, at 375–77; Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), https://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf [https://perma.cc/BL94-YUJT].

160. Situation in the DRC, Case No. ICC-01/04-168, Judgment on Prosecutor's Application for Extraordinary Review (July 13, 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF [https://perma.cc/6ZNW-U3EG].

161. *Id.* ¶ 27 (emphasis added).

principles of law that can be recognized.[162] The wording of the Statute itself references "national laws of legal systems of the world," and does not state all legal systems of the world or all national laws of the legal systems analyzed. If one is to apply Articles 31 and 32 of the VCLT to this section, the plain meaning of the words used lead to only one conclusion. That is that reference is to legal systems of the world, and how many depends on the context and the available information with respect to them. As well, "national laws" does not include all national laws, but rather sufficient national laws to be representative of the legal tradition being surveyed. Again, what is sufficient will depend on the issue at hand as well as the availability of the information. This approach is closer to that proposed by the ICTY than that of Judge Pikis. It provides a proper balance between the need to address the serious issues at hand, while providing a degree of fairness to the person charged with the international crime.

The wording of Article 21(1)(c) of the Rome Statute itself will require the Court to determine if there are principles common to national laws of legal systems of the world that relate to sentencing of international crimes. It is important to note that the focus is on principles that relate specifically to sentencing for international crimes. This is because it has been recognized by writers such as Henham,[163] Drumbl,[164] and Sloane[165] and accepted here that the focus of sentencing does depend on context. And, what purposes and principles that apply to sentencing for domestic crimes need not apply to sentencing for crimes recognized in international criminal law.[166] Thus the focus must be on justifications of punishment in the international context.

How many legal systems and how many national systems will suffice for examination is, as has been noted, difficult of determination. A number of jurisdictions of the common law and the civil law traditions have in the past participated in the prosecutions of international crimes utilizing their own domestic legislation or have adopted implementing complementary legislation to that of the Rome Statute. If the ICC is to follow the dictates of Article 21(1)(c), it would at least have to consider

162. However, in the end Judge Pikis does not have to rely on this analysis, as he concludes that there is no lacunae in the legislation and that the wording of the statute itself is determinative of the issue. *See supra* note 160, ¶ 39. There is no necessity to reference Article 21(1)(c) at all to reach a determination in the case. *Id.* ¶ 32.

163. RALPH HENHAM, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS (2005).

164. MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

165. Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007).

166. HENHAM, *supra* note 163; DRUMBL, *supra* note 164; Sloane, *supra* note 165.

what principles relating to sentencing in international criminal law can be derived from certain jurisdictions within major legal systems.

Since the major gap identified in the sentencing provisions of the Rome Statute is the failure to set out within the Statute any justifications of punishment through the adoption of principles of sentencing, the ICC will be required to look at any legislation that has been adopted by at least a sample of countries within these jurisdictions on the issue of international criminal law, as well as any court decisions that might be available from these various countries that pertain to sentencing for these crimes.[167] At a minimum, countries belonging to the common law and civil law traditions should be included in this grouping. In addition, it may be appropriate to consider any country of the Islamic tradition that has addressed sentencing for international crimes.[168]

VI. THE APPROACHES TO SENTENCING FOR INTERNATIONAL CRIMES ADOPTED BY COUNTRIES OF THE MAJOR LEGAL SYSTEMS OF THE WORLD

In accordance with the complementarity principle recognized in Article 17 of the Rome Statute, a number of countries of the common law and civil law traditions have enacted legislation to prosecute and if found guilty, to sentence those individuals within their jurisdiction who have committed genocide, crimes against humanity, or war crimes. A review of the approach to sentencing for international crimes in these statutes enacted by a sample of countries from these common law and civil law traditions establishes that the general principle that the ICC can generate from such an analysis is that 'principles of sentencing' for international crimes are essential to guide the imposition of penalties for those who commit such crimes. Various principles of sentencing are given priority depending on the approach to sentencing adopted by each country. A review of the sentencing approaches for those found guilty of international crimes from the common law tradition—Australia, Canada,

167. *See* RAIMONDO, *supra* note 130, at 48. He also suggested that decrees and resolutions of administrative organs may also be relevant. However, in the area of sentencing in international criminal law, one does not expect to find such decrees or resolutions of administrative organs. Thus, one is limited to the review of the legislative endeavors and the cases decided in that area.

168. *See* John Gibeaut, *Rough Justice: Behind the Scenes with the American Advisors to the Iraqi v. Saddam Hussein Court*, 93 A.B.A. J. 34 (2007); M. Cherif Bassiouni & Michael W. Hanna, *Ceding the Higher Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 CASE W. RSRV. J. INT'L L. 21 (2007). As a result of the Iraq war of 2003, the Iraqi government set up a tribunal to adjudicate cases of war crimes, crimes against humanity, and genocide committed between July 17, 1968 and May 1, 2003. The law setting up the Tribunal was based to a large extent on a draft model statute prepared by Professor Cheriff Bassiouni of DePaul University in the United States. A number of individuals, including Saddam Hussein, were tried and convicted by the Tribunal and sentenced to death. No reasons were provided for the sentence imposed. Because of the influence of the United States in the drafting and the execution of the law surrounding this tribunal, it is difficult to argue such a tribunal was reflective of Islamic law.

and the United Kingdom,[169] and from the civil law tradition—France and Germany,[170] support the existence of this general principle.

A. *Common Law Countries*

At the close of World War II, some countries of the common law tradition commenced prosecutions of individuals accused of committing international crimes. There were three phases to these prosecutions. The first involved those prosecutions undertaken by national jurisdictions at the close of the war. Such prosecutions were undertaken by Military Tribunals against mainly German and Japanese military personnel as violations of the laws of war, as crimes against peace, and as crimes against humanity.[171] The second approach occurred in the 1980's and was a response to a public outcry against the presence in many countries of individuals who had escaped the initial prosecutions in the immediate aftermath of World War II, and who had emigrated and had gained admission to these common law countries.[172] Phase one and two of the

169. The reason these were chosen is because the legislation and past history of these matters is readily available.

170. These countries were chosen for the same reasons as noted for the common law countries. While there had been some suggestion in the literature that reference could also be made to countries of the Islamic tradition, it is noted that to date only Afghanistan, an Islamic State, has adopted the Rome Statute. However, Afghanistan has not adopted complementary legislation to the Rome Statute for the prosecution of international crimes.

171. In addition to the prosecutions pursuant to the jurisdiction given to the IMT and IMTFE, Control Council 10 was used by the Allies in prosecutions against German military and civilian personnel who were in violation of war crimes, crimes against humanity and crimes against peace. Both the British Military authorities and the American authorities conducted prosecutions within their own zones against individuals considered to be violators of these international crimes. Other countries, including Australia, Canada, Belgium, and France, used their own legislation to ground their prosecutions against German military and civilian personnel who had allegedly violated international law.

