Part One: The Relationship between International Criminal Law and Human Rights

Chapter One: Introduction

The relationship between substantive international criminal law and human rights is, despite the continuously academic and non-academic interest in both disciplines, not conclusively established. There are two main reasons for this: the first one is that none of the two areas is clearly and exclusively defined and delimitated in the first place. The term 'human rights' can cover a plethora of rights and claims like the right to physical integrity and the right to liberty, to fair trail guarantees, minority rights, economic, social and cultural rights and the generally non-enforceable so-called third generation rights.[16] They are mostly rights that protect the individual from an excess of authority from the State, but additional to respecting the individual's human rights, the States' role is also to protect and fulfil the right, meaning to facilitate and provide them vis-à-vis the individual.[17] International human rights law encompasses rights, for example rights protecting life, physical integrity, freedom of movement, minority rights, the mass violation of which are under certain circumstances considered to be crimes under international law and can trigger international criminal proceedings. Hence, there is a clear connection, but no concluding answer, as to the relationship between the two disciplines.

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16 The umbrella term "third generation rights" is in itself ill-defined and covers many different concepts. What unites them is their general non-enforceability as well as their complex nature (which is why they are also referred to as 'composite rights'), see Theo van Boven 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP Oxford 2010) 173-188 at 178; for the multi-faceted concept of 'human rights' see also Laurence R Helfer 'Forum Shopping for Human Rights' 148 University of Pennsylvania Law Review (1999) at 285-400 at 298: 'The corpus of international human rights law does not exist in a single, comprehensive treaty, code or statute. Rather, the rights and freedoms it enshrines are found in a complex web of overlapping global, regional, and specialized agreements, many of which contain identical, related, or even conflicting substantive standards'.

17 See eg Manfred Nowak *U. N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P Engel Kehl 2005) at XX-XXI.

Equally, the notion of international criminal law encompasses not only conduct which is deemed criminal, but also establishes the principles according to which a person can be held accountable for such conduct, the procedure regulating who can investigate and judge such crimes, as well as procedural frameworks for international criminal proceedings that take into account the proper handling of evidence and the rights of all the participants of the proceeding, including the accused person.[18] International criminal law is therefore, broadly speaking, made up of two large set of rules, substantive and procedural ones. The same is true for human rights law as an umbrella term for very different sets of rights, including minimum standards that an individual is entitled to in court proceedings.

This leads to the second reason for the non-conclusive establishment of the relationship between international criminal law and human rights law: due to the broad concepts used, the discourses regarding the commonalities and differences of the two disciplines get increasingly inaccurate and confusing. Scholars and practitioners talk at cross-purposes because they do not have a common understanding and definition of the areas in question and are essentially discussing different subjects:

– One group, and that includes most scholars debating the relationship between international criminal law and human rights law, examines the relationship between international criminal law and human rights law in terms of the substantive interconnectedness of the two: how international criminal law emerged from, was a by-product or the logical last step of, the evolution of human rights.[19]
– The other group, including most of the practitioners interviewed in the course of this research project, have, at first glance, little regard for this question they see as a rather academic problem.[20] In theirday-to-day work, what seems more pressing or immediately relevant is how human rights relate to the procedural aspect of the trial, *inter alia*, how can the rights of the accused be consolidated with the needs of victim protection. This is a logical consequence of international criminal pro-

18 Antonio Cassese *International Criminal Law* (2nd edition OUP Oxford 2008) 3.
19 See below Part One Chapter Three I. eg M. Cherif Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-3) 9 Yale Journal of World Public Order 193-216; Carsten Stahn 'Internationaler Menschenrechtsschutz und Völkerstrafrecht' (1999) 3 Kritische Justiz 343-355.
20 See Part Three Chapter One III. below.

ceedings that take, compared to many national criminal trial, a very long time during which most of the human rights related issues that need to be addressed concern procedural aspects including the length of detention, the degree of victim participation, disclosure of evidence, witness proofing etc.

When discussing the 'use' of human rights law in international criminal law, one must thus first identify which of the two scenarios in question one is faced with, as they both entail very different practical consequences triggered by different legal provisions and questions. Hence, there are two basic conceptual differences that are not sufficiently distinguished with regard to their influence on the development and practical application of international criminal law:

– The first is the influence of human rights law on procedural international criminal law. Those are the rules that safeguard the accused's right to receive a fair, an independent, transparent and expeditious trial which provides for an equality of arms between the parties. Fair trial guarantees containing minimum standards for criminal trials are contained in all major human rights conventions[21] and are a part of customary international law.[22] In the area of international criminal law, the role and influence of international human rights law is much more prominent than in domestic jurisdictions, in which national constitutions often provide for much more efficient mechanisms of individual protection. As these mechanisms are absent in international law, human rights law comes to the forefront to fill the gaps. One of the most crucial, elementary fair trial standards is the principle of legality, made

21 Art. 10 and 11 Universal Declaration of Human Rights (UNGA Res 217 A [III] [10 December 1948] GAOR 3rd Session Part I Resolutions 71); Art. 14 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; Art. 6 Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; Art. 8 American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José); Art. 7 African Charter on Human and Peoples' Rights (adopted 27 June1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter).

22 Patrick Robinson 'The Right to a Fair Trail in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley Journal of International Law Publicist 1-11 at 5.

up of the two basic rules *nullum crimen sine lege* (no crime without law) and *nuella poena sine lege* (no punishment without law).[23] This standard plays a vital role in the assessment of the second and more complex concept:

– The relationship between human rights law and substantive international criminal law. Examining this relationship means nothing less than examining the roots of the evolution of international criminal law. What is substantive international criminal law made of? What is the common denominator of the actions we label crimes under international law? What is the essence of genocide, crimes against humanity and war crimes? These questions are so fundamental because international criminal provisions are vague, their written definition, if any, leaves the need for judicial interpretation. If international criminal law is indeed, as argued by some, the logical result of an evolution of human rights, human rights law is an obvious place for judges in international criminal cases to turn to when they seek to fill the gaps left open by the statutes to the international courts and tribunals they operate in.

However, the judicial interpretation of a crime by way of consultation of substantive norms outside the ones written in the statute in which the crime is contained can undermine the defendant's basic rights to a fair trial. To put it differently and perhaps more strikingly, the application or interpretation of substantive human rights law in criminal matters might violate the defendant's human rights. In this case, the whole essence of what courts in general and international criminal courts and tribunals in particular are, what they stand for, is endangered, for if a court who is to uphold law and justice violates human rights itself, it has essentially failed.[24]

This book will concentrate on the role of human rights in substantive international criminal law. However, as demonstrated above, substantive and procedural international criminal law are interlinked and an incorrect application of one will have obvious consequences on the other. In order to grasp the parameters, guarantees and limitations of the application of human rights law in substantive international criminal law, the understand-

23 Claus Kreß 'Nulla poena nullum crimen sine lege' in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* 2nd ed (OUP 2012) vol VII 889-899 at 889.

24 See also Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71, 59.

ing of human rights in procedural international criminal law is a necessity. The following chapters will hence first outline the relationship between human rights law and procedural international criminal law, followed by the connection between human rights law and substantive international criminal law. This part elaborates on the similarities and the differences of the two fields of law. Once the extent to which human rights law can be useful in international criminal law is established, the thesis will discuss what authorizes the courts and tribunals to use human rights law. This includes a discussion of *nullum crimen sine lege* in international criminal law and the potential clashes of this basic principle of human rights law with the application of human rights law in substantive international criminal law.

Chapter Two: Human Rights Law and Procedural International Criminal Law

'Procedural' human rights law to be applied by international courts and tribunals are, first and foremost, the rights of the accused person. All modern international criminal courts and tribunals explicitly refer to the rights of the accused, albeit to a differing degree of sophistication. The ad hoc and hybrid tribunals, as well as the ICC, all dedicate an article to the rights of the accused during preparation and trial phase.[25] All these provisions are explicitly modelled after Art. 14 ICCPR[26] and only slightly adapted to fit the needs of an international criminal legal context. Other 'procedural'

25 See Art. 21 ICTY Statute; Art. 20 ICTR Statute; Art. Art. 17 SCSL Statute; Art. 16 STL Statute; Art. 35 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea (27 October 2004) S/RKM/1004/006 http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (31 October 2017); see also Art. 67 Rome Statute.

26 International Covenant on Civil and Political Rights adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; for the ICTY see Theodor Meron 'Human Rights Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals' Fourth Marek Nowicki Memorial Lecture (28 November 2008) <http://web.ceu.hu/legal/pdf%20documents/Nowicki/Meron_Enforcement%20of%20HRwarsawnowicki13nov 08.pdf> (as last accessed on 10 June 2013; speech no longer accessible online); 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' UN Doc S/25704 para. 106.

human rights guarantees, taking the example of the Rome Statute as the most detailed and elaborate of the Statute are Art. 20 (*ne bis in idem*); Art. 22 (*nullum crimen sine lege*); Art. 23 (*nulla poena sine lege*); Art. 24 (non-retroactivity); Art. 26 (exclusion of jurisdiction over persons under eighteen); Art. 64 (2) (Trial Chamber as the organ that must ensure a fair and expeditious trial); Art. 66 (presumption of innocence); Arts 81-84 (right to appeal); Art. 85 (right to compensation in cases of unlawful arrest of detention).

These provisions give guidance to the chamber on how it shall conduct proceedings in a way which guarantees a fair trial for the accused. The ICC has taken ample opportunities to examine the human rights of the accused in international criminal proceedings in the course of its first, now-completed, trial against Thomas Lubanga Dyilo. When issuing the first of its two stays of proceedings the Court's Trial Chamber referred extensively to international human rights law regarding the right to a fair trial, more specifically the scope of the prosecution's obligation to disclose exculpatory evidence to the defence.[27]

Human rights law has also been used by the ICC to outline the scope, rules and limitations of victim protection and has already been used to

27 *Prosecutor v Thomas Lubanga Dyilo (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008)* ICC-01/04-01/06-1401 (13 June 2008); para. 58 refers to fair trial provisions in Art. 14(1) ICCPR, the Art. 11(1) UDHR and Art. 6 ECHR; paras 77-81 analyses ICTY and ECtHR jurisprudence regarding the prosecution's disclosure obligations; paras 82-87 deals with the role of the judges in determining whether or not the disclosure obligations have been met. The second stay of proceedings following the refusal of the prosecution to reveal the identity of one of its intermediaries did not include such direct references to human rights instruments outside the Rome Statute, see *Prosecutor v Thomas Lubanga Dylio (Decision on the Prosecution's Urgent Request for Variation of the Time-*
Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU) ICC-01/04-01/06-2517 (8 July 2010); for a comprehensive analysis of the use of regional human rights jurisprudene by the Court in Lubanga see Annika Jones 'Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court' (2016) 16 Human Rights Law Review, 701-29.

clarify the unique victim participation procedure before the ICC.[28] The ICTR and the ICTY have both referenced international human rights law in interpreting what rights a person accused before any of their tribunals is entitled to.[29]

On what legal basis could the *ad hoc* tribunals and the ICC invoke these extra-statutory instruments?

I. Ad Hoc Tribunals

When referencing human rights law in a procedural context, the ICTY and the ICTR, unlike the ICC, could not take recourse to a provision outlining their applicable law (for a detailed analysis of the ICC's rules on the law applicable see Part One Chapter Three II. 2 below). Due to their *sui generis* nature, due to its establishment through UN Security Council Resolutions, it is at times cumbersome to determine which standards they are

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28 Further William A Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 399-400; eg *Situation on the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*) ICC-01/04 UN (17 January 2006); *Prosecutor v Thomas Lubanga Dyilo (Decision on Victims' Participation)* ICC-01/04-01/06-1119 (18 January 2008) para. 35; *Prosecutor v Jean-Pierre Bemba (Fourth Decision on Victims' Participation)* ICC-01/05-01/08 6/39 (2 December 2008) para. 16; instruments referred to varied from the Convention on the Rights of the Child ([adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3) to soft law documents such as Commission on Human Rights 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' ([19 April 2005] ESCOR 61st Session Supp 3, 136); UNGA Res 40/34 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' ([29 November 1985] GAOR 40th Session Supp 53, 213).

