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International criminal tribunals and human rights law: Adherence and contextualization

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CHAPTER 1 INTRODUCTION

1. **The Complex Position of Human Rights before the ICTs**

The rapid development of international criminal law since the 1990s has been driven by lofty goals such as ending impunity and restoring the rule of law. Given their mandates to prosecute individuals allegedly responsible for the most egregious of human rights violations, International Criminal Tribunals (ICTs) are primarily considered as instruments of human rights protection. However, at the same time, the ICTs must be recognized as potential violators of human rights. They conduct criminal investigations, provisionally detain individuals, and put them on trial. All of these activities inherently impact on individuals' human rights, including the right to privacy, the right to liberty, and the right to a fair trial, to name but a few. The ICTs' exercise of public power vis-à-vis individuals necessarily entails the potential of violating their human rights.

However, while states have widely ratified human rights treaties and are often subject to the supervision of human rights courts and quasi-judicial bodies, the same does not apply to ICTs. They are not parties to human rights treaties, nor is their observance of human rights norms subject to any form of external review. It is therefore questionable whether they are bound by international human rights law (IHRL) to begin with. These concerns have been partly remedied by the inclusion of human rights norms in the ICTs' legal instruments. However, as this study will show, this has not prevented serious allegations of human rights violations from being made against them. Quite the contrary, the protection of human rights has been considered the 'Achilles heel of international criminal justice.'¹ This study therefore addresses the way in which the ICTs have interpreted and applied international human rights norms and seeks to identify the strengths and weaknesses of their approach in order to recommend ways in which their practice can be improved in terms of both the substantive level of human rights protection offered, and the cogency and coherence of their interpretative methodology.

In that regard, two essential questions arise. The first is whether and how the ICTs are legally bound by IHRL. In addition to the rights enshrined in their internal legal instruments, (external) norms of IHRL may also enter the ICTs' legal frameworks. In his report that accompanied the draft Statute of the International Criminal Tribunal for the former Yugoslavia

¹ Göran Sluiter, 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law' (2010) 8 Nw U J Int'l Hum Rts 248, 267.

(ICTY), the UN Secretary-General stated that it was ‘axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.’² Similarly, the Statute of the International Criminal Court (ICC) provides that all interpretation and application of law must be consistent with ‘internationally recognized human rights’.³ Although this may be taken to suggest that the ICTs are simply bound by IHRL, the practice of the ICTs shows a more complex picture. Generally, the ICC assesses international and regional human rights treaties to determine whether a right is ‘internationally recognized’.⁴ At the same time, the Court has refused to review the detention of three witnesses because it held that there were ‘numerous exceptions’ to the right to liberty and it could therefore not be considered an ‘intransgressible or peremptory norm of international law’.⁵ As a result, these witnesses have been detained at the seat of the Court for almost three years without the possibility to have their detention reviewed. This decision is at odds with the ICC’s general approach towards determining whether a right is ‘internationally recognized’ based on international human rights treaties. It also suggests a persisting lack of clarity as to whether and how the ICTs are bound by IHRL.

The case law of the ad hoc Tribunals reflects a similar uncertainty regarding the applicability of human rights standards. This is illustrated by the disagreement between Appeal Judges regarding the question whether the Appeals Chamber may substitute a conviction for a first-instance acquittal. Judge Pocar has voiced his opposition to this practice because it deprives persons who are convicted by the Appeals Chamber of the opportunity to have their conviction reviewed by a higher tribunal.⁶ According to Judge Pocar, this is in contravention of the International Covenant on Civil and Political Rights (ICCPR), which should be fully respected by the Tribunals. Judge Shahabuddeen, on the other hand, has argued that human rights norms, as interpreted by human rights courts and supervisory bodies, do not apply to the Tribunal ‘lock, stock, and barrel’.⁷ He relied on the special circumstances of the Tribunal, which he argued legitimized a modification of international human rights norms as applied to

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

³ Art 21(3) ICC Statute.

⁴ See *infra* Chapter 3.

⁵ ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga* (ICC-01/04-01/07-3405-tENG), 1 October 2013, 33.

