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### International criminal tribunals and human rights law: Adherence and contextualization

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**PART III      SYNTHESIS, CONCLUSION &  
RECOMMENDATIONS**



# **CHAPTER 7 ADHERENCE AND CONTEXTUALIZATION: TOWARDS A METHODOLOGICAL FRAMEWORK FOR THE INTERPRETATION AND APPLICATION OF HUMAN RIGHTS NORMS**

## **1. Introduction**

This Chapter develops a methodological framework for the properly contextualized interpretation and application of human rights norms by the ICTs in their procedural practice. The first part of this Chapter categorizes the ways in which the ICTs have interpreted and applied international human rights norms. Based on the foregoing chapters, two approaches have been identified. The first is adherence to IHRL and the second is the contextualization of human rights norms based on the specific circumstances in which the ICTs operate. These approaches are not mutually exclusive. Quite the contrary, they constitute the two pillars upon which the ICTs should build their procedural practice regarding their interpretation and application of human rights norms. Often, the ICTs can only truly adhere to IHRL by properly contextualizing their interpretation and application of human rights norms.

Section 2 addresses the ICTs' adherence to IHRL and section 3 assesses the contextualization of international human rights norms in their procedural practice. The discussion of contextualization addresses the specific contextual factors that have impacted on the ICTs' interpretative practice, and the modalities of contextualization that can be discerned from it. This will result in an overview of the main parameters of the ICTs' contextualization practice and, importantly, its strengths and pitfalls. Section 4 builds on the foregoing analysis to construct a methodological framework that recommends several interpretative steps and parameters that should guide the ICTs' interpretation and application of human rights norms.

## **2. Adherence to IHRL**

The previous chapters have shown that there are many similarities between the interpretation and application of human rights norms by the ICTs and the interpretations of these norms in

IHRL. Two phenomena have driven these similarities. The first is the legislative influence of IHRL, which pertains to the impact of this body of law on the legal instruments of the ICTs. The second is the ICTs' interpretation and application of their legal instruments in a manner consistent with IHRL.

## 2.1. Legislative influence

Legislative influence of IHRL on the procedural law of the ICTs has manifested itself both explicitly and implicitly. Explicit legislative influence is shown by the incorporation of human rights norms in the legal instruments of the ICTs. Implicit legislative influence is shown by the incorporation of procedures in the ICTs' legal instruments that aim to protect the rights of persons implicated by their activities, without explicitly enshrining the right in question.

Explicit legislative influence of IHRL has partially manifested itself with regard to the rights that have been addressed by this study. Both the Statutes of the ad hoc Tribunals and that of the ICC enshrine the right to be tried without undue delay in their provisions pertaining to the rights of accused persons.<sup>1</sup> Similarly, the right to liberty has been incorporated in Article 55 of the ICC Statute, which provides for the rights for persons during the investigation. The right to privacy has not been incorporated in the legal instruments of the ICTs, nor do the legal instruments of the ad hoc Tribunals provide the right to liberty. In addition to the rights that have been addressed in this study, the legal instruments of the ICTs provide several other human rights norms, mainly related to the right to a fair trial, but also, for example, the right of suspects to be assisted by counsel during questioning.<sup>2</sup>

Implicit legislative influence of IHRL on the legal instruments of the ICTs has manifested itself partially with regard to the rights that have been addressed by this study. The Statutes of the ICTs reflect a limited legislative influence of the right to privacy. No such influence could be identified with regard to the ad hoc Tribunals: their legal instruments do not provide procedures that regulate interferences with privacy in the course of the investigations, as is required by IHRL. The legal instruments of the ICC suggest very limited legislative influence of IHRL regarding the right to privacy. Its Statute provides a legal basis for requests for legal assistance in the form of search and seizure operations, a prime example of an investigative measure that interferes with privacy.<sup>3</sup> However, there is no specific legal

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<sup>1</sup> Art 21(4)(c) ICTY Statute; Art 20(4)(c) ICTR Statute; Art 67(1)(c) ICC Statute.

<sup>2</sup> Art 21 ICTY Statute; Rule 42 ICTY RPE; Art 20 ICTR Statute; Rule 42 ICTR RPE; Arts 55 and 67 ICC Statute.