29 *Prosecutor v Akayesu (Appeal Judgment)* ICTR-96-4-A (1 June 2001) para 117; *Prosecutor v Kajelijeli (Appeal Judgment)* ICTR-98-44-A-A (23 May 2005) paras 209-212, 224-230, 251-255; *Prosecutor v Kambanda (Appeal Judgment)* ICTR-97-23-A (19 October 2000) para 33; *Mugenzi and Mugiraneza v Prosecutor (Appeal Judgment)* ICTR-99-50-A (4 February 2013) paraas 7 an 10; *Prosecutor v Furundžija (Appeal Judgment)* IT-95-17/1-A (21 July 2000) para 69; *Prosecutor v Milutinović et al (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction–Joint Criminal Enterprise)* IT-99-37-AR72 (21 May 2003) para. 9, *Prosecutor v Tadić (Appeal Judgment)* IT-94-1-A (15 July 1999) paras 43-51
Prosecutor v Vasiljević (Judgment) IT-98-32-T (29 November 2002) para 197.

bound to.[30] This has led to a particular dogmatic vagueness in the application of law outside the Statute, both in the procedural and substantive sense. As international criminal law is a part of public international law, the *ad hoc* tribunals are generally bound by the same sources of law as any other area of public international law, the ones enlisted in Art. 38 ICJ Statute.[31] The rights of the accused are outlined in Art. 21 ICTY Statute and also in Art. 20 dealing with fair and expeditious trial. The ICTR covers substantially the same rules in Art. 20 and Art. 19 of its Statute respectively. As the tribunals are not given the guidance of a specific list of sources applicable, the tribunals seem to be overly cautious not to overstep their legal boundaries. This, paradoxically, leads to a watering down of the standards of applicable law in many instances before the *ad hoc* tribunals: as the tribunals tread carefully as to not exceed their mandates, they seem to circumvent, in many cases, a discussion whether they apply a certain external provision as (customary) law per se and retreat to the safer notion of using the provision as a 'interpretational guidance' or 'inspiration' for the court without properly discussing the basis of such an application as 'guidance' (see Part One Chapter Three II. 2. C. below). In the end, whether a provision is applied as part of customary international law or as 'inspiration' does usually not change the outcome of the Chamber's reasoning. 'Inspriration' and 'guidance' allow the court to use concepts the legal basis of which is not entirely established in circumvention of dogmatically sound discussions about what authorizes the respective tribunal to apply the standard in question. A thorough examination of the status of the applied law or concept as well as convincing proof of why the specific

30 The ICTY was established pursuant to UNSC Res 808 (1993) (22 February 1993) SCOR 48th Year 28; the ICTR UNSC Res 955 (1994) (8 November 1994) SCOR 49th Year 15; see also eg Christiane Kamardi *Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial Prinzips* (Springer Berlin 2009); Jacob Katz Cogan 'International Courts and Fair Trials: Difficulties and Perspectives' (2002) 27 Yale Journal of International Law 111-140 at 116-8.

31 Alexander Zahar and Göran Sluiter *International Criminal Law: A Critical Introduction* (OUP Oxford 2008) 277; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 89-90: 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under the general rules of international law'.

standard is (or is not) considered to be applicaple to the court and tribunal in question is thereby avoided.

This is a regrettable and at times dangerous neglect. The ICTY has justified its reference to the ICCPR by stating that the fair trial rights in the ICTY Statute are based on the ICCPR, which, in turn, based the provisions on fair trials in the ECHR.[32] The Secretary-General's Report which proposed the ICTY Statute stated that it was 'axiomatic' that the ICTY fully respected international standards regarding the rights of the accused and shared its view that 'such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights'.[33] The ICTY jurisprudence seems to not feel the need to delve into a discussion about the content of customary international law in this are and regards Art. 21 ICTY Statute as awarding a greater scope of protection than Art. 14 ICCP as Art. 21 also covers the pre-trial phase.[34]

The court is, however, concerned with the interpretation of fair trial provisions in international legal treaties by international judicial bodies (such as treaty bodies and regional human rights courts), which it sees not as binding,[35] but holds that the provisions and their interpretation have to be adapted to the 'object and purpose' of the statute and its unique context.[36] This might make sense as far as the interpretation of the legal provision is concerned. The treaty bodies' jurisprudence is not binding in itself but provides authoritative interpretations of the binding texts. The relevance of judgments of regional human rights courts beyond their direct binding force on the parties to a specific case is subject to much discussion

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32 Christiane Kamardi *Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial Prinzips* (Springer Berlin 2009) 148.

33 UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 para 106; see also Theodor Meron 'Human Rights Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals' Fourth Marek Nowicki Memorial Lecture (28 November 2008) <http://web.ceu.hu/legal/pdf%20documents/Nowicki/Meron_Enforcement%20of%20HRwarsawnowicki13nov 08.pdf > as last accessed on 10 June 2013; speech no longer accessible online.

34 *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IC-94-I-10 (10 August 1995) para. 25.

35 Christiane Kamardi *Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial Prinzips* (Springer Berlin 2009) 148.

36 *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IC-94-I-10 (10 August 1995) para. 26.

in international law.[37] They might in any case be an indication of existing customary law. The question at hand is whether existing customary law, in the area of human rights or otherwise, is binding as such to the ad hoc tribunals.

One argument that the ICTY, in particular, invokes to counter such an obligation to apply customary international law in the area of fair trial rights, is that the ICTY Statute, pursuant to Art. 22, obliges judges to provide for the protection of its witnesses and victims. Article 21 ICTY Statute also states that the right to a fair and public hearing is subject to Art. 22.[38] This follows a tendency at the ad hoc tribunals to pay lip service to the importance of international human rights standards before international criminal tribunals but actually wanting 'full authority to determine when it wants to comply with the ICCPR'[39] or other international instruments applicable to it. Instead of a dogmatically sound examination of whether, in fact, the respective instrument is applicable to the ad hoc tribunal and accordingly applying or disregarding it, the tribunals' approach is often characterized by an element of 'yes, but'. One argument, which factually always limits the scope of protection of international human rights instruments,[40] is that the tribunals operate in unique situations of mass violence and thus in a different legal context.[41] The strength of this argument is, however, at least questionable. It is the events that triggered

37 Art. 46 ECHR, for example, states explicitly that the judgments are binding on the parties of the case in question, but do not state that the judgments have an effect *erga omnes*; see, e.g. the speech of Boštjan Zupančič, judge of the ECtHR entitled ‚The Binding Nature of the Judgments of the ECHR and the Universality of Human Rights' (14 April 2014) available at http://www.cd-n.org/index.php?the-binding-nature-of-the-judgments-of-the-echr-and-the-universality-of-human-rights (31 October 2017).

38 *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IC-94-I-10 (10 August 1995) para. 26.

39 James Sloan 'The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look' (1996) 9(2) Leiden Journal of International Law 479-501 at 488.

40 Göran Sluiter ‚Human rights protection in the ICC pre-trial phase' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Nijhoff Leiden 2009) 459-476, 461.

41 *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) para 470; *Prosecutor v Kunarac (Appeal Judgment)* IT-96-23 & IT-96-23/1-A (12 June 2002 paras 142-148; see also eg *Prosecutor v Haradinaj* (Judgment) IT-04-84-T (3 April 2008) para. 127; *Prosecutor v Mićo Stanišić (Judgment)* IT-08-91-T (27 March 2013) para 47.

the tribunals' jurisdiction, not the tribunals themselves that manoeuvre in environments of mass violations. It is the situations themselves, which might constitute a national emergency in which derogations from some rights might exceptionally be allowed. The Rwandan armed conflict ended in July 1994, the ICTR was established in November the same year.[42] It is true that the ICTY was established in May 1993, when the armed conflict in the former Yugoslavia was still on-going. Nevertheless, the court did not start its investigations until July 1994 and the large majority of suspects was investigated, indicted and tried long after the Dayton Agreement. Naturally, this did not necessarily mean that threats to witnesses and victims were eliminated alongside the cessation of the conflict. However, it put the tribunals, which were geographically removed from the crime scenes, in a position not unlike the one many post-conflict States face in the aftermath of mass crimes or a situation like it occurs in large, high-profile criminal investigation involving gangs or other organized crime able to jeopardize the safety of victims and witnesses. These are precisely the kind of situations in which fair trial rights are especially important, to fend off accusations or tendencies of victor's justice and revenge. They are no situations that require any adaptation to a perceived uniqueness of international criminal law and the environment in which it operates.

II. ICC

1. Art. 21 (3) ICC

In order to provide a clearer guidance of the applicable sources and to avoid some of the ad hoc tribunals' dogmatic mishaps, the Rome Statute, as the first international criminal law forum ever, contains a list of the applicable law in Art. 21 Rome Statute. It also can take recourse to a provision that explicitly enables the court to apply some procedural human rights law. Art. 21 (3) Rome Statute reads

> ' [t]he 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,

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Kunarac, para. 488; see also *Prosecutor v Furundžija (Judgment)* IT-95-17 (10 December 1998) para. 162.

42 See ICTR UNSC Res 955 (1994) (8 November 1994) SCOR 49th Year 15;.

paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.[43]

Art. 21 (3) Rome Statute 'provides a standard against which all the law applied should be tested'.[44] This has been affirmed by the ICC Appeals Chamber when it stated that '[h]uman rights underpin the Statute; every aspect of it […]. Its provisions must be interpreted and more importantly applied, in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial'.[45] Art. 21 Rome Statute imposes a hierarchy of sources unknown to Art. 38 ICJ Statute. Art. 21 (3) Rome Statute is on the top of this hierarchy, placing it above the Statute itself.[46] It acts, in a way, as a constitution for the

43 A detailed discussion on the general sources of law applicable for the ICC and other international criminal tribunals can be found under Part One Chaper Three II.

44 Mahnoush H Arsanjani 'The Rome Statute of the International Criminal Court' (1999) 93 American Journal of International Law 22-43 at 29.

45 *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06-772 (14 December 2006) at para. 37.

46 Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71 at 46; Gilbert Bitti 'Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Brill The Hague 2008) 286-304, 293-4; of a different opinion are Gerhard Hafner and Christina Binder 'The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed' (2004) 9 Austrian Review of International and European Law 163-190, 173-177, who argue, inter alia, that Art 69(7) which states: 'Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if [...]' indicates that internationally recognized human rights and the Statute are on equal footing. As the Statute does not provide an exhaustive list of applicable human rights nor does it exhaustively define the ones that are mentioned in the Statute, this argument is not plausible. The ICC itself seems to suggest a supremacy of internationally recognized human rights in the above-cited section of *The Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006)* ICC-01/04-01/06-772 (14 December 2006) at para. 37.

court a norm on which all application of the sources of law have to be measured against.[47]

The phrasing of Art. 21 (3) is likely to stem from paraphrasing a similar one used before the ICTY which states that the ICTY Statute and its Rules of Procedure and Evidence were drafted with regard to and compliance of 'internationally recognized standards of fundamental human rights'[48] and itself referred to a section in the Secretary-General's Report on the Establishment of the ICTY in which the Secretary-General mentioned 'internationally recognized standards regarding the rights of the accused' which are 'in particular, contained in article 14 of the International Covenant on Civil and Political Rights'.[49] The origin of the terminology clarifies that the drafters of the statute thought of Art. 21 (3) Rome Statute as sort of a constitutional provision guaranteeing that trials before the ICC are conducted with regard to the rights of the accused and characterized by the leading principles of fairness, transparency and foreseeability. This was also explicitly mentioned in the last Draft Version of the Rome Statute where the drafters stated that:

> 'It was generally agreed that consistency with international human rights law would require that interpretation by the Court be consistent with the principle of nullum crimen sine lege. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 21.'[50]

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47 See also Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute' 10 (2010) International Criminal Law Review 43-71 at 46; Mahnoush H Arsanjani 'The Rome Statute of the Internatonal Criminal Court' 93 (1999) American Journal if International Law 22-42 at 29; Gilbert Bitti 'Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds) The Emerging Practice of the International Criminal Court (Brill The Hague 2008) 286-304,300-2.

48 *Prosecutor v Tadić (Decision on the Prosecutors Motion Requesting Protective Measures for Victims and Witnesses)* IT-94-1 (10 August 1995) para. 25.

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

50 Draft Art. 20 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum' (15-17 July 1998) A/Conf.183/2/Add.1 para. 63; in the draft article, what is now regulated under Article 21 was proposed to be Art. 20, while nullum crimen sine lege (now Article 22) was discussed as Article 21.