⁶ ICTR, Appeals Judgement, Dissenting Opinion of Judge Pocar, *Prosecutor v. Rutuganda* (ICTR-96-3-A), 26 May 2003, 2-3. See also ICTY, Appeals Judgement, Partially Dissenting Opinion of Judge Pocar, *Prosecutor v. Galić* (IT-98-29-A), 30 November 2006.

⁷ ICTY, Appeals Judgement, Separate Opinion of Judge Shahabuddeen, *Prosecutor v. Galić* (IT-98-29-A), 30 November 2006, 19.

the Tribunals.⁸ Although the Judges agreed that the Tribunals should respect human rights norms, the exact content of this obligation and the extent of the Tribunals' power to deviate from specific treaty norms were in dispute.

The second and related question is whether and to what extent the ICTs are entitled to give an interpretation to human rights norms that differs from those of human rights courts and supervisory bodies, based on the specific context in which the ICTs operate. There are many differences between states, the original addressees of human rights norms, and ICTs, which may impact on the latter's interpretation and application of human rights. In an early decision, the ICTY (in)famously compared itself to a military tribunal, 'which often has more limited rights of due process'.⁹ The Chamber argued that the right to a fair trial had to be 'interpreted and applied in the context of the object and purpose and unique characteristics' of the ICTY Statute.¹⁰ This approach, and the comparison with military tribunals in particular, were subject to criticism and the ICTs have never used the same comparison again.¹¹ However, the idea that the ICTs are allowed to deviate from interpretations of IHRL by human rights courts and supervisory bodies has taken hold in their procedural practice.

Several examples serve to illustrate the adapted interpretation of human rights norms in the context of international criminal proceedings. In an early decision, the ICTY acknowledged that its legal framework governing provisional detention and release departed from IHRL. Such departure, however, was justified by the 'extreme gravity' of the charges against accused persons, and the 'unique circumstances' in which the Tribunal operated, specifically their dependence on states for monitoring provisionally released persons and for ensuring their return to the Tribunal.¹² This justified the presumption of provisional detention and the high burden that the accused bears to prove her/his entitlement to release.

Another striking example of contextualization can be found in an earlier decision in the above-mentioned case of the three detained witnesses before the ICC. These witnesses sought asylum in the Netherlands following their testimony and requested the Court to halt their return to the DRC, relying, among other things, on their right to request asylum and the

⁸ ICTR, Appeals Judgement, Separate Opinion of Judge Shahabuddeen, *Prosecutor v. Rutuganda* (ICTR-96-3-A), 26 May 2003, 21.

⁹ ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 28.

¹⁰ *ibid*, 26.

¹¹ William Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 J Int'l Crim Just 609, 625, who notes that '[f]ortunately, the description was ephemeral, and has remained a very isolated pronouncement.'

¹² ICTY, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić et al* (IT-96-21-T), 25 September 1996, 19.

principle of *non-refoulement*. The ICC held that it could not be bound by this principle in the same way as states, because it lacked territory and was therefore unable to maintain long-term jurisdiction over those individuals.¹³ The same considerations apply to the Court's ability to respect the right to request asylum, since the ICC is unable to grant citizenship. However, rather than finding that it was free to disregard these rights, the ICC held that the principle of *non-refoulement*, in conjunction with the right to request asylum and the right to an effective remedy, implied that the 'there must be no obstacles to the entering of an application for asylum as a result of acts or omissions that may be imputed to the Court.' The Court therefore set aside its statutory obligation to return the witnesses to the DRC and allowed them to remain at the ICC pending their asylum application.¹⁴

These decisions illustrate the complex position of IHRL in the law of international criminal procedure. The ICTs may or may not be formally bound by this body of law and, even if they are, they may still have to contextualize human rights norms in their application in the specific circumstances of international criminal justice.