172. *See* Gillian Triggs, *Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?*, 16 MELB. UNIV. L. REV. 382, 382–83 (1987); W J. Fenrick, *The Prosecution of War Criminals in Canada*, 12 DALHOUSIE L. J. 256, 257 (1989); A. T. Richardson, *War Crimes Act 1991*, 55 MOD. L. REV. 73 (1992).

prosecutions of international crimes by Australia,[173] Canada,[174] and the United Kingdom[175] resulted from the enactment of domestic legislation by each country to authorize such prosecutions either through military courts or domestic courts. Issues of sentence type was addressed in the legislation of each country. In phase one, section 11 of the War Crimes Act 1945 of Australia set out the sentence type available to the court.[176] This included death (by hanging or shooting), imprisonment for life or for a lesser term, or a fine and confiscation of property.[177] A provision with similar penalties was contained in the Canadian legislation,[178] and

173. *See War Crimes Act 1945* (Cth) (Austl.) (authorized the arrest and prosecution of those who had committed war crimes in respect to Australian citizens during World War II). *See also* Triggs, *supra* note 172, at 382; D.C.S. Sissons, *The Australian War Crimes Trials and Investigations 1942-1951* (a military tribunal was constituted to hear the charges, with 814 persons actually prosecuted by military courts under the Australian War Crimes Act for war crimes committed during World War II.); Michael Kirby, *War Crimes Prosecution - An Australian Update*, 19 COMMONWEALTH L. BULL. 781, 782 (1993) (the War Crimes Amendment Act 1988 (Cth) was enacted to grant jurisdiction for the domestic courts to hear the prosecutions of those individuals who had committed war crimes during World War I, and who were now living in Australia. No one has been successfully prosecuted under the provisions of this statute.); Gideon Boas, *We are obliged to act on atrocities*, THE AUSTRALIAN, Oct. 27, 2009.

174. *See* L. C. Green, *Canadian Law and the Punishment of War Crimes*, 28 CHITTY'S L. J. 249, 249 (1980); Fenrick, *supra* note 172, at 257; R. v. Finta, [1994] 1 S.C.R. 708 (Can.). The 1945 War Crimes Regulations was annexed to the 1946 War Measures Act and became the basis of any prosecutions before military tribunals for war crimes committed against Canadian personnel during World War II. Seven persons were convicted of war crimes by the military tribunal. When Canada amended its Criminal Code to allow prosecution of persons living in Canada who had committed war crimes and crimes against humanity during World War II, no one was ever successfully prosecuted.

175. Regulations for the Trial of War Criminals 1945, was issued pursuant to the Royal Prerogative and authorized the participation of the United Kingdom in the prosecution of the people responsible for the three international crimes agreed to by the Allies. *See* Regulations for the Trial of War Criminals 1945, A.O. 81/1945 (UK); *see also* A.P.V. Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945-1949*, 39 INT'L & COMPAR. L. Q. 780, 787 (1990); Richardson, *supra* note 171, at 74; R. v. Sawoniuk [2000] EWCA (Crim) 220 [220] (UK); David Ormerod, *A Prejudicial View*, 2000 CRIM. L. REV. 452. In addition to being one of the major participants in the IMT, Britain prosecuted over 500 trials of individuals in Europe accused of these three crimes. In 1991 Parliament passed the War Crimes Act for the purpose of prosecuting individuals presently living in Britain who had committed war crimes in Germany or its occupied territories. Only one person was ever successfully prosecuted under this Act.

176. *See* sources cited *supra* note 173.

177. *See* Sissons, *supra* note 173, at 21. This Act was utilized by the Australian government between 1945 and 1951 in the prosecution of approximately 1000 war criminals. *See* Triggs, *supra* note 172, at 382. Sentences ranged from short periods of incarceration to death by hanging. A review of the extensive report of these military trials suggests that the sentences imposed were based on the nature of the offenses committed and the culpability of each of those prosecuted. Detailed reasons for the sentences were not provided in his report.

178. *See* discussion and sources *supra* note 174. In Canada four war crime trials were held by Canadian military authorities involving seven accused between 1945 and 1946. All were

in the authority to prosecute under the Royal Warrant in the United Kingdom.[179] However the rationales for sentencing were not specifically addressed by the enacting legislation in either jurisdiction. The reasons for sentencing in court decisions in phase one were limited to one or two lines setting out the sentences to be imposed.[180] In phase two, the Australian legislation provided for penalties of life imprisonment or a lesser term for war crimes in which the predicate offense was murder, and a maximum of twenty five years for other war crimes offenses.[181] In Canada and the United Kingdom, the penalties were the penalties available under domestic legislation, which included a mandatory sentence of life imprisonment for murder and lesser penalties for all other offenses.[182]

The third phase of this process was the adoption by signatories to the Rome Statute of implementing legislation that would allow the prosecution in the domestic jurisdictions of those individuals having some connection to the domestic jurisdiction who have committed either

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convicted and four were sentenced to death and executed, while Kurt Meyer's sentence of death was commuted to life imprisonment. A sixth was sentenced to life imprisonment and the last, because of the lesser role he played, was sentenced to 15 years. *See also Trial of S.S. Bridadefuhrer Kurt Meyer*, 4 L. Rep. of Trials of War Crim. 97–109 (the sentencing report on Kurt Meyer simply states that "Meyer was sentenced to death by shooting. The Convening Authority, however, commuted the death sentence to one of life imprisonment . . . ."). *See* Fenrick, *supra* note 172, at 257, 289–90 (similar to the reports of sentencing in Australia, there is little to determine the reasons for sentencing from these military courts, except to suggest that the sentence was based on the severity of the offenses committed).

179. *See* discussion and sources *supra* note 175. British authorities acted under the Royal Warrant of 1945 in conducting over 500 trials of individuals in Europe accused of these three crimes. Such trials were conducted by military courts, with the ultimate penalty being death. As with the trials conducted before the IMT, the issue of sentencing was dealt with in a perfunctory way. No reasons for the sentence were given. As a result, the trials provide little assistance in the determination of the principles that applied to the imposition of punishment. Congress, *Law Reports of Trials of War Criminals,* https://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html [https://perma.cc/28JW-KSEZ] (a number of cases provide one or two lines setting out the sentence imposed and if death, whether it was subsequently commuted).

180. *See* Lawrence D. Egbert, *Judicial Decisions*, 41 AM. J. INT'l L. 172 (the sentencing comments of the International Military Tribunal in Nuremberg in particular show a lack of justification for the imposition of the sentence for those convicted of the international crimes).

181. *War Crimes Amendment Act 1988* (Cth) s 10.

182. *See* Criminal Code, R.S.C. 1985, c C-46 (Can.); War Crimes Act 1991, c 13 (UK) (Canada, through amendments like s 7 to its Criminal Code, and Britain, through various legislative amendments and enactments, granted their domestic court's jurisdiction to prosecute persons who are citizens or now residents in the respective countries, of offenses such as torture, hostage taking of certain officials, and in the UK certain war crimes even if the offenses were committed abroad). *See also* Redress, *Ending Impunity in the United Kingdom for Genocide, Crimes Against Humanity, War Crimes, Torture and others Crimes under International Law* (July 2008), https://redress.org/wp-content/uploads/2018/01/Jul-08-Ending-Impunityin-the-UK.pdf [https://perma.cc/XE3L-HWNR].

war crimes, crimes against humanity or genocide.[183] To date only two of these cases have been prosecuted in the three domestic jurisdictions. However, a review of the legislation and of the one case that has been successfully prosecuted does illustrate that justifications of punishment through the adoption of principles of sentencing for international crimes are common to all these jurisdictions, even if the priority given to particular justifications are not consistent.