Hence, Art. 21 (3) Rome Statute requires the court to safeguard a fair trial in line with internationally recognized human rights.[51] It expands the list of fair trial rights already explicitly mentioned in the Statute and guarantees its adherence at every stage of the proceedings.[52] The ICC Appeals Chamber has discussed Art. 21 (3) Rome Statute in the context of a potential breach of the rights of the accused when it said [t]he Statute safeguards the rights of the accused […] Such rights are entrenched in articles 55 and 67 of the Statute. More importantly, article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.'[53]

2. What are 'internationally recognized human rights'?

It is less than clear what 'internationally recognized human rights' actually are. Comparing the phrasing with Art 7 (1) (h) of the Rome Statute, which speaks of 'grounds that are universally recognized as impermissible under international law' leaves room for the assumption that Art. 21 (3) requires something short of universal recognition.[54]

According to Art. 31 Vienna Convention on the Laws of Treaties,[55] Art. 21 (3) Rome Statute must be 'interpreted in good faith in accordance

51 See eg William A. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 398-9; Joe Verhoeven 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law' (2002) 33 Netherlands Yearbook of International Law 3-22, 14-15.

52 William A Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 398.

53 *Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006)* ICC-01/04-01/06-772 (14 December 2006) para. 36.

54 George E Edwards 'International Human Rights Challenges to the New International Criminal Court: the Search and Seizure Right to Privacy' (2001) 26 Yale Journal of International Law 323-412 at 376-77.

55 Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; see also *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Ap-*

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In any case, interpretation of the term 'internationally recognized human rights' should be carried out carefully and rather conservatively in line with the object and purpose of the Rome Statute which is ensuring common action in order to punish the 'most serious crimes of concern to the international community'.[56] The Rome Statute is not a human rights treaty in itself and the court it establishes is not a human rights court *per se*. The Preamble to the Rome Statute furthermore contains references to State sovereignty, territorial integrity and non-interference in internal affairs to emphasize the limits of the convention. Far-reaching inclusion of human rights concepts in different stages of becoming actual law and exceeding a conservative reading is not what the parties to the Rome Statue would have been ready to accept. A far-reaching human rights inclusion should therefore be rejected.

Furthermore, Art. 21 Rome Statute (just as Art. 38 ICJ Statute) is a secondary rule of international law, 'which provide for the formation of primary rules, those rules that state what has to be done and what cannot be done'[57]. The provision of Art. 21 (3) Rome Statute only guides the court in how its interpretation and application has to be conducted but it does not in itself define the applicable law for the court.[58]

What, then, does a more conservative approach on this question contain? The 1998 so-called Zutphen Draft of the Rome Statute referred, albeit in a different context, to the term 'internationally protected human rights'. In a footnote, it was made clear that this term was chosen to in-

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peal) ICC-01/04-168 (13 July 2006) para. 33; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages)* ICC-01/04-01/07-522 (27 May 2008) paras 38 and 39; *Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence')* ICC-01/05-01/08-1019 (19 November 2010) para. 49.

56 See Preamble to the Rome Statute.

57 Noora Arajarvi 'Between Lex Lata and Lex Ferenda – Customary International (Criminal) law and the Principle of Legality ' (2010-11) 15 Tilburg Law Review 163-182 at 170.

58 Noora Arajarvi 'Between Lex Lata and Lex Ferenda – Customary International (Criminal) law and the Principle of Legality ' 15 Tilburg Law Review (2010-2011) 163-182 at 170.

clude non-treaty human rights guarantees, namely customary human rights law and that the term was meant to be broader than the term 'international law'.[59] The first part of this footnote is clear and has also been explicitly supported by jurisprudence of the court who stated that '[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions'.[60]

The second part of the footnote is less susceptible to a clear interpretation, particularly because it is not further explained and has not been debated in any of the *travaux préparatoire*. It seems to suggest that 'internationally recognized human rights' seems to be a term more expansive than

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59 Preparatory Committee on the Establishment of an International Criminal Court 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands' (4 February 1998) UN Doc A/AC.249/1998/L.13at 47-50.

60 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la defense en reponse au memoire d'appeal du Procureur'" Separate Opinion of Judge Georghios M. Pikis) ICC-01/04-01/06-424 (12 September 2006) at para. 3; in 2004, Hafner/Binder examined in detail the various manifestations of *opinio iuris* for 'internationally recognized human rights'. For the case of international human rights treaties, they look at the number of ratification and the geographical distribution. After analysing the core human rights treaties (ICCPR, ICESCR, ICERD, CEDAW, CRC, CMW, CAT and their Optional Protocols) Hafner and Binder conclude that for all of these instruments apart from the CMW which only had 26 ratifications in 2004 (47 ratifications as of September 2013) and the second optional protocol to the ICCPR, which deals with the abolition of the death penalty (Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty [adopted 15 December 1989, entered into force 11 July 1991] GAOR 44th Session Supp 49 vol 1, 207; 77 ratifications as of 2013), a *presumptio iuris* should exist as to their international recognition. Based on the numbers of ratifications they deemed sufficient for being 'widely ratified' and therefore recognized, this list now also includes the two optional Protocols to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict and on the sale of Children, Child Prostitution and Child Pornography ([25 May 2000] GAOR 54th Session Supp 49 vol 3, 6. As another one of the core human rights conventions triggering the *presumtio iuris*, the Convention on the Rights of Persons with Disabilities ([adopted 13 December 2006, entered into force 3 May 2008] 2515 UNTS 12) which, as of 2013, has been ratified by 134 States, could be mentioned; see Gerhard Hafner and Christina Binder 'The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed' (2004) 9 Austrian Review of International and European Law 163-190, 186-190.
152 and 164 ratifications respectively in 2013.).

merely customary international law.[61] The most likely interpretation in light of the object and purpose of the convention is that it referred to soft law relevant to the court, which the latter has to take into account and has to give due regard to, but by which it is not bound. [62] This would be first and foremost the jurisprudence of the treaty bodies interpreting internationally recognized human rights law, namely the major UN human rights conventions, as for example the ICCPR, interpreted by the Human Rights Committee ('HRC').[63] On the other hand, judgments of regional human rights courts have to be taken into account by the court to a greater extent than the treaty body decisions.[64] Even though the court itself is not party to any regional human rights treaty, the Member States to the Rome Statute are and, unlike the recommendations of the treaty bodies, the judgments of the regional human rights bodies are binding. For this reason, judgements of regional courts come under Art. 21 (1) (c) of the Rome Statute as part of the 'national laws that would normally exercise jurisdiction' the court takes recourse to when it seeks to distil general principles of law to apply and therefore also find their way into the canon of internationally recognized human rights to be consulted by the court in questions of fair trial.[65]

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61 See also George E Edwards 'International Human Rights Challenges to the New International Criminal Court: the Search and Seizure Right to Privacy' (2001) 26 Yale Journal of International Law 323-412 at 381.

62 See also Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71, 69.

63 See also Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71, 69.

64 See also Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71, 69-70.

65 Daniel Sheppard 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 International Criminal Law Review 43-71, 69-70; Amal Alamuddin 'Collection of Evidence' in Karim A A Khan, Caroline Buisma and Christopher Gosnell (eds) *Principles of International Criminal Justice* (OUP Oxford 2010) 231-305 at 236.

Chapter Three: Human Rights Law and Substantive International Criminal Law

This chapter will explore the relationship between and the use of 'substantive' human rights law in the work of the material consideration of international criminal courts and tribunals. It will first scrutinize the similarities, the common development, but also the differences between the two fields of law. This is necessary to understand to what degree it is actually warranted for the courts and tribunals to refer to international human rights law before delving into the question to what degree the ad hoc tribunals and the ICC are entitled to refer to international criminal law in this context by their own secondary law.

I. Relationship ICL – Substantive HR:

> 'Crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by the State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations'.[66]

International criminal law has been called a 'hybrid branch of law'[67]. It is a part of public international law that encompasses 'notions, principles and legal constructs'[68] from national criminal law as well as from both international humanitarian law and international human rights law.[69] International human rights law and international criminal law are obviously related as a violation of the one (e.g. the prohibition of slavery) often finds a mirror provision in the other (e.g. enslavement as a crime against humanity). Many crimes under international law do consist of mass violations of human rights. According to its Preamble and Art. 1 Rome Statute, the ICC is responsible for the prosecution of the most serious crimes of concern to the international community as a whole. This is an expression of a system of values and morals the international community as a whole seeks to pro-

66 William Schabas, Commentary on the Rome Statute, Article 7, p. 139.
67 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 7.
68 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 7.
69 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 4-10.

tect.[70] The codification of those values of the international community is, to a great extent, to be found in international human rights law.[71] Furthermore, the human rights movement and the focus of human rights institutions like the Inter-American Court of Human Rights (IACtHR) and the HRC on accountability of mass violations fertilized and spurred the development of legal concepts of international criminal law and are responsible for much of the political momentum that led to the ad hoc tribunals and later to the establishment of the ICC.[72]

At the same time, the two concepts are framed very differently in dogmatic legal terms. Human rights law formulates rights the individual has against the State.[73] International criminal law is a catalogue of prohibitions, obligations and criminal offences based on the principle of individual criminal responsibility[74]

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70 Carsten Stahn and Sven-R. Eiffler 'Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom' (1999) 82(1) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 253-277, 267.

71 Carsten Stahn and Sven-R. Eiffler 'Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom' (1999) 82(1) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 253-277, 267.

72 William A Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 397.

73 However, the non-binding nature of many bodies which are accessible to individuals in order to individually claim their rights vis-à-vis States raises the question to what degree human rights can indeed be classified as rights of the individual; for this discussion see Jost Delbrück and Rüdiger Wolfrum *Völkerrecht* Volume I/2: *Der Staat und andere Völkerrechtssubjekte; Räume unter internationaler Verwaltung* (2nd edition De Gruyter Berlin 2002) with further references, in particular, to two of the most influencial scholars of modern public international law whose views differed substantively on the subject: whereas Hans Kelsen was of the opinion that human rights cannot be seen as rights of the individual if said individual cannot enforce the rights in national or international courts whose judgments are binding upon States (Hans Kelsen *Principles of International Law* [Rinehart and Company New York 1952] 143-4), Hersch Lauterpacht argued for the existence of human rights as individual rights even if the individual cannot enforce the rights directly (Hersch Lauterpacht *International Law and Human Rights* [FA Praeger London 1950] 27, 48, 61, 159-160).
(2nd edition De Gruyter Berlin 2002) 260-4.

74 See *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) para. 470; however, the extent to which State involvement is a prerequisite element of crimes against humanity has in recent years been controversially discussed, with many ar-

So how are the two disciplines related; what unites them what sets them apart?

There are obvious intersections: in the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the crimes now known as crimes against humanity were enlisted under the heading 'systematic or mass violations of human rights'.[75]

During the negotiation of the Rome Statute, there were repeated attempts to expand the jurisdiction of the court to so-called 'treaty crimes': crimes which were enshrined in international human rights treaties but the customary nature of which was not beyond doubt.[76] Examples of such 'treaty crimes' are, for instance, terrorism or drug trafficking. Ultimately, these crimes were not included as crimes punishable by the ICC. However, there are examples of such 'treaty crimes' to be found in the Rome Statute, albeit not listed as separate crimes, but under the heading of crimes against humanity or war crimes. The crimes of apartheid, forced disappearance (crimes against humanity) and intentional attacks on personnel in peacekeeping missions (war crimes) are punishable under the Rome Statute and had before only been explicitly punishable under human rights law conventions. This indicates flexibility and provides for a margin within which international criminal courts and tribunals can take recourse to international human rights law, may it be treaty law, custom or jurisprudence of international courts. Furthermore, it also indicates the interrelation between human rights law and international criminal law.

The extra-statutory conventions which the courts and tribunals use are made up first and foremost of the conventions directly related to the 'core

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guing for a necessary involvement of State or at least State-like actors, see Claus Kress 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision' (2010) 23 Leiden Journal of International Law 855–73; William A Schabas 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 Leiden Journal of International Law 847–53; see also International Criminal Court 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' ICC-01/09-19 (31 March 2010), Dissenting Opinion of Judge Hans-Peter 83–163.

75 UN ILC 'Draft Code of Crimes against the Peace and Security of Mankind' in 'Report of the International Law Commission on the Work of Its Forty-Third Session' (29 April – 19 July 1991) (1991) vol II part II UNYBILC 79.