2. Research Question and Purpose of the Study

Human rights law has been described as the ideal lens through which to assess 'the structure and functioning of international criminal justice'.¹⁵ Many studies on international criminal proceedings have taken this perspective as a parameter with which to evaluate the law and practice of the ICTs.¹⁶ This study seeks to add to the existing scholarship in two ways. First, it focuses on the use the ICTs have made of the standards of IHRL, including those reflected in the judgments and decisions of human rights courts and supervisory bodies, in their own interpretation and application of human rights norms. Second, this study investigates how the

¹³ ICC, Decision on *Amicus Curiae* Application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile", *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 64.

¹⁴ *ibid*, 73.

¹⁵ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003), 1.

¹⁶ See eg; Erik Møse, 'Impact of Human Rights Conventions on the Two *ad hoc* Tribunals' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003); William Schabas, 'The Right to a Fair Trial' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court - Volume II* (II Sirente 2004); Stefan Trechsel, 'Rights in Criminal Proceedings under the ECHR and the ICTY Statute - a Precarious Comparison' in Bert Swart, Göran Sluiter and Alexander Zahar (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (OUP 2011); Masha Fedorova, Stan Verhoeven and Jan Wouters, 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings' in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia 2009); Denis Abels, 'Prisoners of the International Community' (PhD Thesis, University of Amsterdam 2012); Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012).

specific context in which the ICTs operate has impacted on their interpretative practice regarding human rights norms. The purpose of this study is to assess these aspects of the practice of the ICTs, and make recommendations for improving this practice. Therefore, the central research question is:

How should international criminal courts and tribunals interpret and apply international human rights norms in their procedural practice?

This question reflects the ‘double life’ of human rights norms in the legal frameworks of the ICTs.¹⁷ Their instruments have reproduced human rights norms, such as the right to a fair trial, as a result of which such norms have clearly become binding. However, this incorporation leaves two essential questions unanswered. The first is whether the ICTs are bound by human rights norms that have not been reproduced in their legal instruments. To answer it, this study investigates whether the ICTs are bound by IHRL as a body of international law. Second, such incorporation does not settle the relevance or prescriptive authority of IHRL, including decisions of human rights courts and supervisory bodies, vis-à-vis the ICTs’ own interpretation of human rights norms. Should they follow such authoritative interpretations of these norms, or may the ICTs reformulate these norms based on the specific context in which they operate? These two questions are central to this study.

The fundamental differences between states and ICTs unavoidably impact on the latter’s capability to protect human rights norms, which have been developed to govern the conduct of states, not of ICTs. As has been stated, the ICC cannot be bound by the principle of *non-refoulement* and the right to request asylum in the same way as states, because it does not have a territory where individuals could permanently reside.¹⁸ The ICC essentially had to invent an answer to the question of how these human rights norms would apply to an ICT, because its circumstances fundamentally differ from those of states and it cannot interpret and apply these norms in the same way. As this study will show, there are numerous examples of situations in which the specific nature of ICTs and the context in which they operate has impacted on their interpretation and application of human rights norms. The important question is whether and under what circumstances such an impact is acceptable.

¹⁷ Sergey Vasiliev ‘International Criminal Trials – a Normative Theory’ (PhD Thesis, University of Amsterdam 2014), 93.

¹⁸ ICC, Decision on *Amicus Curiae* Application and on the “*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile*”, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), 9 June 2011, 64.

This study employs a working hypothesis that the specific context of international criminal justice has an impact on the ICTs' procedural practice regarding human rights norms. The need for the ICTs to 'contextualize' human rights norms in their interpretation and application in the specific circumstances of international criminal proceedings has been widely acknowledged.¹⁹ However, it has never been the central subject of an in-depth study. This dissertation seeks to fill this gap by disclosing the merits and drawbacks of a contextual approach to the ICTs' human rights obligations in terms of the substantive level of protection offered by the ICTs, and the quality of their legal reasoning and interpretative methodology. Contextualization can have two primary consequences. The ICTs either depart from human rights standards in a way that decreases the protection of the respective right in their specific context, as illustrated by the decisions of the ad hoc Tribunals on provisional release. Alternatively they can expand the scope of human rights protection as compared to IHRL, in order to ensure the effective protection of the right in question in the specific context of international criminal proceedings. Such an approach is illustrated by the ICC's decision to set aside the Statute to protect the detained witnesses' right to request asylum.