1. Australia

As a signatory to the Rome Statute, Australia enacted complementary legislation through the International Criminal Court Act (Consequential Amendments) Act 2002.[184] The Australian legislation sets out the definitions of war crimes, crimes against humanity and genocide, and where possible, attempts to mirror the definitions provided by the Rome Statute. However, the penalty sections are specific to Australia with the maximum penalty being life imprisonment for all offenses of genocide,[185] some crimes against humanity such as murder[186] and extermination,[187] and some war crimes such as killing,[188] and attacking civilians.[189] Some other crimes against humanity can attract maximum sentences of 10, 17 or 25 years, as well as other war crimes that attract sentences with maximums of 10, 17, or 25 years. There are no sentencing guidelines set out, but the Crimes Act 1914, as amended, applies to sentencing of federal offenses, of which these crimes form a part.[190] The main sentencing approach is contained in section 16A of that Act.[191] The general approach is a focus on the severity of the offense. This appears to be a form of the proportionality principle. Other factors that must be considered are set out in subsection 2 of the section. They include, in no order of importance, deterrence,[192] general punishment,[193] and rehabilitation.[194] The result is an emphasis on the offense itself while

183. *See* International Criminal Court Act 2002 (Cth) (Austl.); Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24 (Can.); International Criminal Court Act 2001, c 17 (UK), https://www.legislation.gov.uk/ukpga/2001/17/section/51 [https://perma.cc/BA4D-ACNB].

184. International Criminal Court (Consequential Amendments) Act 2002 (Cth).

185. Australian Criminal Code 1997 (Cth). (Cth) s 268.3-268.7 (as amended by the International Criminal Court (Consequential Amendments) Act 2002).

186. *Id.* s 268.8.

187. *Id.* s 268.9.

188. *Id.* s 268.24(2).

189. *Id.* s 268.35.

190. *Crimes Act 1914* (Cth) (Austl.) (as amended).

191. *Id.* s 16A.

192. *Id.* s 16A(2)(j).

193. *Id.* s 16A(2)(k).

194. *Id.* s 16A(2)(n).

considering the circumstances of the offense as well as the circumstances of the offender and others.

There have been no sentences imposed under the new provisions of the International Criminal Court Act. Thus, it is unknown how the courts will interpret sentencing in this context. However, because there have been set out different maximum imprisonment lengths, the concept of a hierarchy of offenses will potentially play some role in the process of determining the appropriate sentence to be imposed.

2. Canada

Following the Rome Statute passage, Canada enacted enabling legislation to allow prosecutions of persons accused of war crimes, crimes against humanity and genocide who committed such offenses in Canada. The legislation also confers jurisdiction on Canadian courts over a person who committed such offenses elsewhere and that person was a Canadian citizen or employed by Canada, the person was a citizen of a state engaged in armed conflict with Canada, the victim was Canadian, the victim was a citizen of a state involved with Canada in an armed conflict, or after the time of the alleged offense, the person is now living in Canada.[195] The definitions of war crimes, crimes against humanity and genocide were taken from the definitions provided in the Rome Statute.[196] Sections 4(2), 5(3), and 6(2) of the Act provide the penalties for those who commit these crimes inside or outside Canada.[197] Section 6(2), in conjunction with section 8, states that if such crimes were committed outside Canada by a person now residing in Canada, and an intentional killing forms the base of the crime, that person shall be sentenced to life imprisonment.[198] In any other case, the maximum punishment for those who have committed such crimes is life imprisonment.[199]

The provisions of the Criminal Code of Canada with respect to sentencing apply to offenses under the Crimes Against Humanity and War Crimes Act.[200] Section 718 and section 718.1 of the Criminal Code of Canada are the pertinent sections. Section 718 sets out the purposes of sentencing, and these include deterrence, denunciation, rehabilitation, and the acceptance of responsibility.[201] The main principle of sentencing

195. *See* Crimes Against Humanity and War Crimes Act, *supra* 183, s 8. Unlike most legislation, this Act applies to offenses committed before the Act came into effect. *Id.*

196. *Id.* s 4(3).

197. *Id.* ss 4(2), 5(3), 6(2).

198. *Id.* s 6(2)(a).

199. *Id.* s 6(2)(b).

200. Pursuant to the Interpretation Act of Canada, the provisions of the Criminal Code of Canada apply, as appropriate to any federal offense. *See* Interpretation Act, R.S.C. 1985 c I-21. This applies to those cases where there is no mandatory sentence of life imprisonment.

201. *See Canadian Criminal Code*, *supra* 182, s 718s.

is set out in section 718.1.[202] It states that "a sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender.'"[203] Thus, except for those offenses that have a mandatory sentence of life imprisonment,[204] in the determination of the appropriate sentence the sentencing provisions of §§ 718 and 718.1 of the Criminal Code apply. How they will apply to these most serious crimes is unknown to date. There are only two completed prosecutions under the 2000 Act.

Desire Munyaneza, a former resident of Rwanda, had immigrated to Canada and was charged with offenses under the Crimes Against Humanity and War Crimes Act.[205] He was found guilty of genocide, crimes against humanity, and war crimes committed in Rwanda during 1994.[206] In the sentencing judgment of October 29, 2009, Denis, J. found that the accused had participated in the intentional killing of hundreds of Tutsis, and concluded that the mandatory sentence of life imprisonment applied.[207] And, because he had concluded that the killings were planned and deliberate, the legislation also required that the accused not be eligible for parole for 25 years.[208] The sentencing judge added that even if the legislation did not require it, the nature of the acts committed were so horrendous that a sentence of life imprisonment, to reflect the seriousness of the offenses, should be imposed, without parole eligibility for 25 years.[209] In other words, the principle of proportionality would require that the sentence be the severest one able to be imposed in Canadian law. The only other case brought under the Crimes Against Humanity and War Crimes Act, that of Jacques Mungwarere, resulted in an acquittal on all charges.[210]

The legislative structure, and the one case that has used that structure, points to the seriousness of the offense as the overriding consideration in the imposition of the appropriate sentence. However, the legislation does call for a consideration of principles of deterrence, denunciation, and rehabilitation as principles for consideration in the imposition of the appropriate sentence. Each principle can play a role in the justification for the implementation of the appropriate penalty.

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202. *Id.* s 718.1.

203. *Id.*

204. These are the offenses of war crimes, crimes against humanity and genocide that involve the intentional killing of another.

205. R. v. Desire Munyaneza, (2009) R.J.Q. 2836, ¶ 56 (C.S. Que.).

206. *Id.* ¶ 2089.