<sup>3</sup> Art 93(1)(h) ICC Statute.

basis for requests that pertain to other coercive measures, nor do the ICC's legal instruments regulate such interferences by making their execution subject to checks and guarantees, as is required by IHRL.<sup>4</sup>

The Statutes and RPEs of the ad hoc Tribunals lay down procedures for the arrest and subsequent provisional detention of suspects and accused persons, thus evincing a measure of implicit legislative influence of IHRL with regard to the right to liberty. For example, there must be a reasonable suspicion before a suspect can be arrested, and detained persons can apply for provisional release pending trial.<sup>5</sup> The grounds upon which detained persons can be granted release partially mirror the grounds for provisional detention in IHRL. These procedures aim to prevent arbitrary and unlawful deprivations of liberty, as required by IHRL. Although, as has been shown, the regulation of liberty deprivation before the ad hoc Tribunals is not in line with IHRL,<sup>6</sup> the procedures laid down in their legal instruments do evince partial legislative influence of IHRL. For example, the judges of the ad hoc Tribunals amended their RPEs in order to bring its provisional release regime more in line with IHRL.<sup>7</sup> The regulation of liberty deprivation before the ICC shows a stronger legislative influence of IHRL. For example, the Statute requires both a reasonable suspicion and a ground for provisional detention, while grounds for detention are almost identical to the grounds recognized in IHRL.<sup>8</sup> Similarly, the ICC Statute requires mandatory periodic review of the continued necessity of detention.<sup>9</sup>

There has also been implicit legislative influence of IHRL regarding the right to be tried without undue delay. For example, in addition to the explicit provision of this right, the Statutes of the ICTs require Chambers to ensure the expeditiousness of the proceedings.<sup>10</sup> Moreover, the legal instruments of the ICTs incorporate rules and procedures that aim to facilitate the expeditiousness of the proceedings. For example, the Security Council amended the Statutes of the ad hoc Tribunals to enable the appointment of *ad litem* judges to increase the capacity of the Tribunals and enable them to handle more cases at the same time.<sup>11</sup>

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<sup>4</sup> See *supra* Chapter 4, section 4.2.1.

<sup>5</sup> Rules 64 and 65, ICTY and ICTR RPE; see further *supra* Chapter 5, section 3.1.

<sup>6</sup> For a summary of the discrepancies between the ad hoc Tribunals' law and practice and IHRL, see *supra* Chapter 5, section 3.5.

<sup>7</sup> See *supra* Chapter 5, section 3.5.

<sup>8</sup> Art 58 and 60 ICC Statute.

<sup>9</sup> Art 60(3) ICC Statute.

<sup>10</sup> Art 20(2) ICTY Statute; Art 19(2) ICTR Statute; Art 64(1) ICC Statute.

<sup>11</sup> Art 13*ter* ICTY Statute, as amended by UNSC Resolution 1481 (14 August 2002) UN Doc S/RES/1481; Art 12*ter* ICTR Statute, as amended by UNSC Resolution 1432 (14 August 2002) UN Doc S/RES/1432.

## 2.2. Consistent Interpretation

The second way in which the ICTs have adhered to IHRL is by interpreting and applying their legal instruments in a manner consistent with international human rights norms.<sup>12</sup> Article 21(3) of the Statute explicitly requires the ICC to do this, and this provision has been said to codify existing practice before the ad hoc Tribunals, which have indeed confirmed that they are bound by internationally recognized human rights.<sup>13</sup> Such consistent interpretation has occurred explicitly, when ICTs rely on IHRL norms and interpretations by human rights courts and supervisory bodies for the purpose of interpretation and application of their own instruments. There has also been implicit consistent interpretation, when the ICTs do not refer to such sources, but it is clear from their decisions that they have been inspired by IHRL.

With regard to the right to privacy, there has been a limited amount of implicit consistent interpretation before the ICTs. For example, there is some practice at the ICTs of judicial authorization for coercive measures that could infringe upon the right to privacy. The Prosecutor may have sought such authorization in order to adhere to IHRL, which incorporates a strong preference for judicial authorization for coercive measures. However, the judicial warrants granted in such cases did not address any formal or material conditions for the interference with privacy rights as would be required by IHRL, nor did they refer to IHRL.<sup>14</sup> Decisions regarding the admissibility of evidence allegedly gathered in violation of the right to privacy evince more explicit consistent interpretation. In such decisions, the ICTs generally cite the right to privacy contained in human rights instruments, as well as case law of the ECtHR.<sup>15</sup> The ICC has even found a violation of the right to privacy because a coercive measure was not proportionate, a requirement that the Court based on case law of the ECtHR.<sup>16</sup> However, the fact that the ICTs profess to adhere to IHRL in these decisions should

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<sup>12</sup> Similarly Lorenzo Gradoni, 'The Human Rights Dimension of International Criminal Procedure' in Göran Sluiter and others (eds), *International Criminal Procedure - Principles and Rules* (OUP 2013), 92, who notes that 'interpretation of procedural rules in the light of human rights standards is a relatively frequent occurrence.'