3. Scope and Delineation

This study addresses the law and practice of three ICTs—the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the ICC—to the exclusion of other—special and hybrid—tribunals. This limitation has several reasons. Since the mid-1990s, there has been a proliferation of ICTs, each with a specific mandate and, importantly, with a distinct legal character.²⁰ These features have consequences for their applicable law and for their recourse to various sources of international and domestic law. Generally, a distinction can be drawn between purely international criminal tribunals, on the one hand, and hybrid or internationalized tribunals on the other.²¹ Three aspects of hybridity can be distinguished.²² First, some

¹⁹ See eg Gabrielle McIntyre 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas and William Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Koninklijke Brill NV 2003); Masha Fedorova and Göran Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings' (2009) 3 *Hum Rts & Int'l Legal Discourse* 9; Vasiliev (n 17), 138-155.

²⁰ For an overview of the development of international criminal justice see eg Salvatore Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy' in Göran Sluiter and others (eds), *International Criminal Procedure – Rules and Principles* (OUP 2013) 2013; Vasiliev (n 17), 26-55.

²¹ See eg Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight against International Criminality' in Cesare Romano, André Nollkaemper and Jann Kleffner (eds), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004); Daphna Shraga, 'the Second Generation UN-Based Tribunals: a Diversity of Mixed Jurisdictions' in Cesare Romano, André Nollkaemper and Jann Kleffner (eds), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004); Wil-

hybrid tribunals are embedded in a domestic legal system, second, their applicable law often consists of an amalgam of international and domestic law, and third, their organs, including their Chambers, are composed of international and domestic staff. These characteristics set them apart from purely international tribunals, like the ICTY, ICTR, and ICC.²³

Two hybrid tribunals, the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL), are sometimes classified as international tribunals. In a sense they are ‘more’ international than other hybrid tribunals, like the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Panels for Serious Crimes (SPSC), because they were established by a treaty and a Security Council resolution, respectively, and because of their formal independence from the domestic legal systems.²⁴ However, they are classified as hybrid courts because their applicable law is an amalgam of international and domestic law and because their organs, including their Chambers, are composed of domestic and international staff.²⁵ The hybrid nature of their applicable law may be expected to impact on their engagement with IHRL. For example, the SCSL Statute provides that the Judges of the Court, in amending the Rules of Procedure and Evidence (RPE), ‘are to be guided by the Sierra Leonean Criminal Procedures Act 1965’.²⁶ Although the impact of Sierra Leonean procedural law on the SCSL is uncertain, the Court itself has held that the domestic criminal justice act of Sierra Leone, which ‘lays down the basic procedures of adversary criminal trials that are

liam Schabas *The UN International Criminal Tribunals – the former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006), 5-7.

²² See eg Laura Dickinson, ‘The Promise of Hybrid Courts’ (2003) 97 *Am J Int’l L* 295, 295: ‘[s]uch courts are “hybrid” because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic’.

²³ See also Vasiliev (n 17), 72, who refers to these ICTs as ‘truly international’.

²⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002); UNSC, Resolution 1757 (30 May 2007) UN Doc S/Res/1757, see also in the appendix: Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal (6 February 2007).

²⁵ Art 5 SCSL Statute; Art 2 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002); Art 2 STL Statute; Art 2 Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal (6 February 2007), as appended to UNSC, Resolution 1757 (30 May 2007) UN Doc S/Res/1757. The mixed composition of these Tribunals, including of their Chambers, suggest that domestic law and practice may be expected to have a larger impact on the law and practice of these courts than on that of the ICTY, ICTR, and ICC. See also Chandra Sriram, ‘Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone’ (2006) 29 *Fordham Int’l L J* 472, 480-481, on the hybrid nature of the SCSL; Antonio Cassese *International Criminal Law* (2nd edn, OUP 2008), 332; Zappalà, *Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy* (n 20), 52-54.