207. R. c. v. Desire Munyaneza, (2009) R.J.Q. 2089, ¶¶ 59–60 (C.S. Que.).

208. *See* Crimes Against Humanity and War Crimes Act, *supra* 183, s 15(1)(a).

209. R. v. Desire Munyaneza, *supra* note 205, ¶ 56.

210. *See* R. v. Jacques Mungwarere, [2013] O.J. No. 6123 (C.S. Ont.).

3. United Kingdom

In conformity with the complementarity principle of the Rome Statute, Parliament enacted the International Criminal Court Act 2001.[211] The Act mirrors the definitions of war crimes, crimes against humanity and genocide as found in the Rome Statute, and confers jurisdiction on courts in England and Wales pursuant to § 51 of the Act, and Northern Ireland, pursuant to § 60 of the Act, to prosecute those individuals who committed such offenses in those jurisdictions, or who committed those offenses outside the jurisdiction by persons who are UK nationals, UK residents or for England and Wales, who are subject to UK service jurisdiction.[212] These offenses may have been committed before the individual acquired the status of a UK resident or a UK national, provided they were committed after the coming into force of the Act.[213]

Sentences for those offenses involving murder or as ancillary to murder are the same as sentences for corresponding offenses in domestic law.[214] In cases other than murder and ancillary to murder, the maximum penalty is 30 years imprisonment.[215] In imposing sentences the court must be guided by the purpose and principles of sentence, as set out in section 142 of the Criminal Justice Act 2003 as amended.[216] The purpose of sentence as set out in that section is to punish offenders, to deter them, to rehabilitate them and to protect the public and make reparations for harm done. These are not given any particular priority in the legislation. How these sentencing provisions will operate in practice is unknown to date, as there have been no prosecutions undertaken under the International Criminal Court Act 2001.[217]

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211. International Criminal Court Act 2001, *supra* note 183.

212. *Id.* §§ 51(2), 58(2).

213. *Id.* § 68(2). However, the Act was amended by § 70 of the Coroners and Justices Act 2009 (UK) c. 25, to allow prosecutions for offenses committed after January 1, 1991 if the offenses committed were crimes under international law at that time.

214. *Id.* §§ 53(5), 60(5). A good explanation of the various categories of murder is found in, Sally Lipscombe & Jacqueline Beard, *Mandatory Life Sentences for Murder*, HC Library, Briefing Paper. No. 3626 (Nov. 12, 2015), http://researchbriefings.parliament.uk [https://perma.cc/8BP8-2H7R].

215. International Criminal Court Act 2001, *supra* note 183, §§ 53(6), 60(6).

216. Criminal Justice Act 2003, c. 44 § 142 (UK), https://www.legislation.gov.uk/ukpga/2003/44/contents. However, these purposes do not apply to sentences which are fixed by law. *Id.* § 142(2)(b).

217. Prosecutions have been undertaken under § 134 of the Criminal Justice Act of 1988, for persons committing torture and hostage taking committed outside the United Kingdom by persons presently residing within the country. Colonel Kumar Lama of Nepal was prosecuted under § 134(1) of the Criminal Justice Act 1988, for two counts of "intentionally inflicting sever pain or suffering in the exercise of his functions as a public official." Colonel Kumar Lama of Nepal is charged with two counts of torture. The trial began at the Old Bailey in London in February 2015, but was adjourned on March 18, 2015 until August of that year. *See* BBC, *Nepalese Officer*

B. *Civil Law Countries*

Prosecutions for international crimes took on a somewhat similar tract to the common law experience in countries of the civil law system. There were prosecutions of war crimes by both German[218] and French[219] authorities after World War II. For both Germany and France, however, the interest in prosecuting war criminals soon waned, to be revived in Germany in the early 1960's and in France later in that decade.[220] In Germany, because of the statute of limitations, these prosecutions were first limited to murder, manslaughter and related cases, and in later years

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Kumar Lama Torture Trial Adjourned, BBC NEWS (Mar. 18, 2015), http://www.bbc.com/news/uk-england-sussex-31932371 [https://perma.cc/2ECE-ESJ4] (accessed Oct. 27, 2015). He was acquitted on August 2, 2016, of one count of torture, with a hung jury on the second count. On September 6, 2016, the Crown decided not to proceed again with the second charge. *Kumar Lama*, TRIAL INT'L (Apr. 14, 2016), https://trialinternational.org/latest-post/kumar-lama/ [https://perma.cc/S3HN-U2BV]. *See also* Sneha Shrestha, *The Curious Case of Colonel Kumar Lame: Its Origins and Impact on Nepal and the UK and its Contribution to International Jurisdiction*, TLI THINK! PAPER (Sept. 1, 2017), https://ssrn.com/abstract=3105720. *See* R. v. Zardad [2006] EWCA (Crim) 1640 (Eng.), https://www.legal-tools.org/doc/88053c/pdf/ [https://perma.cc/2KPY-73K4] (An Afghan warlord, living in the UK, was successfully prosecuted under the same section for offenses in Afghanistan. He was sentenced to 20 years imprisonment after which he was to be deported. The sentencing decision is unreported.).

218. German courts were required to utilize the provisions of Control Council 10 when prosecuting German citizens for committing war crimes, crimes against humanity or crimes against peace against fellow Germans. The penalties were those set out in Control Council 10, which included death, imprisonment up to life, forfeiture of property, restitution of property, and deprivation of certain civil rights. German law was reinstated in 1950 and the original German Criminal Code of 1871 was again used to prosecute those Germans who had committed atrocities against others. *See* Robert A. Monson, *The West German Statute of Limitations on Murder: A Political, Legal and Historical Exposition*, 30 AM. J. COMPAR. L. 605, 606–08 (1982); Fritz Weinschenk, *The Murderers Among Them: German Justice and the Nazis*, 3 HOFSTRA L. & POL'Y SYMP. 137, 138 (1999); NUREMBURG TRIALS FINAL REPORT APPX. D: CONTROL COUNCIL LAW NO. 10, PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY art. II (3) (1945), http://avalon.law.yale.edu/imt/imt10.asp (accessed Sept. 5, 2015).

219. The French not only participated in the prosecutions at the IMT, but by Decree dated August 23, 1945, D 1945 L 216 . . . they could and did prosecute those who had collaborated with the enemy, and by Ordinance dated 28 August 28, 1944, titled '*Relative a la Repression des Crimes*crimes *de Guerre*guerre' they could prosecute war crimes committed by enemy nationals or their agents. *See* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 316–17 (1994–1995). The first few years following the end of World War II saw the prosecution of many in the French courts. However, due to prescription rules that apply in French law, the time limitations for the prosecution of war crimes lapsed.

220. The revival of interest in Germany resulted from the discovery of documentation from the Nazi regime which detailed the efforts of the Germany hierarchy in attempting to exterminate the Jews. *See* Monson, *supra* note 218, at 607–08; Weinschenk, *supra* note 218, at 140. In France, prosecutions focused on those who had been the decision makers with respect to the deportation of Jews from France during the Second World War. Examples were the prosecutions of Klaus Barbie, Paul Touvier, and Maurice Papon. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 675–78 (2011).

only to murder.[221] The German Penal Code of 1871 was the operative piece of legislation.[222] Fewer and fewer prosecutions occurred after 1979 mainly because of the age of those previously involved. In 2002, Germany, as a signatory to the Rome Statute, passed legislation giving it complementary jurisdiction over war crimes, crimes against humanity, and genocide.