76 See also Zimmermann in Trifferer 130f.

crimes' over which the ICC has jurisdiction, namely the Genocide Convention and the four Geneva Conventions and two Additional Protocols and their violation is often characterized by violations of human rights law at the same time as violations of international criminal law/international humanitarian law.[77] The case law of the ICTY and ICTR is replete with reference to jurisprudence of international judicial bodies applying international human rights law. However, there is no clear blueprint or structure in the reference to international human rights law in international criminal courts and tribunals. This is partly owed to the fact that there is no 'one-size-fits-all'-solution for the use of human rights law in international criminal law, as 'human rights' are in themselves a complex and fragmented concept in which the different rights are elaborated, enforceable and protected to varying degrees. These degrees could be classified according to the stages identified by Bassiouni, which are outlined in the following section. Furthermore, international criminal justice is developed in a decentralised manner by a variety of different practitioners (international courts and tribunals) and scholars whose conception of what 'international criminal law' is and what sources it derives from, vary according to the legal system they were educated in and their field of expertise. In-

77 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. There are other conventions laying down the laws of war which are of relevance, for instance the 1907 Hague Convention, Convention respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277.

ternational (human) rights lawyers and scholars often arrive at different conclusions than their colleagues who are specialised in criminal law.

1. Hierarchy vs Horizontal Completion

One of the major theories on the interrelation between human rights and international criminal law has been developed by Cherif M. Bassiouni when he identified five stages of emergence and development of human rights.[78] First, he identifies the enunciative stage, '[t]he emergence and shaping of internationally perceived shared values through intellectual and social processes'[79]; second, the declarative stage, in which the shared values get pronounced as such at an international level. In the prescriptive stage, the values are proscribed in a normative binding form, for example in an international treaty. This stage is followed by the enforcement stage which is categorized by a quest for means of encoring the proscribed values. In the final and most elaborated stage, the criminalization stage, violations of these shared values are internationally punishable.[80] According to Bassiouni, there is a logical development of human rights from the shaping of shared values, the emergence of non-binding commitments towards them and the elaboration of specific normative prescriptions towards enforcement and finally a penalization of violations of these shared values.[81] For Bassiouni, 'international criminal proscriptions are the ulti-

78 MC Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-83) 9 Yale J World Pub. Ord 193-216; see also, for preceding discussions on the interrelation oh human rights and international criminal law Robert K Woetzel 'International Criminal Law and Human Rights: The Sharp Edge of the Sword' (1968) 62 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 117-123.

79 MC Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-83) 9 Yale J World Pub. Ord 193-216 at 195.

80 MC Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-83) 9 Yale J World Pub. Ord 193-216.

81 MC Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-83) 9 Yale J World Pub. Ord 193-216, 195.

ma ratio modality of enforcing internationally protected human rights'[82]. Similarly, Meron holds that criminalizing human rights norms through means of international criminal law enhances 'the bite of human rights law'[83] as it provides for additional enforcement mechanisms, adding to human rights law by providing measures against individual actors instead of States.[84]

This approach partly overlaps with the approach taken by the International Law Commission (ILC) when adapting its first Draft Articles of Crimes against the Peace and Security of Mankind in 1991.[85] The ILC's article entitled 'Systematic or mass violations of human rights' 'in substance covers the same field as article 5 of the Statute of the International Tribunal [for the Former Yugoslavia]' as the ILC states itself in 1994, meaning the substantive content of the draft article is the prohibition of crimes against humanity.[86] As a consequence, international criminal law and human rights law overlap on a lot of occasions and depend on each other in order to establish the given parameters in which the two disciplines shift, where they stand and in what direction they intend to develop further. Bassiouni's theory explains the relation between the two disciplines as to their emergence and common roots. But this model offers only limited value when it comes to the practical application of human rights law in international criminal law.

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82 MC Bassiouni 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights' (1982-83) 9 Yale J World Pub. Ord 193-216, 196.

83 Theodor Meron 'Human Rights Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals' Fourth Marek Nowicki Memorial Lecture (28 November 2008) <http://web.ceu.hu/legal/pdf%20documents/Nowicki/Meron_Enforcement%20of%20HRwarsawnowicki13nov 08.pdf > (as last accessed on 10 June 2013; speech no longer accessible online 36).

84 Theodor Meron 'Human Rights Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals' Fourth Marek Nowicki Memorial Lecture (28 November 2008) <http://web.ceu.hu/legal/pdf%20documents/Nowicki/Meron_Enforcement%20of%20HRwarsawnowicki13nov 08.pdf > (as last accessed on 10 June 2013; speech no longer accessible online) 36.

85 UN ILC 'Draft Articles against the Peace and Security of Mankind' Yearbook of the International Law Commission [1991] vol II part II UNYBILC 79-107;.

86 UN ILC 'Report of the International Law Commission on the Work of Its Forty-Sixth Session' (2 May–22 July 1994) GAOR 49th Session Supp 10, 40 at 39; see also William Schabas, Commentary on the Rome Statute, Article 7, p. 141.

Carsten Stahn criticizes Bassiouni's analysis at a normative-legal level when it comes to the different application requirements for international criminal law and human rights law. He states that crimes under international law require an attack not of an individual, but of the international community as a whole and that they must therefore be seen in the context of a threat to international peace and security.[87]

Whereas it is undoubtedly true that international criminal law, from the outset, has been a means to counteract and punish crimes that 'endangered the international community or shocked the conscience of mankind'[88] and a reference to the peace and security of mankind is to be found in the preamble of the Rome Statute, it has never necessarily been the case that just because a crime under international law is shocking to the international community as a whole, it does also aleways constitute a threat to international peace and security. Specific instances of genocide or crimes against humanity, shocking as they might be, might not automatically threaten international peace and security.[89] Also, during recent years, observers witnessed a change of focus in international criminal law, which more and more deals with internal conflicts and situations and in which the threshold for crimes against humanity is dramatically lowered to the point where no state or state-like organization needs to be involved, which in turn tends to lower any threat to international peace and security.[90]

Still, it is undeniably true that international criminal law deals with crimes that are collective in nature, committed against a specific group of persons or population, rather than 'a limited and randomly selected num-

87 Carsten Stahn 'Internationaler Menschenrechtsschutz und Völkerstrafrecht' (1999) 3 Kritische Justiz 343-355, 351; Carsten Stahn and Sven-R. Eiffler 'Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom' (1999) 82(1) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 253-277, 263.

88 United Nations War Crimes Commission *History of the United Nations War crimes Commission and the Development of the Laws of War* (HMSO London 1948) 179.

89 For example, the post-election violence in Kenya, is being dealt with before the ICC and during which the prosecution claims crimes against humanity have been committed, has never been subject to a Security Council Resolution, under Chapter VII or otherwise.

90 See International Criminal Court 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' ICC-01/09-19 (31 March 2010).

ber of individuals'.[91] Nevertheless, the reason for their punishment, and what sets them apart from other crimes, is the mass violation of human rights, a violation that targets individuals systematically for a specific infringement of their human rights not because of their individual and personal characteristics but because they belong to a specific group as such. This does by no means contradict that the underlying offences, though not the scope of protection of these crimes, are human rights violations.

In addition, Bassiouni has been criticized, in particular, for his narrow view on international criminal proscriptions as the 'highest form' of human rights protection. Stahn claims that the relationship between the two disciplines is not a vertical but rather an horizontal one as the question whether or not the violation of a human right is punishable by means of criminal law does not create a hierarchy within international human rights law and does not make one set of human rights more meaningful and important than others.[92] According to Stahn, the reason why some human rights are protected by means of an international criminal threat of punishment is not that those rights are more important than others whose violation does not trigger criminal charges, but the reason is simply that these rights are more prone to infringement in the context of conflict.[93] He sees this further substantiated by the fact that the rights Bassiouni talks about are not protected in absolute terms but only in the context of armed conflict or when they are committed as part of a widespread or systematic attack.[94] Stahn's criticism here is only partly convincing. As the ICJ has held, human rights are applicable in times of peace as well as in times of armed conflict[95] and military occupation.[96] However, for all its talk about the indivisibility of human rights, the international system of human rights protection in itself introduces a hierarchy of human rights by identifying

91 *Prosecutor v Kunarac* (Appeal Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) para. 90.

92 Carsten Stahn ‚Internationaler Menschenrechtsschutz und Völkerstrafrecht' 3 *Kritische Justiz* (1999) 343-355, 354.

93 Carsten Stahn, Internationaler Menschenrechtsschutz und Völkerstrafrecht, at 354.

94 C. Stahn, Internationaler Menschenrechtsschutz und Völkerstrafrecht, at 351.

95 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 para. 25.

96 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, paras 106-113; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 para 216.

some from which derogation is not possible even in times of 'public emergency' or 'war'.[97] Prime examples of emergencies that 'threaten the life of the nation'[98] are, amongst others, international as well as internal armed conflict and unrest.[99] Core minimum rights that are not eligible for derogation even in those times are, in all the instruments, the prohibition of torture, slavery and servitude, as well as *nullum crimen/nulla poene sine lege* and certain aspects of the right to life.[100] The ACHR and the ICCPR expand the prohibition of derogations to other rights such as the freedom of religion (ACHR and ICCPR), the rights of the child (ACHR) or the right to participate in government (ACHR). In addition, the HRC declared several elements of rights that are not listed in Art. 4 (2) factually non-derogable as well, given their status in general international law.[101] These include the right of persons deprived of their liberty to be treated with dignity,[102] the prohibition of genocide with explicit reference to Art. 27 ICCPR regulating the rights of minorities,[103] propaganda of war and hate speech[104] as well as deportation and forcible transfer of population. The latter is deemed non-derogable by the HRC with explicit reference to its status as a crime against humanity under the Rome Statute.[105] The core minimum rights, covered by all the conventions that include non-derogable provisions, as well as the majority of provisions deemed non- dero-

97 See Art. 4 (2) ICCPR, Art. 15 ECHR, Art. 27 ACHR (2); while the first speaks only of public emergency, the three latter instruments refers to both public emergency and war.

98 See Art. 4 (1) ICCPR, Art. 15 (1) ICCPR.

99 Jaime Oraá *Human Rights in States of Emergency in International Law* (Clarendon Press Oxford 1992) 30-31; see also UN Commission on Human Rights 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile' (1962) UN Doc E/CN.4/826, 153.

100 See See eg Manfred Nowak U. N. Covenant on Civil and Political Rights: CCPR Commentary (N. P Engel Kehl 2005) 85.

101 UN HRC 'General Comment No 29: Derogations from Provisions of the Covenant during a State of Emergency (Art. 4)' (24 July 2001) GAOR 56th Session Supp 40 vol 1, 202; The HRC, in its General Comment, mostly followed the evaluations of the International Commission of Jurists in International Commission of Jurists *States of Emergency—Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists* (International Commission of Jurists Geneva 1983).

102 Para. 13 (a).

103 Para. 13 (c).

104 Para. 13 (e).

105 Para. 13 (d).

gable by the HRC, mirror crimes under international law. It is in a situation of international or internal war, 'the greatest public emergency',[106] that crimes under international law are mostly committed. In these circumstances, international criminal law complements the provisions of international human rights law by providing penal sanctions in the case the most core rights are violated. Many of those are again mirrored in Common Article 3 of the 1949 Geneva Conventions, albeit modified to fit the subject-matter of the Geneva Conventions and its beneficiaries.[107] Other human rights, even if they are violated on a mass scale, will never trigger international legal responses. This is to say that whereas for some rights, international criminal law can indeed be seen as a complimentary set of instruments to be applied alongside human rights law on a horizontal level, for other rights, the relation is more of a vertical one. This is due to the hierarchy inherent in the international system of human rights protection to begin with.

The problem with Bassiouni's model in light of the subject of this book is rather that its simplicity, which makes it so appealing at first sight, presents a basic structural problem that renders the model to be of limited use in terms of practical application. This is exemplarily shown by the fact that the principle of *nullum crimen sine lege*, which is at length discussed under Part One Chapter Three III, is not mentioned.