²⁶ Art 14(2) SCSL Statute. See also Håkan Friman, ‘Procedural law of Internationalized Criminal Courts’ in Cesare Romano, André Nollkaemper and Jann Kleffner (eds), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004), 321; Vasiliev (n 17), 73, who notes that the SCSL ‘represents a form of ‘nationalized’ international criminal justice’.

followed in Sierra Leone’, may also be appropriate for the circumstances of the Court.²⁷ The STL Statute includes a similar provision regarding the guiding force of the Lebanese code of criminal procedure.²⁸ As a result, it has been held that the procedural regime of the STL ‘amounts to a novel hybrid regime’.²⁹ Finally, the human rights obligations of hybrid tribunals that are embedded within a state’s domestic legal system also depend on the human rights obligations of the state in question.

As a result, different questions arise regarding the position of IHRL in the law and practice of hybrid tribunals than with regard to purely international tribunals. The differences between international and hybrid tribunals do not lend themselves to drawing general conclusions regarding the status of IHRL in international criminal adjudication and the parameters of contextualization. In the interest of a focused and in-depth discussion, this study thus focuses on purely international criminal tribunals. The ad hoc Tribunals are the ‘pioneers’ of modern international criminal law and procedure.³⁰ They were the first international criminal tribunals established after the Nuremberg and Tokyo Tribunals, and have had a substantial impact on the law and practice of subsequently established ICTs. Although the case law of the ICC on some issues is still relatively underdeveloped, it is the only permanent ICT and the future face of international criminal justice. In addition, the ICTY, the ICTR and the ICC have been the most prolific ICTs, in that the volume of their case law is larger and provides a rich source for inquiry.

The second limitation on the scope of the study concerns the understanding of international human rights law that is adopted. It focuses exclusively on human rights norms as contained in the sources of international law—in particular human rights treaties—and as interpreted and applied by human rights courts and supervisory bodies. The focus is on international and regional human rights treaties, in particular the ICCPR, the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR), and on the practice of human rights courts and bodies that supervise states’ compliance with those treaties, ie the Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the European Commission of Human Rights (ECnHR), the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACnHR), and the African

²⁷ SCSL, Decision on Amendment of the Consolidated Indictment, *Prosecutor v. Norman, Fofana, and Kondewa* (Case No SCSL-044-14-AR73), 16 May 2005, 46.

²⁸ Art 28(2) STL Statute.

²⁹ Sergey Vasiliev, ‘Introduction’ in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (OUP 2013), 18.

³⁰ Similarly, Fedorova (n 16), 14.

Commission on Human and Peoples' Rights (ACnHPR).³¹ The domestic interpretation and application of human rights norms and its impact on the ICTs falls beyond the ambit of this study.

The third limitation of the scope of this study is its focus on the ICTs' procedural practice. Human rights norms are an integral part of any system of criminal procedure. They 'shield' or protect individuals from possible excesses of criminal law enforcement.³² At the same time, human rights have a 'sword' function: individuals responsible for violating them can be prosecuted, as is illustrated by the fact that the ICTs prosecute and try individuals allegedly responsible for grave violations of human rights norms. As a result, IHRL has a significant impact on the ICTs' interpretation and application of substantive international criminal law.³³ However, the exclusive focus of this dissertation is on the 'shield' as opposed to the 'sword' function of human rights norms. It is therefore only concerned with the ICTs' procedural law and practice.

Fourth and finally, instead of attempting to provide an all-encompassing overview of the interpretation and application of human rights norms by the ICTs, this study focuses on three specific human rights norms: the right to privacy, the right to liberty, and the right to be tried without undue delay. This allows an in-depth analysis of the way in which the ICTs have interpreted and applied these norms, of whether and how their interpretations deviate from IHRL, and of their use of various sources of IHRL in their interpretative practice. The three rights that have been selected provide a representative picture of the ICTs' interpretation and application of human rights norms.

The selection has been based on several criteria informed by the purposes of this study. First, the study is not limited to fair trial rights alone because it seeks to analyze the relevance of IHRL for the ICTs in general. The way in which the ICTs interpret and apply human rights norms that appear to have a limited immediate relevance to the exercise of their functions as criminal courts is therefore of particular interest. The second criterion has been to ensure that the study covers both rights that have been incorporated in the ICTs' legal in-

³¹ Or 'supervised' in the case of the ECnHR, which is no longer in existence.

³² Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 J Int'l Crim Just 5771, 7.

³³ See eg Schabas, 'Synergy or Fragmentation?' (n 11) who shows that the case law of the ECtHR has greatly impacted on the ICTs' interpretation and application of their substantive law. For other studies on this, see eg Claire de Than and Edwin Shorts (eds), *International Criminal Law and Human Rights* (Sweet & Maxwell 2003); Jeremy Sarkin, 'The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application since the Nineteenth Century' (2007) 1 Hum Rts & Int'l Legal Discourse 125; Patricia Pinto Soares, 'Tangling Human Rights and International Criminal Law: the Practice of International Tribunals and the Call for Rationalized Legal Pluralism' (2012) 23 Crim L Forum 161.

struments and those that have not. This is meant to test the ICTs' adherence to internationally recognized human rights generally and not only to those rights that have been reproduced in their internal law. Third, this study investigates whether and in what way the context in which the ICTs operate may impact on their interpretation and application of human rights norms. Therefore, it addresses those human rights norms the interpretation of which is expectably influenced by the specific context of international criminal proceedings. Fourth, the availability of relevant law and practice of the ICTs regarding the respective rights has also served as a selection criterion.

These criteria warrant the choice for the following rights: (1) the right to privacy, as applicable in the context of criminal investigations; (2) the right to liberty, as applicable in the context of provisional detention; and (3) the right to be tried without undue delay. First, only one of these rights (the right to be tried without undue delay) is a classical fair trial right. These three rights govern distinct aspects of the practice of the ICTs: respectively, the investigation, the provisional detention of the accused, and the trial itself. Second, only the right to be tried without undue delay is incorporated in all the ICTs' legal instruments. The right to liberty is enshrined in the ICC Statute, but not in those of the ad hoc Tribunals, and the right to privacy is absent from all ICTs' legal instruments. Third, the specific context of the ICTs is anticipated to impact on the interpretation and application of all of these rights. For example, since the ICTs do not have enforcement powers, they rely on states for the execution of investigative measures. This is expected to impact on the way in which the ICTs have interpreted and applied the right to privacy. Similarly, the ICTs have no territory of their own, as a result of which the implementation of possible decisions to provisionally release suspects depends on the cooperation of states. Furthermore, the proceedings before the ICTs have often been criticized for their slow pace.³⁴ This is expected to impact on their interpretation and application of the right to be tried without undue delay. Finally, there is a substantial amount of case law on the right to liberty and the right to be tried without undue delay, in particular. Decisions on the right to privacy have been less frequent, but there is sufficient practice to draw conclusions regarding the interpretation and application of this right in the context of the ICTs.

This dissertation incorporates developments in the case law of the ICTs up to 1 November 2014.

³⁴ See *infra* Chapter 6.

4. Methodology and Approach

This study employs the methods of classical legal research. It analyses and assesses the law and practice of the ICTs regarding the interpretation and application of international human rights norms and makes recommendations for improved practice. The analysis of the ICTs' procedural practice proceeds in two steps. First, the interpretation and application of human rights norms by the ICTs is compared to the interpretation of IHRL norms by human rights courts and supervisory bodies. Second, the ways in which the ICTs use IHRL, including precedents from human rights courts and supervisory bodies, is analyzed and assessed.

This objective warrants the application of the comparative methodology. When comparing the interpretation and application of law in two distinct contexts, the differences between them must be acknowledged.³⁵ The two legal systems that are being compared are, on the one hand, the procedural practice of the ICTs, and on the other hand, IHRL as enshrined in international conventions and as interpreted by human rights courts and supervisory bodies.³⁶ Strictly speaking, decisions of quasi-judicial human rights supervisory bodies are not judicial. Nevertheless, the work of the HRC, the ECnHR and the IACnHR, in particular, will be referenced in this study because it contains authoritative interpretations of the scope and content of the human rights norms contained in the ICCPR, the ECHR and the ACHR, respectively. The adjudicative context of an ICT is different from that of a human rights court or supervisory body. The latter courts and bodies are called upon to assess whether a state has violated the rights of an individual, while the ICTs must themselves apply human rights norms directly in the context of criminal proceedings. However, IHRL can still serve as the basis for normative guidance regarding the law of criminal procedure: human rights courts and supervisory bodies assess the interpretation and application of human rights norms by states in the context of criminal proceedings. This study distills general rules from human rights treaties and from the practice of human rights courts and supervisory bodies relating to the conduct of criminal proceedings. These are compared to the approach taken to the interpretation and application of the same rights in the ICTs' procedural practice.