France passed legislation making it clear that the laws of prescription did not apply to crimes against humanity.[223] By doing so, it could bring prosecutions against those three individuals—Klaus Barbie, Paul Touvier and Maurice Papon—who had been instrumental in the deportation and subsequent deaths of members of the Jewish community in France.[224] These three prosecutions were very controversial in France, and took many years to complete.[225] In 1992, France enacted new legislation to address crimes against humanity.[226] It was this new law, as modified, that was to be used to prosecute any individual found in France who had committed, in France or elsewhere, crimes against humanity.[227] France passed amendments to its Penal Code in 2010 to provide complementary legislation to the Rome Statute to prosecute war crimes, crimes against humanity, and genocide.[228]Although existing legislation did allow for the prosecution of such offenses in France, the 2010 amendments extended definitions of crimes against humanity and war crimes, and provided specific penalties for some of these offenses.

1. Germany

In accordance with its acceptance of the Rome Statute in 2002, Germany adopted a Code of Crimes against International Law. This Code came into effect one day before the Rome Statute, and applies to any

221. Monson, *supra* note 218, at 609–15; Weinschenk, *supra* note 218, at 142–43.

222. Between 1965 and 1969, 361 persons were prosecuted for Holocaust-related crimes and from those 361 prosecuted, 223 were convicted. Of the 223 convicted, 63 were sentenced to life imprisonment. From 1970 to 1979, West German prosecutors prosecuted 219 individuals, with 137 convictions, of which 32 individuals received life sentences. See Weinschenk, *supra* note 218, at 147; *see also* Patrick Kroger, *Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case Under Code of Crimes Against International Law*, EUROPEAN CENTRE FOR CONSTITUTIONAL AND HUMAN RIGHTS (2016), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf [https://perma.cc/6CQP-DYHP].

223. Sadat Wexler, *supra* note 219, at 320.

224. BASSIOUNI, *supra* note 220, at 675.

225. Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMPAR. L. 151, 186 (2010).

226. *Id.* at 188.

227. *Id.*

228. Loi 2010-930 (2010) du 9 août 2010 portant adaptation du droit penal à l'institution de la Cour pénale international [Law 2010-930 of August 9, 2010 Adapting Criminal Law to the Institution of the International Criminal Court] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000022681235/ [https://perma.cc/SG3M-TRFG] [hereinafter Adapting Criminal Law to the ICC].

crimes committed after that time.[229] Article 1 gives the German courts universal jurisdiction over the offenses in international law defined in the statute,[230] but pursuant to § 153(f) of the German Code of Criminal Procedure it is only required that prosecution proceed if the individual under investigation is within the country.[231] The offenses substantially mirror those in the Rome Statute, with some minor adjustments to accord with German law.[232] The penalty sections for the three offenses in the Code, however, are unlike the penalty sections in the Rome Statute. They divide the penalties into life sentences for killing as genocide,[233] as a crime against humanity,[234] or as a war crime.[235] For other offenses under each head of crime type, the penalties are a cascading range of mandatory minimums starting at not less than 10 years,[236] to not less than 5 years,[237] to not less than 3 years,[238] and lastly, for less serious war crimes, either not less than 2 years, 1 year or 6 months.[239] The legislation references the phrase 'least serious cases' to justify when the mandatory sentences may be reduced, but provides no criteria to explain that phrase.

The sentencing principles that are to apply in these cases are those contained in the German Criminal Code.[240] The German Criminal Code contains a section entitled "Sentencing," which encompasses section 46 through section 76 of the Code.[241] The main purpose of sentencing a person under the German Code is retributive.[242] Section 46(1) of the

229. Steffen Wirth, *Germany's New International Criminal Code: Bringing a Case to Court*, 1 J. INT'L CRIM. JUST. 151, 152 (2003).

230. *See* Gesetz zur Einführung des Völkerstrafgesetzbuches, 2002 [Act to Introduce the Code of Crimes against International Law of 26 June 2002], June 29, 2002, BGBL I at 2254-60 (Ger.), https://www.gesetze-im-internet.de/vstgb/BJNR225410002.html [https://perma.cc/MV3P-63DW] [hereinafter Code of Crimes against International Law]. Section 1 states, "This Act applies to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offense was committed abroad and bears no relation to Germany." *Id.* § 1.

231. *See* Wirth, *supra* note 229, at 158–59.

232. *Id.*

233. Code of Crimes against International Law, *supra* note 230, § 6(1).

234. *Id.* § 7(1).

235. *Id.* § 8(1).

236. *Id.* § 8(4). Take hostage a person protected under international law for example.

237. *Id.* § 6(2). Less serious cases of genocide for example.

238. *Id.* § 7(1).

239. Code of Crimes against International Law, *supra* note 230, § 8(5).

240. Strafgesetzbuch [German Criminal Code], Nov. 13, 1998, BGBL I at 3322, last amended by Article 1 of the Law, Sept. 24, 2013, BGBL I at 3671 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/UJ3Z-RTAQ] [hereinafter German Criminal Code].

241. *Id.* §§ 46–76

242. Thomas Weigend, *Germany*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 252, 258 (Kevin Heller & Marcus Dubber eds., 2011). In a previous article, Weigend has noted that

German Criminal Code notes that 'the guilt of the offender is the basis for sentencing'.[243] It then goes on to note that the effect the sentence is expected to have on the offender's future life 'shall' be taken into account, and under subsection 2 the court is required to weigh the circumstances in favor of and against the offender.[244] However, concerns for either deterrence or rehabilitation can trump proportionality, and the maximum sentence the offense deserves cannot be increased because of other factors.[245] Nor can it be decreased below what it deserves for the same reason. How this will translate into sentencing determinations for those crimes under the Code of Crimes under International Law is yet to be determined. Nor does one know how the retributive principle, focusing on the seriousness of the offense, will influence sentencing patterns in Germany.

The first prosecution using the new Code of Crimes against International Law involved two individuals from Rwanda, Ignace Murwanashyaka and Straton Musoni, charged with war crimes and crimes against humanity for their activities in the eastern region of the Democratic Republic of Congo in 2008-2009.[246] The prosecution began at the Higher Regional Court in Stuttgart, and a decision was rendered on the 28th of September 2015.[247] Murwanashyaka was convicted of aiding and abetting war crimes, while Musoni was convicted of leading a terrorist organization.[248] Murwanashyaka was sentenced to thirteen years' incarceration while Musoni was sentenced to eight years.[249] The written judgment of the court's decision on culpability is lengthy,

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the German sentencing theory is complicated and conceptually murky. He suggests that the traditional desert-based system has been more individualized with reforms since the 1960's. *See* Thomas Weigend, *Sentencing and Punishment in Germany*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 203 (Michael Tonry & Richard Fraise eds., 2001).