2. Structural Differences vs Universality

The obvious overlap and the common roots of the two concepts has made human rights law a self-evident place to seek recourse when international criminal tribunals had to fill the gaps their respective statutes left when defining crimes under the tribunals' jurisdiction. The most ground-breaking jurisprudence in this respect, which is extremely telling when it comes to the relationship of human rights and international criminal law and its conception by practitioners is the ICTY judgement in the case against

106 UN Enable 'Human Rights in Time of Emergency' http://www.un.org/esa/socdev/enable/comp210.htm (31 October 2017).

107 Theo van Boven 'Distinguishing Criteria of Human Rights' in Karel Vasak and Philip Alston (eds) *The International Dimensions of Human Rights* (Greenwood Press Wetport 1982) 43.

Dragoljub Kunarac, in which the chamber delved into an in-depth analysis of the two concepts, their similarities and differences.[108]

The Chamber stated that because of the resemblance, in terms of goals, values and terminology between human rights and international criminal law, recourse to practices and instruments of human rights law is often taken by international criminal law in order to determine the content of customary international law with regards to a specific question of international criminal law.[109] The Trial Chamber also agreed with the chamber in *Furundžija* on its approach taken, the determination of the definition of torture under customary law, supplemented with specific elements which stem from the international criminal/international humanitarian law context in which the crimes under scrutiny of the ICTY were committed.[110] The court referred solely to 'international humanitarian law' in its argumentation, but it factually examined the definition of torture as a crime against humanity valid also outside of armed conflict. The court took account of the peculiarities of the conduct punishable under the ICTY Statute, which is limited to crimes committed in relation to an armed conflict, circumscribed as 'serious violations of international humanitarian law' by the UNGA resolution establishing the ICTY, but its conclusions are valid for the whole body of international criminal law.[111]

The ICTY, in *Kunarac*, bestowed great care in portraying the similarities and differences of the two regimes as well as the intersection in which the two meet. The court identified two crucial doctrinal points in which the human rights regime and the international criminal law regime differed fundamentally:

i. Firstly, the ICTY found the role of the State as an actor in international human rights law to fundamentally differ from the role of the State in international criminal law. In the human rights context, the ICTY found the State to be the 'ultimate guarantor' of the rights in questions, the entity which is bound to observe them and the one which will be accountable for violations and responsible for the halt of infringements.[112] Even though human rights can also have a horizontal

108 *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001).
109 Prosecutor v Kunarac (Judgment) IT-96-23 (22 February 2001) para. 467.
110 Prosecutor v Kunarac (Judgment) IT-96-23 (22 February 2001) para. 468–69.
111 UNSC Res 808 (1993) (22 February 1993) SCOR 48th Year 28 para. 1; UNSC Res 827 (1993) (25 May 1993) SCOR 48th Year 29 para. 2.
112 Prosecutor v Kunarac (Judgment) IT-96-23 (22 February 2001) para. 470 (i).

effect on the relations between private actors, ultimately, it is that State that is under an obligation to protect its citizens or inhabitants against a violation of their rights by State as well as non-State agents. International criminal law, in contrast, is based on the principle of individual criminal responsibility and the role of the State as peripheral when it comes to accountability.[113] In order to illustrate that point, the ICTY cited two US-American decisions applying the Alien Tort Claims Act.[114] In *Filártiga v Peña-Irala*, the United States Court of Appeals held that torture perpetrated by a State official violated universally accepted customary human rights law.[115] 15 years later, the same court held in *Kadić v Karadžić*, that when it comes to acts (including torture) which could be qualified as genocide or war crimes, no State involvement was necessary in order to hold an individual accountable for said actions. [116]

With respect to the last argument brought forward by the Chamber, is has, however, to be observed that what leads to the actual accountability of a single individual under international criminal law, is, in the vast majority of cases and especially when it comes to genocide and crimes against humanity, his or her involvement in illegal conduct as part of a State organ or an organization affiliated with the State (or at least as part of a State-like entity exercising effective control over a specific territory). Even though non-State actors have in recent years become the centre of the international criminal law spotlight and have often been the focus of prosecutorial investigations and indictments before the ICC, this development has been criticized harshly by those who think that international criminal law has first and foremost been established to prosecute criminal behaviour of States, involving large segments of a State apparatus and resources, and not to help govern-

113 See further for the obligations of individuals in the context of international criminal law: Jost Delbrück and Rüdiger Wolfrum *Völkerrecht* Volume I/2: *Der Staat und andere Völkerrechtssubjekte; Räume unter internationaler Verwaltung* (2nd edition De Gruyter Berlin 2002) 265-6.

114 Alien Tort Claims Act (1789) 28 USC § 1350.

115 *Filártiga v Peña-Irala* United States Court of Appeals (2nd Cir 1980) 630 F 2d 876, 878–79.

116 *Kadić v Karadžić* United States Court of Appeals (2nd Cir 1995) 70 F 3d 232.

ments to dispose of insurgencies and rebel forces within their own country.[117]

In addition, some significant human rights provisions oblige States to make the violation of a certain human right a criminal offence based on individual criminal responsibility. This is, for example, the approach of Article 4 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) according to which acts of torture, their attempt, complicity and participation shall be a criminal offence in any Member State. [118]

ii. The second structural differences lies, according to the view taken by the ICTY in *Kunarac*, in the functions of international criminal law as a penal regime in which the prosecutor on one side faces the individual defendant at the other side and of international human rights law in which the respondent is the State.[119]

For these reasons, the Trial Chamber concludes that international human rights law can only be referred to in international criminal law when taking into account the peculiarities which are inherent in this specific area of law.[120]

This can be countered with the HRC's observation that human rights standards contain an obligation to bring perpetrators of human rights violations to justice, thereby acknowledging that one area might trigger the other.[121]

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117 Claus Kress 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision' (2010) 23 Leiden Journal of International Law 855–73; William A Schabas 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 Leiden Journal of International Law 847–53; see also International Criminal Court 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' ICC-01/09-19 (31 March 2010), Dissenting Opinion of Judge Hans-Peter Kaul 83–163.

118 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112.

119 Prosecutor v Kunarac (Judgment) IT-96-23 (22 February 2001).para. 470 (ii).

120 *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) para. 471.

121 UN HRC 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) GAOR 59th Session Supp 40 vol 1, 175.

A similar-sounding argument, which nonetheless follows a different logic, is brought forward by McIntyre. He states that the courts and tribunals are setting their own human rights standards in the context of courts dealing with crimes committed in times of armed conflict.[122] For him, the relevant question is not whether the court and tribunals adhere to international human rights standards but whether the standards they are setting themselves are deemed proper so that the court or tribunal can be said to comply with the rule of law.[123]

This point of view has, in turn, been described as dangerous by Sluiter. His arguments are twofold: firstly, he points to the universality of human rights as minimum standards, like the majority of the fair trial rights.[124] He does, however, admit that there are indeed rules that need to be adapted and re-interpreted in the context of international criminal courts and tribunals. Second, he claims that 'one notices the harmful tendency that this so-called re-interpretation of the human rights corpus in light of the unique character and circumstances of international criminal tribunals practically by definition results in reduced protection, and always favours the interests of prosecution and/or victims over those of the accused'.[125]

Though international criminal law and human rights law, as demonstrated above, have many things in common, they are, in some ways, exact opposites. Not only in the way elaborated on before the ICTY in *Kunarac,* but also in a dogmatic sense of emergence and applications of the two regimes a substantial structural difference exists. Human rights, as part of public international law, are subject to the gradual development and inter-

122 G McIntryre 'Defending Human Rights in the Area of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William A Schabas (eds) *International Criminal Law Developments in the Case Law of the ICTY* (Brill Leiden 2003) at 194.

123 G McIntryre 'Defending Human Rights in the Area of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William A Schabas (eds) *International Criminal Law Developments in the Case Law of the ICTY* (Brill Leiden 2003) at 194.

124 Göran Sluiter 'Human rights protection in the ICC pre-trial phase' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Nijhoff Leiden 2009) 459-476, 461.

125 Göran Sluiter 'Human rights protection in the ICC pre-trial phase' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Nijhoff Leiden 2009) 459-476, 461.

pretation of this area of law by way of custom and gradual codification.[126] They are also often formulated in a general way, which makes their interpretation by treaty bodies and courts a vital component of their implementation.[127] On the other hand, criminal law, albeit also often leaving lacunae in its subject-matter provisions that require interpretation by judges is by definition more static, because it operates in an environment in which the need to reach a verdict is limited by basic principles of criminal law of which *nullum crimen sine lege* is one of the most important.

II. Legal Basis for the Application of Extra-Statutory Substantive Law

Having established the close relationship between human rights law and international criminal law, their similarities and differences, and having concluded that, indeed, it can be, from a practical point of view, advisable or even necessary for an international criminal court or tribunal to seek guidance from the vast area of human rights law in specific cases, the question is: what is the basis on which the institutions are authorized to do so? The statutes of the respective international criminal courts and tribunals establish the crimes which are covered by their jurisdiction. However, these statutes are only applicable to the respective tribunals and do not represent universally valid codifications of international criminal law, which makes them not so much of a criminal code but rather a 'specification of the jurisdictional authority'[128] of the respective court of tribunal.[129] Neither is it correct to assume that these statutes do in all cases merely represent a written record of an already existing customary rule even though, it is well possible that some of the provisions laid down in the Rome Statute will be an orientation for other courts and tribunals and as such slowly turn to be customary international law.

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126 See eg Hersch Lauterpacht 'Codification and Development of International Law' (1955) 49(1) American Journal of International Law 16-43.

127 See also Louise Doswald-Beck and Sylvain Vité 'International Humanitarian Law and Human Rights Law' (1993) 293 International Review of the Red Cross, available at <https://www.icrc.org/eng/resources/documents/misc/57jmrt.htm> (31 October 2017).

128 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 5.

129 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 14.

1. Ad Hoc Tribunals

Rather, international criminal law is based on a variety of sources, both written and unwritten ones. This is hard to consolidate with the traditional Romano-Germanic conception of criminal law as an entity that interprets and applies written legal provisions.[130] However, international criminal law, as a branch of public international law, is subject to the very same sources that apply to the rest of this field. As long as there is no exhaustive lists of crimes available for the respective tribunal (as it is the case at the Rome Stature for the ICC), the courts and tribunals therefore have to orientate themselves on the general sources of public international law.

A guideline for applicable sources and their hierarchy is enshrined in the famous Article 38 ICJ Statute, which reflects the sources of international law proper.[131] Article 38 designates that the ICJ shall apply

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Hence, the courts and tribunals can mostly draw upon primary sources (treaties and custom) as well as secondary sources (law-making processes envisaged by customary rules or treaty provisions) and finally general principles of law and international criminal law.[132]

The ICTR and the ICTY are, therefore, under a current pressure to justify their use of human rights law by reference to the state of customary international law in the area. As we will see in Chapter Two, they undertake this exercise applying varying degrees of effort and dogmatically sound methodology.

130 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 14.
131 Ian Brownlie *Principles of Public International Law* (6th ed OUP Oxford 2012) 5.
132 Antonio Cassese *International Criminal Law* (2nd edition OUP Oxford 2008) 14.

2. ICC

The law applicable for the ICC is, different from what is stipulated for the ad hoc tribunals, expressly stated in a provision which for large parts, mirrors Article 38 ICJ Statute but adapts it to the specific requirements of a criminal law regime. Article 21 Rome Statute is *lex specialis* to Article 38 ICJ Statute and the first codification of the sources of international criminal law[133]. Article 21(1) of the Rome Statute determines that the ICC 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.

Article 21(2) and (3) clarify further:

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.

Article 21 Rome Statute, unlike Article 38 ICJ Statute, provides a clear hierarchy between the sources of law. First and foremost, the ICC is to use

133 Margaret Mcauliffe deGuzman in: Otto Triffterer, Rome Statute, 2nd ed p 703; G Bitti 'Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds) The Emerging Practice of the International Criminal Court (Koninklijke Brill 2008) 285-304 at 286-7.

its statute and its Elements of Crime and Rules of Procedure and Evidence, all secondary sources may only be used if a gap exists in the Statute. Such was affirmed by the Appeals Chamber of the Court.[134]

The 'Elements of Crime' which, pursuant to Article 9 Rome Statute, assist the Court in the interpretation and application of the statutory rules on genocide, crimes against humanity and war crimes are a valuable, non-binding guideline for the court in defining the crimes under its jurisdiction. However, in order to capture the core definition of the crimes and what they contain, the courts and tribunals may often have to resort to documents other than the actual statutes related documents.

a. Art. 21 (3) Rome Statute

Article 21(3) Rome Statute explicitly mention that the application of the law according to Art. 21 must happen in accordance with internationally recognized human rights. Does this mean that the article gives the Court the authorization to look at human rights law for the definition of crimes under the statute? Rather, what the drafters of the Statute had in mind when drafting this provision were indeed procedural rights, namely the procedural rights of the accused.[135] This spirit of the provision becomes clear when one looks at a footnote that the article included in its Final Draft Version. It stated:

'It was generally agreed that consistency with international human rights law would require that interpretation by the Court be consistent with the principle of nullum crimen sine lege. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 21.'[136]

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134 *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06-772 (14 December 2006) para. 34.