The methodology employed for the analysis of both IHRL and the law and practice of the ICTs is legal positivism. This study assesses the law as it is, rather than as it should argu-

³⁵ Similarly John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark van Hoecke, *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 170, who argues that the comparative researcher must 'understand the institutional setting out of which the law arises and is used'.

³⁶ Art 38(1)(d) ICJ Statute mentions judicial decisions as a subsidiary means for the determination of rules of law international law.

ably be. Hence the focus on norms with a valid legal basis in the sources of (international) law and the way in which these norms have been interpreted and applied in international legal practice.³⁷

Two premises underlie this study that have shaped its design, including the methodology, the theoretical framework, and the analytical structure. The first is that the effective protection of human rights is an essential component of any fair system of criminal justice. The second is the working hypothesis, stated above, that the differences between domestic and international criminal justice may require the reinterpretation of human rights norms when applied in the context of an ICT.

The theoretical framework used to assess the law and practice of the ICTs is constructed in Chapters 2 and 3. These Chapters both address two questions: the first is whether and how the ICTs are bound by IHRL and the second is whether this possible binding effect allows or enables the tribunals to interpret and apply human rights norms contextually, considering the specific circumstances in which they operate. Chapter 2 addresses these questions from the perspective of international law, and Chapter 3 from the perspective of the ICTs' internal law and practice. The study's theoretical framework consists of two components: (1) the ICTs' obligation to adhere to IHRL; and (2) the possibility and need for the ICTs to contextualize their interpretation of human rights norms, based on the specific context in which they operate. As will be shown, these components are not mutually exclusive, but closely intertwined. Following the analyses of the ICTs' interpretation and application of human rights norms in Chapters 4 to 6, the final Chapter evaluates the ICTs' approach in light of these components. The strengths and weaknesses of their interpretative practice are assessed based on the resulting level of human rights protection offered and, particularly, the quality of the ICTs' legal reasoning and the cogency, coherence and consistency of their interpretative methodology.

5. Structure

The study is divided into two parts. The first part addresses whether and how the ICTs are bound by IHRL, and whether the ICTs may interpret human rights norms contextually in their procedural practice. This is vital for an understanding of the position of international

³⁷ See eg Frauke Lachenmann, 'Legal Positivism', *The Max Planck Encyclopedia of Public International Law* (updated July 2011) < <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1856?rskey=0bAxXR&result=17&prd=EPIL> > accessed 17 September 2014; Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011), 37-41.

human rights norms in the legal frameworks of the ICTs. Whether the ICTs are bound by IHRL is debatable, as is the possible legal basis for its binding character. It has been argued that the creators of the ICTs made a policy choice to bind these tribunals to IHRL.³⁸ Others, however, have argued that the ICTs' status as subjects of international law necessarily implies that they are bound by general international human rights law.³⁹ Determining whether the binding nature of human rights law was an imposed (or self-imposed) 'policy choice' or an inescapable legal obligation is important, as it may have implications for the ICTs' ability to deviate from IHRL and to interpret these norms in their specific context.⁴⁰

Chapter 2 addresses the binding nature of IHRL vis-à-vis the ICTs from the perspective of international law. This Chapter examines whether and how international law imposes human rights obligations on the ICTs *a priori*. It argues that the ICTs are bound by general international human rights law in accordance with international law. At the same time, this does not mean that the determination of the scope and content of the ICTs' actual human rights obligations is a straightforward exercise. Quite the contrary, this Chapter discusses three features of general international human rights law that complicate the ascertainment of the actual human rights obligations of the ICTs under international law. These features are the indeterminacy of the law contained in the sources of general IHRL, the inherently flexible nature of human rights norms, and the possible creation of *lex specialis* to govern human rights protection in the specific context of international criminal proceedings.