243. German Criminal Code, *supra* note 240.

244. *Id.*

245. Weigend, *Germany*, *supra* note 242, at 258–59.

246. *See A First for Germany: Trial of Rwandan Militia Members Under Principle of Universal Jurisdiction*, *in* 2014 Annual Report, EUROPEAN CENTRE FOR CONSTITUTIONAL AND HUMAN RIGHTS (2014), https://www.ecchr.eu/fileadmin/Jahresberichte/ECCHR_Annual_Report_2014.pdf [https://perma.cc/6U98-5BF7].

247. TRIAL INTERNATIONAL, *Ignace Murwanashyaka* (Mar. 15, 2013) https://trialinternational.org/latest-post/ignace-murwanashyaka/ [https://perma.cc/HG2G-UMZ2] [hereinafter TRIAL].

248. James Karuhanga, *Government Lauds Guilty Verdict for FDLR Leaders*, THE NEW TIMES (Sept. 29, 2015), https://www.newtimes.co.rw/section/read/193003 [https://perma.cc/NWA2-4G86].

249. Musoni was released immediately as he had already spent six years in custody, and in accordance with German law, his sentence is remitted after two thirds is served. Murwanashyaka had appealed his sentence. *See* TRIAL, *supra* note 247. The Prosecution had also appealed. A new trial was ordered for Dr. Murwanashyaka, however, unfortunately he died in February of 2019 before a new trial could be undertaken. *Id.*

encompassing some 366 pages.[250] The decision on sentencing is very short, and is very limited in scope.[251] For each of the defendants, reference is made to their high status in the FDLR, their family situations, and in the case of Mr. Musoni, the fact he had renounced the organization during the trial.[252] For Dr. Ignace Murwanashyaka reference is also made of a previous sentence for activities within the FDLR, and the fact he had not been deterred as a result of the previous sentence.[253] However, like many of other sentencing decisions for offences of this nature, reference to the purposes and principles of sentencing is lacking.[254]

2. France

In 2010 France enacted enabling legislation as complementary jurisdiction to the Rome Statute.[255] The French Penal Code of 2004 had provided definitions of genocide and crimes against humanity. In Book II, Title 1 subtitle 1 the French Penal Code of 2004 at paragraphs 211-1 to 213-5 set out the definitions of genocide and crimes against humanity, and that the penalties for both was "criminal imprisonment for life."[256] With the amendments in 2010 a more detailed definition of crimes against humanity (Article 212-1) is provided, and a more detailed structure set out for the sentences available to the court depending on the type of violation of the law. Sentences range from a maximum sentence of life imprisonment for genocide[257] and incitement to genocide,[258] to 15 years maximum for the offence of engaging in humiliating and degrading treatment of persons of the opposite party.[259] In addition natural persons can also be subject to forfeiture of civic, civil and family rights, prohibition to hold office, area banishment, and confiscation of any and all assets.[260] The French Penal Code also states that legal persons, who are distinct from natural persons, can also be found liable for genocide and crimes against humanity, and are subject to a grouping of penalties found in Articles 131-139 of the Penal Code, as well as confiscation of any or all of their assets.[261]

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250. Oberlandersgericht Stuttgart Urteil vom 28.9.2015, 5 - 3 StE 6/10

251. *Ib.* Teil 5 Strafzumessun page 361–63.

252. *Ib.*

253. *Ib.*

254. *See generally* Kroger, *supra* note 222.

255. *See* Adapting Criminal Law to the ICC, *supra* note 228.

256. Code pénal [C. pén.] [Penal Code] art. 211-1, 212-1 (Fr.), https://www.legal-tools.org/doc/418004/pdf/ [https://perma.cc/3Z7N-7BM6] [hereinafter French Penal Code].

257. *Id.* art. 211-1.

258. *Id.* art. 212-2.

259. *Id.* art. 461-5.

260. *Id.* art. 213-1. However, the bans are increased because of the conviction for international crimes. *See* Adapting Criminal Law to the ICC, *supra* note 228, art. 462-3.

261. *See* French Penal Code, *supra* note 256, art. 213-3.

The sentencing provisions of the Penal Code apply to the crimes of genocide, crimes against humanity, and war crimes, and it is clear from the provisions of the Penal Code that only those sentences provided are to apply. Book II, Title III Articles 131 to Article 133-17 set out the various penalties that can be imposed for violations of the penal laws of France. Two points are of particular note. The first is that under the provisions of this section, if the penalty for felonies for natural persons is life, then "the court may impose criminal imprisonment for a term, or imprisonment for not less than two years."[262] Secondly, Article 132-24 states that the court imposes the penalties and sets their limits in accordance with "the circumstances and the personality of the offender."[263] It therefore seems that the focus of all penalties is on the circumstances of the offence and the background of the offender. These are the guiding principles that infuse all sentencing practices in French courts and should influence the sentencing provisions relating to war crimes and crimes against humanity.

France has set up a special investigative unit to determine if former Rwandan citizens, residing in France, should be prosecuted for international crimes committed during the Rwandan genocide. The pace at which the French authorities have proceeded in these cases has resulted in much criticism of the French proceedings.[264] Three persons have been successfully prosecuted in France and convicted of genocide committed during the Rwandan massacre.[265]

VII. WHAT OF THE DECISIONS OF THE AD HOC TRIBUNALS?

The ICTY, the ICTR and the SCSL have issued numerous sentencing decisions. Each of the tribunals have put forth justifications for the

262. *Id.* art. 132-18.

263. *Id.* art. 132-24.

264. The case of Wenceslas Munyeshyaka, a Rwandan priest who has been a fugitive in France since the early 1990's, is a good example. His case has been before the French courts on various issues since 1995. Press Release, *The Rwandan Cases: France should arrest Wenceslas Munyeshyaka, Laurent Bucyibaruta and Dominique Ntawukuriryayo immediately!*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (July 6, 2007), https://www.fidh.org/en/region/Africa/rwanda/france-should-arrest-wenceslas-munyeshyaka-laurent-bucyibaruta-and-4467 [https://perma.cc/7HA7-KQB7].