135 Margaret McAuliffe deGuzman 'Art. 21: Applicable law' in Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (2nd edition Beck Munich 2008) 701-712, 711.

136 Draft Art. 20 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum' (15-17 July 1998) A/Conf.183/2/Add.1 para. 63; In the draft article, what is now

Hence, this provision entails the explicit right of the ICC to apply procedural customary international human rights law.[137] As such, it frees the ICC from engaging in discussions the ad hoc tribunals had to engage in regarding the legal authorization to apply procedural human rights standards.

However, the mere fact that the Rome Statute mentions human rights as an underlying constitutional principle against which the application and interpretation of the Rome Statute has to be measured does not mean that existing human rights norms can be turned into penal provisions under international law.

b. Art. 21 (1) (b) Rome Statute

According to Article 21 (1) (b) Rome Statute, the ICC can apply, 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. The question arises what are 'applicable treaties' in the context of this provision. The ICTY took this to apply international conventions which bind the parties having jurisdiction in the case.[138] For the ICC, the same argument which has been used to dismiss the direct application of national laws is equally valid: in case of this approach, the ICC would apply different standards to different accused but for the same conduct.[139]

According to another, very restricted view, the 'applicable treaties' are merely the Geneva Conventions (and possibly the Genocide Convention) as they are incorporated in the definition of war crimes. [140]

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regulated under Article 21 was proposed to be Art. 20, while *nullum crimen sine lege* (now Article 22) was discussed as Article 21.

137 See Part One Chapter Two above.

138 Margaret McAuliffe deGuzman 'Art. 21: Applicable law' in Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (2nd edition Beck Munich 2008) 701-712, 706.

139 See also Margaret McAuliffe deGuzman 'Art. 21: Applicable law' in Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (2nd edition Beck Munich 2008) 701-712, 704 in relation to the application of domestic law.

140 Margaret McAuliffe deGuzman 'Art. 21: Applicable law' in Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (2nd edition Beck Munich 2008) 701-712, 704.

Art. 21 (1) (b) Rome Statute unproblematically applies to conventions which a) are part of customary international law and b) are punitive in nature (e.g. Genocide Convention or Geneva Convention and Protocols.) The problem of application of human rights treaties in the substantive context is less one in the case of treaties which provide for penal consequences in case of violation as for example the CAT. It is more problematic in the case of recently emerged concepts like gender-based rights and gender-based violence, concepts which are controversial amongst States and which, in their current state of evolution, consist of a multitude of binding as well as non-binding instruments with no punitive character.

Central to the understanding of the reference of international courts and tribunals to other areas of human rights is the concept of customary international law. A careful examination of whether or not a particular action is prohibited under customary international law is particularly important in the context of criminal law and the significance of the principle of legality.

The UN Secretary-General's report calling for the establishment of the ICTY explicitly states

[i]n the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.[141]

This report was later approved by the Security Council Resolution which established the ICTY.[142] 'According to the Secretary-General's Report as a whole (approved by the Security Council), international human rights law of crime and criminal procedure should generally apply in an international criminal tribunal'.[143]

But, whereas in a national legal criminal system, customary law is scarcely used in criminal trials, the international arena still depends to a

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141 UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 para. 34.

142 UNSC Res 827 (1993) (25 May 1993) SCOR 48th Year 29 para. 1.

143 Kenneth S Gallant 'International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals' (2010) 43 The John Marshall Law Review 603–34, 609.

large degree on customary law to reflect the rapid developments within the international community, with which the development of new treaty law can only marginally keep up. In the words of Malcolm Shaw '[c]ustom within contemporary legal systems, particularly in the developed world, is relatively cumbersome and unimportant and often only of nostalgic value. In international law on the other hand it is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs'[144]

'Principles and rules of international law' in Art. 21 (1) (b) Rome Statute authorizes the court formally to apply the necessary customary law. This approach is shared amongst some of the most senior commentators and scholars in international criminal law.[145]

Schabas argues that the reference in Art. 21 (1) (b) Rome Statute to 'principles and rules of international law' suggests a resort to Art. 38 (1) (a)-(c) ICJ Statute and that Art. 21 (1) (b) encompasses all three sources of law enlisted in Art. 38(1) (a) – (c). He justifies this with reference to Art. 21 (1) (c) Rome Statute which, albeit including a reference to 'general principles of law' just as Art. 38 (1) (c) ICJ Statute follows a comparative criminal law approach which is not so much focussed on delineating the content of public international law as such but rather calls at the Court to look at national laws representing legal systems of the world (including the laws of States that would normally have jurisdiction over the case) to derive principles the court may apply.[146]

Art. 21 (1) (b) provides that the 'applicable treaties, and the principles and rules of international law' the court shall apply must only be applied as secondary rules and only 'where appropriate'. The court therefore has to find a reason for the application of Art. 21 (1) (b) or (c), an objective in

144 Malcolm N Shaw *International Law* (6 ed Cambridge University Press Cambridge 2008) 73.

145 Eg Alain Pellet who argues that 'In reality, there is little doubt that this provision [Art. 21(1)(b)] refers, exclusively, to customary international law, of which the "established principles of international armed conflict" clearly form an integral part' Alain Pellet 'Applicable Law' in Antonio Cassese, Paola Gaeta John RWD Jones (eds) *The Rome Statue of the International Criminal Court: A Commentary* vol 2 (OUP Oxford 2002) 1051-1084 at 1071 or William A. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 391.

146 William A. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010) 391.

the Statute or the Rules of Procedure and Evidence as the primary sources of law that those primary sources do not meet by themselves. Regarding the substantive parts of the Rome Statute, this follows logically from having jurisdiction over the crimes enlisted in Arts 6-9 pursuant to Art. 5 Rome Statute. Therefore the court also must have the incidental jurisdictionto decide how the crimes are defined and what they contain (*Kompetenz-Kompetenz*).[147] 'Incidental jurisdiction […] covers the rules that the court can apply to settle a preliminary question whose resolution is necessary to decide on the principal question brought to the court. Of course, the final decision of the court is always based on the legal rules falling under its primary jurisdiction […] the ''outside' rules […] come into play as legal rules proper'.[148]

The ICC Chambers and the Office of the Prosecutor seem to agree in their understanding that the court is only allowed to apply substantive extra-statutory rules as long as they are customary international law.[149] In its first ever judgment, however, the court refers to customary international law only indirectly, citing the ICRC Study on Customary International Law in footnotes on the definition of a non-international armed conflict as one of several sources.[150] In her separate and dissenting opinion, Judge Odio-Benito referred to customary international law as one of several sources of law along with the Rome Statute and human rights treaties in general.[151]

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147 Giulia Pinzauti 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law- A Critical Discussion of *Kononov v. Latvia*' (2008) 6 Journal of International Criminal Justice 1043-1060, 1048-49 and explanations in fn 6.

148 Giulia Pinzauti 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law- a Critical Discussion of Kononov v. Latvia' 6 (2008) Journal of International Criminal Justice 1048-49 1049.

149 See eg *Prosecutor v Thomas Lubanga Dyilo (Decision on the confirmation of charges)* ICC-01/04-01/803-tEN (29 January 2007) para 274; *Prosecutor v Thomas Lubanga Dyilo (Prosecution's Closing Brief)* ICC-01/04-01/06-2748-Red fn 78, paras 52, 53, 138, 150 (1 June 2011).

150 *Prosecutor v Thomas Lubanga Dyilo (Judgment)* ICC-01/04-01/06 (14 March 2012) fn 1646.

151 *Prosecutor v Thomas Lubanga Dyilo (Judgment. Separate and Dissenting Opinion of Judge Odio-Benito)* ICC-01/04-01/06 (14 March 2012) para 6.

c. Guidance and Interpretational Aid

'Interpretational aid'[152] or 'guidance'[153] are often-employed buzzwords in terms of a broad reference to human rights or humanitarian law. These vague terms tend to be invoked by court in tribunals when trying to avoid creating precedent by declaring a certain issue of human rights law binding law to be applied before their court. Referring to a legal source outside the respective Statute as 'guidance' or 'inspiration' seems to be an easy way out which contains the benefit of referring to a source of law to strengthen the legal weight and the persuasion of the argument while, at the same time, avoiding to set precedent for a future application of extra-statutory sources with all its complications. It is exactly for these reasons, however, that a use of these legally vague terms is problematic. The Statutes of the courts and tribunals are to be applied subject to the sources of public international law as listed in Art. 38 ICJ Statute or subject to the *lex specialis* of Art. 21 Rome Statute in case of the ICC. The judges would be entitled to use human rights law as guidance in order to determine whether or not a provision inside or outside the Statute, a legal concept or principle, is binding law according to one of the sources enlisted in either Art. 38 ICJ or Art. 21. Rome Statute. However, in order to do that the courts have to clearly label their exercise as interpretational aid towards clarifying the binding concept of a specific character under a specific provision of their sources. In the absence of that, invoking vague terms such 'inspiration' or 'guidance' means having the cake while eating it which, in terms of criminal law, is a dangerous exercise which can easily violate the rights of the defendant and should therefore be avoided.

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152 *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) 482.

153 *Prosecutor v Blaškić (Judgment)* IT-95-14-T (3 March 2000) 329; *Prosecutor v Delić (Judgment)* IT-04-83-T (15 September 2008) footnote 153; *Prosecutor v Deronjić (Judgment)* IT-02-61-S (30 March 2004) para 159; *Prosecutor v Galić (Judgment)* IT-98-29-T (5 December 2003) footnote 87; *Prosecutor v Halilović (Judgment)* IT-01-48-T (16 November 2005) para 99; *Prosecutor v Haradinaj (Judgment)* IT-04-84-T (3 April 2008) para 107; *Prosecutor v Kordić (Appela Judgment)* IT-95-14/2-A (17 December 2004) para 69; *Prosecutor v Krajišnik (Judgment)* IT-00-39-T (27 September 2006) para. 705; *Prosecutor v Kupreškić (Judgment)* IT-95-16 (14 January 2000) paras 588, 590; *Prosecutor v Limaj (Judgment)* IT-03-66-T (30 November 2005) para 86; *Prosecutor v Tadić (Appeal Judgment)* IT-94-1-A (15 July 1999) para. 321; *Prosecutor v Delalić et al (Celebići Case Judgment)* IT-96-21-T (16 November 1998) para 432.

III. Application of Substantive Extra-Statutory Human Rights Law and the Principle of Nullum Crimen Sine Lege

1. The concept of nullum crimen sine lege?

The principles of *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law) have been called the 'bulwark of the citizen against the state's omnipotence (…) the Criminal Code is the criminal's magna charta. It guarantees his or her right to be punished only in accordance with the requirements set out by the law and only within the limits laid down in the law'[154] for conduct that was 'unambiguously criminal at the time of its commission'.[155] There are four elements which together make up the *nullum crimen* principle in the national setting: the law must be written law; the crime must be defined with sufficient certainty; the law must not be applied retroactively; the crime must not be construed by way of analogy.[156] *Nullum crimen* and *nullla poena sine lege* are connected to the requirements of specificity, certainty, foreseeability and accessibility of criminal law.[157] The principles are the cornerstone of any punitive system which invokes legitimacy and basis on the rule of law. *Nullum crimen* and *nulla poena sine lege* touch upon one of the most fun-

154 Franz von Liszt ‚Die deterministischen Gegner der Zweckstrafe' (1893) 3 Zeitschrift für die gesamte Strafrechtswissenschaft 325-70 at 357 (translation by Antonio Cassese in *International Criminal Law* 2 ed Oxford University Press (2008) at 37).

155 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 733.

156 See eg Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 734; *Prosecutor v. Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 193; see also Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 Journal of International Criminal Justice 1007-1017, at 1008.