Chapter 3 assesses the binding nature of IHRL from the perspective of the internal law and the practice of the ICTs. This Chapter shows that their obligation to adhere to IHRL is recognized in the law and practice of the ICTs and is not limited to the formal sources of 'general international human rights law'. This Chapter discusses the legal basis for this obligation as far as it can be discerned from the ICTs' legal instruments and case law. Particular attention is paid to Article 21(3) of the Rome Statute, which explicitly provides that the ICC must interpret and apply its applicable law in a manner consistent with internationally recognized human rights. The Chapter further analyzes the normative force of IHRL in the procedural law and practice of the ICTs. In addition, two remaining obstacles to the determination of the actual content of human rights obligations of the ICTs are assessed. These include the

³⁸ See eg Zappalà, *Human Rights in International Criminal Proceedings* (n 15) 5-7.

³⁹ See eg Göran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights' (2003) 37 *New Eng L Rev* 935, 937; Lorenzo Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down?' (2006) 19 *Leiden J Int'l L* 847, 851; Guido Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations' (2007) 20 *Leiden J Int'l L* 613, 614.

⁴⁰ Vasiliev (n 17), 124.

ill-defined category of human rights norms that bind the ICTs and the fact that even if a human rights norm applies to the ICTs, its specific context may still require an adaptation.

The second part of this study analyzes the actual interpretation and application of specific human rights norms by the ICTs. Chapters 4, 5, and 6 assess the ICTs' law and practice regarding three human rights norms—the right to privacy, the right to liberty, and the right to be tried without undue delay—from two perspectives. The first perspective is comparative. Each Chapter compares the interpretation and application of the respective human rights norm in the law and practice of the ICTs with the way in which this right is interpreted and applied in IHRL. The objective is to disclose possible deviations from IHRL by the ICTs. These Chapters particularly focus on instances where the ICTs have explicitly deviated from IHRL and on the reasons they have proffered to justify such deviation. The second perspective focuses on the ways in which the ICTs have used sources of IHRL, including decisions of human rights courts and supervisory bodies, in their own interpretation and application of human rights norms. This will further reflect on the position of IHRL in the law and practice of the ICTs.

Chapters 4, 5, and 6 each commence with an analysis of the IHRL framework regarding the human rights in question. These sections assess the scope and content of the respective right, and the legal test generally applied by human rights courts and supervisory bodies to determine whether the right has been violated. The analysis covers international human rights law and the interpretation of human rights norms by human rights courts and supervisory bodies. An attempt has been made to cover a broad range of human rights practice, and thus to include the practice of international and regional human rights courts and supervisory bodies. Subsequently, each Chapter analyzes the interpretation and application of the right in question by the ICTs. The approaches of the ad hoc Tribunals, on the one hand, and of the ICC on the other are discussed separately because of sometimes significant differences between them. Each Chapter concludes with an analysis that summarizes the comparative findings regarding the interpretation and application of the right in question by the ICTs and in IHRL and identifies the ways in which the ICTs have used sources of IHRL in their interpretative practice.

Chapter 7 offers an analysis of the findings arrived at in the previous Chapters and answers how the ICTs *should* interpret and apply human rights norms in their procedural practice. First, it shows that the ICTs' interpretation and application of international human rights norms has been driven by two phenomena: adherence and contextualization. On the one hand, the ICTs have adhered to IHRL and interpretations thereof in their law and practice. At

the same time, the ICTs have deviated from these standards and given a contextualized interpretation of these norms, based on the different circumstances in which they operate. This Chapter analyzes and categorizes these approaches in order to expose their strengths and pitfalls. The conclusions are used to construct a methodological framework recommended for the proper—and contextualized—interpretation and application of human rights norms by the ICTs.

Finally, Chapter 8 provides overall conclusions, summarizes the findings arrived at in this study and identifies directions for further research.