265. Kim Willsher, *Rwandan former spy chief Pascal Simbikangwa jailed over genocide*, THE GUARDIAN (Mar. 14, 2014, 7:28 PM), http://www.theguardian.com/world/2014/mar/14/rwanda-former-spy-chief-pascal-simbikangwa-jailed-genocide?CMP=share_btn_link [https://perma.cc/9HWE-QV4H]. Octavien Ngenzi and Tito Barahira were both convicted of genocide and crimes against humanity and sentenced to life imprisonment. Their initial appeals were heard in 2017 and the Paris Cour d'Assises upheld the life sentences. These sentences were further upheld by the Cour de cassation in October 2019. *See* James Karuhanga, *French court upholds life sentence for two Genocide convicts*, THE NEW TIMES (Oct. 17, 2019), https://www.newtimes.co.rw/news/french-court-upholds-life-sentence-two-genocide-convicts [https://perma.cc/KR6W-ERKM].

imposition of sentencing. The ICTY, the ICTR and the SCSL have each stated that retribution and deterrence are the principal justifications for sentencing.[266] There has been some inconsistency in the tribunal

266. Generally, these two principles of sentence were given equal weight, and were to be combined in some manner with the gravity of the crime and the degree of responsibility of the offender. There have been several decisions in which the Trial Chambers have concluded that deterrence must be given primary consideration in the determination of a sentence. *See* R. v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 1234 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en/ [https://perma.cc/F5RS-WMW3]; Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 900 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf [https://perma.cc/BF5X-7FHX] (stating that, "Individual and general deterrence has a paramount function and serves as an important goal of sentencing." However, the court then goes on to state that, "An equally important goal is retribution. . ."). The majority of decisions that have a sentencing component to them reference these factors in their decisions. A relative sample include: Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 455 (Dec. 6, 1999), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-3/trial-judgements/en/991206.pdf [https://perma.cc/ZHF6-UCRE]; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf [https://perma.cc/8XSR-9MA5]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 986 (Jan. 27, 2000), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf [https://perma.cc/4XA8-JYR3]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), https://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf [https://perma.cc/4ZNM-PZW4]; Prosecutor v. Kunarac, Case No. IT-96-23/1-T, Judgment, ¶ 838 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf [https://perma.cc/55YL-2U7U]; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 847 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf [https://perma.cc/S5B8-YXYU]; Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002), https://www.icty.org/x/cases/milan_simic/tjug/en/sim-sj021017e.pdf [https://perma.cc/A9R9-DE7E]; Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), https://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf [https://perma.cc/QJE9-EVLQ]; Prosecutor v. Češić, Case No. IT-95-10/1-S, Sentencing Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004), https://www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf [https://perma.cc/2UMF-ZJ9D] (rehabilitation is also considered an important factor here); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgment and Sentencing, ¶ 498 (July 15, 2004), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-71/trial-judgements/en/040715.pdf [https://perma.cc/89U6-J2CX]; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), https://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf [https://perma.cc/H5NR-BJ3F]; Prosecutor v. Bralo, Case No. IT-95-17-S, Sentencing Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 7, 2005), https://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf [https://perma.cc/3U3P-7PSR] (also stresses rehabilitation as important but not to be given undue weight); Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶ 1134 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006), https://www.icty.org/x/cases/krajisnik/tjug/en/kra-jud060927e.pdf [https://perma.cc/4Y2R-EJ8L] (also includes rehabilitation); Prosecutor v.

decisions of the ICTY and the ICTR in particular with respect to the priority of one or the other justifications being the predominant principle for consideration in sentencing.[267] However, as Drumbl has noted, "a survey of all the cases of the ad hoc tribunals over time, though, reveals a preference for retributive motivations . . . ."[268] And, any consideration by these tribunals of the justifications of punishment in their decisions are perfunctory in nature, without any analysis of why these justifications should apply, and in what context.[269] Hola describes this as a *pro forma* listing of the purposes of sentencing, with no clear link to the ultimate reasoning for the imposition of a particular quantum of sentence.[270] Concentration is placed on the 'gravity of the offence' as the real determiner of the sentence to be imposed, noted in the cases as the litmus

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Zelenović, Case No. IT-96-23/2-S, Sentencing Judgment, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007), https://www.icty.org/ x/cases/zelenovic/tjug/en/zel-sj070404-e.pdf [https://perma.cc/7XKR-DAD5] (does not include rehabilitation); Prosecutor v. Tamba, Case No. SCSL-2004-16-T, Sentencing Judgment (July 19, 2007), http://www.rscsl.org/Documents/Decisions/AFRC/624/SCSL-04-16-T-624.pdf [https://perma.cc/Y8Z4-6URB]; Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment on the Sentencing (Oct. 9, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.10.09_Prosecutor_v_Fofana_Kondewa.pdf [https://perma.cc/GWC4-ZAJ3]; Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 1057 (Nov. 28, 2007), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf [https://perma.cc/H9EY-QXY2]; Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 587 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008), https://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf [https://perma.cc/E9PM-NWR3]; Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, ¶ 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), https://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf [https://perma.cc/WU4D-EV2W]; Prosecutor v. Sesay, Case No. SCSL-04-15-T, Sentencing Judgment (Apr. 8, 2009), http://www.worldcourts.com/scsl/eng/decisions/2009.04.08_Prosecutor_v_Sesay_Kallon_Gbao.pdf [https://perma.cc/U9Q9-2T92]; Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 2128 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010), https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf [https://perma.cc/L4RH-CL2Z].

267. Ralph Henham, *The Internationalisation of Sentencing: Reality or Myth*, 30 INT'L J. SOCIO. L. 265, 269 (2002); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 72 (2003); DRUMBL, *supra* note 164, at 61; D'ASCOLI, *supra* note 6, at 297; Barbara Hola, *Sentencing of International Crimes at the ICTY and the ITCR*, 4 AMSTERDAM L. F. 3, 7 (2012).

268. DRUMBL, *supra* note 164, at 61.

269. When the ICTY, in particular, commenced its sentencing process, it had in the case of Prosecutor v. Erdemović expressed broader philosophical reasons for the imposition of sentence. These included stigmatizing criminal conduct which infringe fundamental values of humanity. Prosecutor v. Erdemović, Case No. IT-96-22-T*bis*, Sentencing Judgment, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), https://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf [https://perma.cc/3YZR-W22Z]. However, such analysis is the exception, and has been labelled by Drumbl as an outlier. *See* DRUMBL, *supra* note 164, at 61.

270. Hola, *supra* note 267, at 7, 23.

test for the determination of the sentence.[271] The justifications of punishment, whether retribution, deterrence and/or rehabilitation, play no overt role in the determination of the quantum of sentence. Rather, once reference is made to these justifications in the sentencing decisions, it is the concentration on the mechanics of the sentencing process that forms the framework for the determination of the particular sentence.[272] In accordance with the general approach that the ICC has taken to Article 21 of the Rome Statute, it is doubtful if the Court would open its decision making process to consider decisions of the ICTY, the ICTR and the SCSL in its determination of the principles of sentencing to apply.

VIII. PRINCIPLES OF SENTENCING IN INTERNATIONAL CRIMINAL LAW AS A GENERAL PRINCIPLE OF LAW

To date, the ICC has not adopted an approach to an Article 21(1)(c) analysis and has been reticent to do so. In the review undertaken for this work of in excess of six hundred Pre-Trial, Trial and Appeal Chambers decisions in which Article 21 is referenced, the Court has generally resisted proposing any approach to the analysis of Article 21(1)(c).[273] For example, in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* the Appeals Chamber responds to the prosecution claim that there exists a general principle of law in the legal systems of countries of the world with respect to conflicts of interest for lawyers with the comment that:

> The main additional argument raised by the Prosecutor in the present appeal relates to the purported existence of a general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution. Without intending to define in any detail what is required to establish a general principle of law, the Appeals Chamber notes that the practice in the five countries to which the

271. *See* Prosecutor v. Mucić, Case No. IT-96-21-A, Judgement, ¶ 731 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf [https://perma.cc/YF2G-UWV8].