157 *Prosecutor v. Vasiljević (Judgment) IT-98-32-T (29 November 2002* para 193; see also Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 Journal of International Criminal Justice 1007-1017, at 1008.

damental functions of criminal law, namely deterrence of crimes.[158] Any deterrent effect whatsoever as a prerequisite requires maximum foreseeability and legal certainty and regular enforcement of criminal law.[159]

2. Nullum Crimen Sine Lege in International Criminal Law

The application of the principle *nullum crimen sine lege* in international criminal law faces problems which are rooted in the peculiarities of international criminal law as a public international law regime applying criminal law.

In international criminal law in its current form, crimes are not defined in a specificity that would be required in national law. Many crimes are construed in a general manner and contain common place terms like 'inhumane acts'[160] or 'great suffering'[161] that lack the precision needed for the law to be applied without in-depth interpretation by the courts.[162] The international legal order, as opposed to national legal orders is merely loosely structured one with sovereign legislature[163] and the criteria of foreseeability and accessibility are therefore particularly difficult to measure and/or to fulfil.[164]

It has been claimed that the international legal order rests 'uncomfortably' besides *nullum crimen sine lege*.[165] Thedor Meron, in 1987, took the

158 See eg Andrew Ashworth *Principles of Criminal Law* (6th ed OUP Oxford 2009) 16-7.

159 See also Andrew Ashworth *Principles of Criminal Law* (6th ed OUP Oxford 2009) 16, 63-66.

160 See Art. 7 (1) (k) Rome Statute.

161 See Art. 8 (2)(a)(iii) Rome Statute.

162 See also A. Cassese International Criminal Law 2nd ed Oxford University Press (2008) at 41-2.

163 Margaret Mcauliffe deGuzman in: Triffterer, Rome Statute, 2nd ed p 703.

164 See also *Prosecutor v Vasiljevic (Judgment)* IT-98-32-T (29 November 2002) para. 193, Jonas Nilsson 'The Principle of Nullum Crimen Sine Lege' in Olaoluwa Olusanya *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing Groningen 2007) 35-64, 62-63.

165 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 746; see also Jonas Nilsson 'The Principle of Nullum Crimen Sine Lege' in Olaoluwa Olusanya *Rethinking International*

pragmatic stance that international criminal tribunals will 'continue to be guided by the degree of offensiveness of certain acts to human dignity'.[166] Yet, the offensive, debasing and criminal character of an act and, following from this, the foreseeability of the act as prohibited and enforced by criminal penalties is not always clear cut in the context of international criminal law. Whereas it is clear that the killing of a person in peacetime and in the absence of any grounds for justification such as self-defence, is a crime, the same conduct, in the context of an armed conflict, is not necessarily a punishable act and may in fact not be penalized. Apart from the fact that it therefore cannot be assumed that the penal nature of an act and its seriousness is always obvious in the context of mass crimes, there is another factor which makes *nullum crimen sine lege* in international law differ from its application in national law. International criminal law features crimes that do not necessarily have a counterpart of a similar manifestation in national law.[167] Others are based on acts which might have an equivalent in national criminal codes but these acts are extended by an additional element, which mirrors the context of the crime and the aggrevated circumstances, which turns these actions into crimes affecting the international community as a whole.[168]

Hence, courts are needed to define the exact contents of these provisions gradually, applying the broad definitions to a multitude of different scenarios that might not even have been foreseen by their drafters on a case-by-case basis. Therefore, judicial analysis of statutory rules, treaties and customary law are a vital component of international criminal law, more so than in most national criminal courts.

Criminal Law: The Substantive Part (Europa Law Publishing Groningen 2007) 35-64 at 39.

166 Theodor Meron 'The Geneva Conventions as Customary Law' 1987 81(2) American Journal of International Law 348-370, 361.

167 A different opinion is voiced by Jonas Nilsson who argues that *nullum crimen sine lege* will hardly be a successful challenge in contemporary international criminal law precisely because of the seriousness of the crime and, as Nilsson claims, because 'these crimes, or crimes very similar to them, most likely existed in the domestic criminal law of the defendant' Jonas Nilsson 'The Principle of Nullum Crimen Sine Lege' in Olaoluwa Olusanya *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing Groningen 2007) 35-64, 64.

168 Georg Dahm, Jost Delbrück and Rüdiger Wolfrum *Völkerrecht* Volume I/3: *Die Formen des völkerrechtlichen Handelns; Die inhaltliche Ordnung der internationalen Gemeinschaft* (2nd edition De Gruyter Berlin 2002), 1088.

Furthermore, the lack of a central authority or a court of higher instance complicates a stringent jurisprudence further and leads to the fact that any specification and interpretation of the general rules must remain decentralized and fragmentary.[169]

One of the consequences of this state of affairs is that judges, unlike in national legal systems, often have to take recourse to extra-statutory law, in particular to customary international law, in order to solve contemporary legal questions.[170] Because international criminal law is also a relatively recent discipline and as such cannot resort to *lex lata* as comprehensive and sophisticated as it might be the case in domestic systems,[171] it also cannot take recourse to a catalogue of well-defined and sufficiently large customary international law,[172] often, judgements in international criminal law 'appear instead to be largely *declaratory* of nascent and previously unexpressed customary principles'.[173]

This is the background before which the area of conflict between *nullum crimen sine lege* and the use of extra-statutory law arises. Public international law has always been vulnerable to criticism of being too vague, too open to interpretation, hardly law at all. The old criticism that 'the borderlines between interpretation of existing law and the making of new law are inevitably fluid'[174] are equally true for international criminal law in its contemporary work-in-progress-form.

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169 Antonio Cassese *International Criminal Law* (Oxford University Press 2008) 42-3.

170 Regarding the importance of customary international law in a public legal order lacking a common legislative see Jost Delbrück and Rüdiger Wolfrum (eds) *Völkerrecht* Volume I/1: *Die Grundlagen; die Völkerrechtssubjekte* (2nd edition De Gruyter Berlin 1989), 55.

171 Noora Arajarvi 'Between Lex Lata and Lex Ferenda – Customary International (Criminal) Law and the Principle of Legality ' 15 Tilburg Law Review (2010-2011) 163-182 at 168.

172 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 745.

173 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 745.

174 Wolfgang Friedmann 'The North Sea Continental Shelf Cases – A Critique' (1970) 64 American Journal of International Law 229-240 at 235.

Acting under such preconditions, it seems particularly important to safeguard the rights of any accused by a strict interpretation of *nullum crimen sine lege*.

There is a dispute amongst scholars as to just how strictly *nullum crimen sine lege* should be applied in international criminal law.

The most extreme position is that the principle of *nullum crimen sine lege* is only applicable in domestic law.[175] This opinion is to be disregarded. Even though international criminal law is a branch of public international law and the sources relevant for public international law are therefore in principal applicable to international criminal law also, a mere reference to this does not relieve from a discussion of the principle problem that international law is a system of criminal law and ultimately will rule over the criminal punishment in form of deprivation of liberty of individuals. Hence, it requires principles guaranteeing a fair way of establishing guilt or innocence of this individual.

According to another straits of arguments, *nullum crimen sine lege* in international law is broader a. because of the nature of international law and b. because the protected interest is peace and security and the 'preservation of the world order',[176] tilting the balance to be struck between the competing interests in favour of the protection of peace and security. [177] In general, this is a variation of the discussion of substantive justice vs principle of legality, which in international criminal law prominently has been led at the time of the Nuremburg trial.[178] Supporters of the doctrine of substantive justice recognized supremacy of substantive justice to be met-

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175 Wolff Heintschel von Heinegg 'Criminal International Law and Customary International Law' in Andreas Zimmermann (ed) *International Criminal Law and the Current Development of Public International Law* (Duncker and Humblot Berlin 2003) 27-46 at 28.

176 M Cherif Bassiouni *Crimes against Humanity in International Criminal Law (*2nd ed Kluwer Law International The Hague 1992) 144.

177 M Cherif Bassiouni *Crimes against Humanity in International Criminal Law* (2nd ed Kluwer Law International The Hague 1999) 144; see Bruce Broomhall 'Art 22: *Nullum crimen sine lege'* Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (2nd edition Beck Munich 2008) 713-729, 718 fn 30 for Art. 22.

178 Most prominently Hans Kelsen 'Will the Judgment of the Nuremberg Tribunals Constitute a Precedent in International Law?' (1947) 1 International Law Quarterly 153-71, 165; Antonio Cassese 'Crimes against Humanity' in Antonio Cassese, Paola Gaeta John RWD Jones (eds) *The Rome Statue of the International Criminal Court: A Commentary* vol 1 (OUP Oxford 2002) 353-78, 354-5.

ed out over procedural questions regarding the formal prohibition of the conduct by law at the time the action was taken. [179] The doctrine of substantive justice, in contrast, concentrates on the prohibition of socially harmful conduct or conduct which is dangerous to society or, in the case of international criminal law, the international community and the preservation of its peace and security.[180] However, the major arguments behind the principle of *nullum crimen sine le*ge namely, legitimacy, deterrence rule of law, are not touched by these arguments, and they do require a narrow construction of *nullum crimen*. These principles and aims of criminal law are absolute and cannot be lightly given up, even in the context of mass crimes. Whereas 'threat to international peace and security' is in itself a wide term whose definition is contested and evolves over time, the right to a fair trial is absolute and not open to derogation.[181] A trial is either fair, or it is not. In any criminal trial, one of its most important components, *nullum crimen sine lege*, which is part of customary international law,[182] must be vigorously adhered to. This is even more crucial when keeping in mind that the undertaking of international criminal law was a controversial one from the beginning and has from the very start, been struggling with claims of violations of the principle of legality.[183] Whereas these claims might have had some truth to it in the era of Nuremberg[184], there is less need, in modern international courts and tribunals, with its in-

179 Claus Kreß 'Nulla poena nullum crimen sine lege' in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* 2nd ed (OUP 2012) vol VII 889-899 para 16.

180 Antonio Cassese *International Criminal Law* (2nd edition OUP Oxford 2008) 36.

181 See for example Art. 4 (2) ICCPR; Art. 15 (2) ECHR.

182 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 734; Göran Sluiter 'Human Rights Protection in the ICC pre-trial phase' in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Nijhoff Leiden 2009) at 461.

183 See further Hans-Heinrich Jeschenk 'The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute' (2004) Journal of International Criminal Justice 38-55, 40-42.

184 This is true, at the very least, when it comes to the prosecution for crimes against peace and crimes against humanity; See inter alia Claus Kreß ‚Nulla poena nullum crimen crimen sine lege' in Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law Oxford University Press (2012) para 16; see also Antonio Cassese *International Criminal Law* (2nd edition OUP Oxford 2008) 38-39.

creasingly vast amount of case law, to open themselves to criticism because of a broad construction of the international crimes it has jurisdiction over.[185] This is particularly important when keeping in mind that since the Nuremberg Trials, basically all relevant universal and regional human rights treaties have included the principle *nullum crimen sine lege* as one of the basic components of the rule of law and a most fundamental human right.[186] This naturally had to have an effect on the conduct of international courts and tribunals set up by the international community and, again, shows the interconnectedness between international criminal law and human right law.[187] Criminal courts, due to their nature, and due to their power to infringe upon one of the individual's most basic human rights, the right to liberty of person,[188] are not the right forum to expedite the progressive development of international law. They can further such development by way of progressive interpretation of existing laws only to the extent a strict construction of the principle of *nullum crimen sine lege* allows it. In this sense, there approach has to be a 'conservative' one,[189] 'predictable and precise'.[190] A less stringent approach is also not necessary. International criminal law can evolve and new crimes can develop as the recently-included definition of aggression into the Rome Statute shows.[191] The successful definition of the crime of aggression, which had been deemed to be very unlikely before, shows that compromise and cooperation in the advancement of criminal law making is by all means possible in the international arena even given a strict application of *nullum crimen sine lege*.

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185 See also Antonio Cassese *International Criminal Law* 2nd edition Oxford University Press (2008) at 40-1,see also Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R W D Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 740-1.

186 Antonio Cassese *International Criminal Law* 2nd edition Oxford University Press (2008) at 41.

187 Antonio Cassese International Criminal Law (2ed Oxford University Press 2008) at 40.

188 See Art. 8 ICCPR; Art. 3 UDHR, Srt. 5(1) ECHR, Art. 7(1) ACHR, Art. 6ACHRP.

189 Theodor Meron 'Revival of Customary Humanitarian Law' (2004) 99(4) American Journal of International Law 817-834, at 817.