272. Such an approach has been a consistent one in the sentencing process. Hola as well comments on this process, noting that judges just list the justifications of punishment with no further reference as to the effect these justifications have on sentencing outcomes. *See* Hola, *supra* note 267, at 23.

273. Some trial courts have suggested that because of the diversity of positions in various domestic jurisdictions on the particular issue under consideration, there never will be found consistent principles common to all jurisdictions that could apply. *See* Prosecutor v. Nourain, Case No. ICC-02/05-03/09-168, Decision on Prosecution's Request to Invalidate Appointment of Counsel to Defense (June 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_08482.PDF; Prosecutor v. Chui, ICC-01/04-02/12-4, Concurring Opinion of Judge Wyngaert, ¶ 17 (Dec. 18, 2012), http://www.worldcourts.com/icc/eng/decisions/2012.12.18_Prosecutor_v_Ngudjolo_Chui.pdf [https://perma.cc/N6EM-5T9Z].

> Prosecutor has referred is not consistent. Notably, as the Prosecutor accepts, the practice in one of them (the United Kingdom) appears to be opposite to the one contended for by the Prosecutor.[274]

The above commentary by the ICC is in keeping with the generally conservative approach it has taken to its interpretation of Article 21. As stated above, while there have been occasions when the ICC has been willing to set aside its conservative approach to the use of Article 21, it is not a common practice. It has at times, when the circumstances appeared to require it, either ignored the strict interpretation of the Statute demanded by the provisions of Article 21 to accomplish certain goals.[275] However, as can be seen from the analysis undertaken in this Article, the ICC can use the Raimondo comparative law approach to determine if there are principles of law common to the major legal systems of the world. One of these legal principles is that in the imposition of sentences for international crimes justifications of punishment through the use of principles of sentencing are common to at least common law and civil law legal traditions. Thus, the ICC can legitimately consider principles of sentence in the determination of appropriate sentences by the Court. What principles to apply requires a contextual analysis of the purpose of the Rome Statute coupled with what the Court wishes to accomplish in a particular case.

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274. Prosecutor v. Nourain, Case No. ICC-02/05-03/09-252, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 30 June 2011 entitled "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defense," ¶ 33 (Nov. 11, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_18736.pdf [https://perma.cc/MY8G-TEKP] (emphasis added).

275. *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2705, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010 (Mar. 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_03026.PDF [https://perma.cc/R8RB-WHWL]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2727, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness (Apr. 28, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05473.PDF [https://perma.cc/5SY6-GM4X]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf [https://perma.cc/7NVK-9ZEQ]; Prosecutor v. Nourain, Case No. ICC-02/05-03/09-410, Concurring Separate Opinion of Judge Eboe-Osuji (Oct. 26, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_09218.PDF [https://perma.cc/RXR3-74FZ]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-3040-Anx, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case (June 11, 2013), https://www.icc-cpi.int/RelatedRecords/CR2013_04193.PDF [https://perma.cc/MWG4-7QU7]; *see also* Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12-4, Concurring Opinion of Judge Wyngaert (Dec. 18, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_10250.pdf [https://perma.cc/CDB5-829U] (making the traditional argument that compliance must be made with Article 21).

Thus, the answer to the question posed in the title to this Article is that Article 21 of the Rome Statute is not an impediment to the development of sentencing principles by the ICC. The application of the Raimondo approach does not limit such principles to legal maxims that have been accepted *in foro domestic*, but to broader principles of law that have been recognized and adopted in international law.[276] The Raimondo approach provides the ICC with a broader scope to determine which general principles of law can apply, especially in the area of sentencing, for crimes within its jurisdiction. This broader approach should encourage the ICC to undertake the type of analysis proposed in this Article whenever it needed to refer to Article 21(1)(c) in order to determine whether 'principles of law' exist that could apply to the particular situation under consideration. This is important for two reasons. The first is that the legitimacy of the Rome Statute as a workable treaty is enhanced when the Court, born as a result of that treaty, properly applies the provisions of the Statute in a thoughtful and judicious manner. It must be remembered that Article 21, as a particular provision setting out the manner in which the law was to be applied by the ICC, is unique to that Statute. Rather than rely on the traditional sources of international law set out in Article 38 of the International Court of Justice, the signatories to the Rome Statute intended that this hierarchical procedure agreed to by the negotiating states would provide a 'high level of state control over the interpretative mandate granted to the court.'[277] This is in keeping with the enhanced degree of mistrust which the negotiating states had towards the judges of international tribunals, in that there was a perception that if there was not some attempt to confine the interpretative musings of such judges, judicial activism might run rampant, contrary to the expressed wishes of those states who would become signatories to the Rome Treaty.[278] A failure to abide by the strictures of Article 21, as has occurred in the failure to subject issues of sentencing to this strict process, can quickly lead to an erosion of confidence in the Court and its decisions. The second reason this approach is important is more practical in nature. As a result of the analysis undertaken in this Article of three common law countries and two civil law countries, the principle of law that applies is that the ICC can legitimately consider principles of sentences in making sentencing determination.[279] It is recognized that there is no consistency

276. RAIMONDO, *supra* note 130, at 19.

277. *See* Cryer, *supra* note 31, at 391.

278. *See* Hunt, *supra* note 31, at 61; *see also* Cassese, *supra* note 31.

279. The analysis undertaken was limited to five countries due to the limitations of space and the limitations of necessary information. It should be noted however, that in two civil law countries referenced in two studies published in 2019, the phrase 'principles of sentencing' are also referenced in the determination of the appropriate sentence for international crimes. A study

among states of the common law or civil law traditions surveyed as to the principles that should apply when sentencing for violations of international criminal law crimes. Indeed, the analysis demonstrates that those domestic courts that have adopted statutory provisions for the prosecution of international crimes have simply transposed their domestic justifications onto international crimes within their jurisdiction with no analysis of the appropriateness of those justifications to international crimes. Yet, each state does recognize the necessity for the use of some principles in the justification for the punishment of those who violate international criminal law. The issue for the ICC will now be which principles of sentence should apply to the determinations of sentence. The ICC will have its own priorities, based on the purpose of such prosecutions as perceived by the Court, and the sentencing principles must be reflective of those priorities.

published in 2019 analyzing sentencing in Ethiopia for international crimes, 'principles of sentencing' as stated in the domestic penal code of 1957, were mentioned in the sentencing decisions for many of those convicted of genocide and war crimes between 1992 and 2010. *See* Taderre Simie Metakia, *Punishing Core Crimes in Ethiopia: Analysis of the Domestic Practice in Light of and in Comparison with Sentencing Practices at the UNITCs and the ICC*, 19 INT'L CRIM. L. REV. 160, 172–75 (2019). In the prosecution of international crimes in Croatia, reference is also made to principles of sentencing during the imposition of penalties after conviction for international crimes. Those sentencing principles were in codified form but had been changed to some degree in a new Criminal Code enacted in 2013. *See* Maja Munivrona Vajda, *Domestic Trials for International Crimes-A Critical Analysis of Croatian War Crimes Sentencing Jurisprudence*, 19 INT'L CRIM. L. REV. 15, 18–23 (2019).