190 Theodor Meron 'Revival of Customary Humanitarian Law' (2004) 99(4) American Journal of International Law 817-834, at 822.

191 Generally, the Rome Statute can be amended pursuant to its Articles 121 and 122.

This strict application does, however, have to be adapted to the realities of law making in international law, in particular, to the codification and progressive development of public international law through custom on one hand and to the young age of international criminal law as such. The scarceness of State practise in the classical sense in this area is an obstacle for the deduction of customary international law in the area. Susan Lam therefore claims that because of this scarceness, the jurisprudence of the ad hoc tribunals often seems to convey a *de lege ferenda* character.[192] Relying on the theory of modern positivism as suggested by Bruno Simma and Andreas Paulus that pays regard to the shifting position of States in international law and gives increased attention to alternative manifestations of State practise and *opinion juris*, a strict interpretation of *nullum crimen sine lege* is feasible without compromising the greater rationale behind international criminal justice.[193] This approach allows for a deduction of State practise and *opinio iuris* from an expanded range of actions by States and by international institutions. State's domestic legislations, but also their voting records, the acceptance of work of institutions like the International Law Commission or the ad hoc tribunals play a big part of the deduction of customary international law.[194]

3. How is this area of conflict solved in international criminal jurisprudence?

The *ad hoc* tribunals have elaborated on *nullum crimen sine lege* in a way that will be beneficial for the ICC in future proceedings. The ICTY was created with the explicit mission to only apply those legal norms which

192 Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*' in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Volume I Oxford University Press Oxford (2002) at 746.

193 Bruno Simma and Andreas L Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 American Journal of International Law 302-315, 306-313.

194 Bruno Simma and Andreas L Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 American Journal of International Law 302-315, 307.

were beyond doubt part of customary international law.[195] *Nullum crimen sine lege* therefore demanded of the chamber to prove, when prosecuting persons 'responsible for serious violations of international humanitarian law', that the crimes in question existed in customary international law.[196] Already in the early-on *Tadić* case, the tribunal set out four prerequisites for a crime to be an international crime under the court's jurisdiction: the infringement of a rule of international humanitarian law, the customary or treaty law character of the crime, the 'seriousness' of the violation of humanitarian law (the crimes must constitute a breach of important values), and the consequence of individual criminal responsibility set up by the rule in question.[197] In *Milutinović et al* the ICTY stated that certain behaviour had to be recognized as a crime 'qua custom at the time this crime was allegedly committed'.[198]

As the Trial Chamber in *Furudzija* has held, a conventional, non-statutory provision can have an extra-conventional effect 'to the extent that the definition at issue codifies, or contributes to developing or crystallizing customary international law'.[199] This is uncontroversial in the case of the ICTY which is only to apply customary international humanitarian law. The same is, however, equally true for any other criminal court or tribunal. Extra-statutory law can only be applied if it derived in accordance to the

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195 UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 para. 34.

196 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' UN Doc S/25704 at para. 29.

197 Tadić Interlocutory Appeal, para. 94; Bruno Simma and Andreas L Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 American Journal of International Law 302-315 at 311; for an analysis of the realities of judicial lawmaking in the early stages of the ICTY but arguing that the controversial Tadić Appeal Decision was an the result of unique, exceptional circumstances see Tamás Hoffmann 'The Gentle Humanizer of Humanitarian Law – Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict' in Carsten Stahn and Larissa van den Herik (eds) Future Perspectives on International Criminal Justice (Asser Press Leiden 2010). 58-80.

198 *Prosecutor v Milutinović et al (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction–Joint Criminal Enterprise)* IT-99-37-AR72 (21 May 2003) para. 9.

199 *Prosecutor v Furundžija (Judgment)* IT-95-17 (10 December 1998) para. 160; more on the ad hoc tribunal's interpretation of the principle of nullum crimen sine lege see Gerhard Werle and Florian Jeßberger *Principles of International Criminal Law* (3rd ed OUP Oxford 2014) 40.

rules of law-making found in the respective statutes (if any) or under Art. 38 ICJ Statute and is customary in nature (see above under Part One Chapter Two and Part One Chapter Three II.). As Art. 38 ICJ Statute is applicable as the indicator of sources for the *ad hoc* tribunals and Art. 38 ICJ Statute mirrors Art. 21 Rome Statute in the listed sources, nothing indicates that the sources of substantive law at the ICC should differ from those of the *ad hoc* tribunals, in particular, because the ICTY has also engaged in identifying general principles of law through comparative analysis in its jurisprudence.[200] It is absolutely necessary in order to safeguard a fair trial and the observance of the principle of legality. In order to apply an extra-statutory legal provision or use an interpretation by a court or treaty body affiliated with a legal instrument other than the statute of the respective court or tribunal, the responsible trial chamber needs to prove whether the provision it seeks to apply is indeed part of customary international law. This can at times be a difficult and controversial undertaking. The court and tribunals need to carefully examine provisions with regard to their status in customary international law. They then need to examine whether the provision in question can be applied within the regime of international criminal law, which is different, in nature and purpose, from human rights law.

On the other hand, the *ad hoc* tribunals as well as the ICC repeatedly clarified that *nullum crimen sine lege* does not prevent them from 'interpreting and clarifying elements of a particular crime'.[201] The ICTY also relied heavily on the jurisprudence of the ECtHR in order to conclude that *nullum crimen sine lege* does also not preclude 'the progressive development of the law by the court'.[202]

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200 *Prosecutor v Erdemović (Appeal Judgment, Joint Separate Opinion of Judge Mc Donald and Judge Vohrah)* IT-96-22-A (7 October 1997) para 40.

201 *Prosecutor v. Vasiljević (Judgment)* IT-98-32-T (29 November 2002) para. 196; see also *Prosecutor v Aleksovski (Appeal Judgment)* IT-95-14/1 (24 March 2000) paras126-17; *Prosecutor v Delalić et al (Celebići Case Appeal Judgement)* IT-96-21-A (20 February 2001) para 173; see also *Prosecutor v Imanishimwe* et al *(Appeal Judgment)* ICTR-99-46-A (7 July 2006) para 127.

202 *Prosecutor v Milutinović et al (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction–Joint Criminal Enterprise)* IT-99-37-AR72 (21 May 2003) para 38, referring to *Kokkinakis v Greece (Judgment)* (ECtHR) Series A No 260 A paras 36 and 40; *EK v Turkey (Judgment)* appl 28496/95 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-64586> (31 October 2017) para 52; *SW v*

The jurisprudence of the ECtHR is non-binding to any international criminal court or tribunal as such. But when interpreting the principle of *nullum crimen sine lege* as a part of customary international law, the ECtHR offers the most sophisticated canon of jurisprudential analysis of this principle and, as such, can be consulted by international courts and tribunals. This has been recognized by the ICTR when it stated '[r]egional human rights treaties, such as the European Convention of Human Rights (ECHR)[203] and the American Convention on Human Rights (ACHR)[204] and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the tribunal. They are however, authoritative, as evidence of international custom.'[205]

According to the ICTY Appeals Chamber, *nullum crimen sine lege* only prohibits the court 'from creating new law or from or from interpreting existing law beyond the reasonable limits of acceptable clarification.'[206]

Being able to rely on customary law (which is applicable given the structural differences of international criminal law discussed in Part One Chapter Three I. 2. above) in accordance to Art. 38 ICJ Statute or Art. 21 Rome Statute already provides the courts and tribunal with a substantial degree of flexibility that mirror the realities of international law but do not provide persons with a degree of legal certainties they might be able to rely on in national jurisdictions. The relatively young age of international criminal law and the fragmentation of its jurisprudence increase the given vagueness. This reality has to be accepted. Any further lowering of the standard of *nullum crimen sine lege* on account of the peculiarities of international criminal law is not compatible with international human rights

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United Kingdom (Judgment) (ECtHR) Series A No 335 B paras 35-36; *CR v United Kingdom (Judgment)* (ECtHR) Series A No 335 C para 34.

203 COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

204 American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

205 *Barayagwiza v Prosecutor (Decision)* ICTR-97-19-A (3 November 1999) at para. 40.

206 *Prosecutor v Milutinović et al (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction–Joint Criminal Enterprise)* IT-99-37-AR72 (21 May 2003) para. 38.

law and jeopardises one of the most fundamental achievements the international community subscribed to: fair proceedings leading to transparent and comprehensible outcomes based on the rule of law. Furthermore, the vaguer the applicable law is, the more restrictive should the interpretation and of the provision be conducted.[207] For this reason, the attempt of the ICTY Chamber in *Vasiljević* to water down the e principle of *nullum crimen sine lege* in international criminal law are to be rejected.[208] The Trial Chamber in this case argued that the standards of accessibility and foreseeability have to be adapted to the 'specificity of customary international law'.[209]

As Nilsson rightly argues, the specificity of customary international law primarily lies in its character as non-written law as well as in the lack of a centralized authority involved in its creation.[210] Yet, for non-written law, the ECtHR has affirmed the application of *nullum crimen sine lege* in principal without restrictions. [211]

As guaranteeing fair proceedings is an essential safeguard shielding individuals from the excess of authorities, this standard cannot be lightly given up.[212] The compromises that have to be made regarding some degree of adjustment in international criminal law in this respect are due to the nature of public international law as such and the sources from which it derives. Compromises can, however, not be made with reference to the nature of the crime in questions or any potential threat to peace and security they might constitute.

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207 *Kokkinakis v Greece (Judgment)* (ECtHR) Series A No 260 A paras 7-9.

208 *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 193; see also *Prosecutor v Hadžihasanović et al (Decision on Joint Challenge to Jurisdiction)* IT-01-47-PT (12 November 2002) para. 62.

209 *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 193.

210 Jonas Nilsson 'The Principle of Nullum Crimen Sine Lege' in Olaoluwa Olusanya *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing Groningen 2007) 62.

211 Eg *Sunday Times v United Kingdom* (ECtHR) Series A No 30 para 47.

212 See further Jonas Nilsson 'The Principle of Nullum Crimen Sine Lege' in Olaoluwa Olusanya *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing Groningen 2007) 62-63.

Chapter Four: Concluding Remarks

What is at stake when it comes to the extra-statutory application of legal provisions in substantive criminal law is nothing less than the principle of *nuella poena sine lege*. International criminal law offers a unique area of conflict in this respect because it combines criminal law, the formulation of which, in national systems, is mainly in the hand of the legislative branch, with public international law, which evolves through the way States act and the gradual acceptance of these acts and the underlying motivations for these acts as customs and principals of law.[213]

This book argues in favour of a narrowly constructed application of extra-statutory human rights law. As we have seen, international criminal law and international human rights law share many similarities. Structural and dogmatic differences, which could call for precaution when invoking human rights law in substantive international criminal law do in fact exist, but they are fewer in number than sometimes argued and are often subject to discussion and resolution.

It is argued here that the true danger in applying human rights law in substantive international criminal law lies not in the conceptional differences of the two, but in the potential violation of the principle of *nullum crimen sine lege* by way of recourse to extra-statutory law. Because of this danger, the organs of the ICC, foreseen as the main institution for the practical application of international criminal law in the future, need to be in agreement about the legal basis of their application of extra-statutory substantive law and to what degree of application the court is authorized by it. Here, it is argued that Art. 21(3) Rome Statute is a provision which guarantees the rights of the accused person, but cannot be invoked for applying extra-statutory substantive law. In this case, Art. 21 (1) (b) Rome Statute is the more appropriate source of law. Therefore, a narrow construction of the statutes of the *ad hoc* tribunals and the ICC is advised and concludes that extra-statutory substantive international criminal law can only be applied as part of customary international law (general principles of law play less of a role in the substantive part of international criminal justice). Recourse to vague terms like 'interpretational guidance' should be avoided for the sake of legal clarity and fairness of criminal proceedings. For the same reasons, voices which see the role of *nullum crimen sine lege* in in-

213 Margaret McAuliffe deGuzman in: Triffterer, Rome Statute, 2nd ed p 704.

ternational criminal law less prominent than in national legal systems are rejected.

As these parameters of the recourse to international human rights law are defined, the next part of the book will deal with the actual application of human rights law by the *ad hoc* tribunals as well as the ICC. It will be examined to what degree the doctrinal framework set out by general international law as well as the respective statutes is adhered to, to what degree the courts and tribunals actually use international human rights law in their substantive considerations and how this use is categorized and justified.