<sup>13</sup> On the ad hoc Tribunals' obligation to respect internationally recognized human rights, see *supra* Chapter 3, section 2.

<sup>14</sup> See eg ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Bratunac, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998; ICTY, Search Warrant for the Public Security Centre (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić* (IT-95-5/18-T), 11 September 2003; see further *supra* Chapter 4, section 3.1.

<sup>15</sup> See eg ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 29; ICC, Decision on the Admission of Material from the 'Bar Table', *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009; see *supra* Chapter 4, sections 4.1.1. and 4.2.1.

<sup>16</sup> ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 82; similarly ICC, Decision on the Admission of Material from the 'Bar Table', *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 38.

not be taken to imply that their approach is actually in line with the right to privacy. Quite the contrary, this right is significantly underprotected in the law and practice of the ICTs.<sup>17</sup>

The case law of the ICTs regarding provisional release is replete with references to IHRL, and thus displays a large measure of explicit consistent interpretation. Although various aspects of the actual approach of the ICTs to provisional release are inconsistent with the international human right to liberty, the ICTs often refer to sources of IHRL when interpreting and applying aspects of their legal frameworks regarding provisional detention.<sup>18</sup> For example, the ICC has often held that in IHRL provisional detention should be the exception and release should be the rule, a maxim that it claims to be reflected in its legal instruments.<sup>19</sup> The ICC has also held that the duty to periodically review provisional detention is not only incumbent on the Pre-Trial, but also on the Trial Chamber.<sup>20</sup> The ICTY has also noted that the removal of the requirement of ‘exceptional circumstances’ for provisional release was fully in line with IHRL.<sup>21</sup>

The ICTs’ approach to the right to be tried without undue delay displays a limited measure of implicit consistent interpretation. Their approach to this right as a whole substantially departs from IHRL, but aspects of it are clearly inspired by the international human right to be tried without undue delay nonetheless. For example, the ad hoc Tribunals have generally held that a determination of whether the right to be tried without undue delay has been violated hinges on an assessment of five factors, four of which have clearly been drawn from IHRL, even though the Tribunals do not explicitly acknowledge this.<sup>22</sup> Similarly, their interpretation and application of these factors has often been substantiated with references to case law of the ECtHR.<sup>23</sup> In addition, all ICTs have relied on the right to be tried without undue delay as a device to expedite the proceedings by, for example, limiting the parties’ use

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<sup>17</sup> See *supra* Chapter 4, section 5.

<sup>18</sup> For a brief overview, see *supra* Chapter 5, sections 3.5. and 4.7.

<sup>19</sup> See eg ICC, Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pretrial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-330), 18 March 2008, 7; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba* (ICC-01/05-01/08-403), 14 April 2009, 36.

<sup>20</sup> See eg ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-976), 9 October 2007, 8; ICC, 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, *Prosecutor v. Bemba* (ICC-01/05-01/08-743), 1 April 2010, 2; see further *supra* Chapter 5, section 4.1.

<sup>21</sup> See eg ICTY, Decision on Miroslav Tadić’s Application for Provisional Release, *Prosecutor v. Simić et al* (IT-95-9-PT), 4 April 2000, 8.

<sup>22</sup> See eg ICTR, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; for a full discussion, see *supra* Chapter 6, section 3.2.

<sup>23</sup> See generally, *supra* Chapter 6, section 3.3.



of certain procedures.<sup>24</sup> The ICTs' approach to the right to be tried without undue delay thus evinces a mix of implicit and explicit consistent interpretation. Nevertheless, this has resulted in an approach to this right that is not in line with IHRL.<sup>25</sup>

The impact of IHRL on the procedural practice of the ICTs is thus substantial. The ICTs have displayed an awareness of the fact that the norms in their legal instruments do not operate in a legal vacuum, but are often based on parallel provisions in human rights instruments, which, in turn, have been further developed by human rights courts and supervisory bodies. The case law of the ECtHR in particular has often been quoted by the ICTs.<sup>26</sup>

Generally, the ICTs have acknowledged their obligation to abide by internationally recognized human rights. The resulting adherence to IHRL has manifested itself in three modalities of consistent interpretation that can be discerned in the ICTs' procedural practice.<sup>27</sup> These modalities illustrate the normative force of international human rights norms with respect to the law and practice of the ICTs.

The first is simple consistent interpretation. This occurs when the ICTs refer to IHRL when interpreting and applying their own internal legal instruments, and when they use IHRL and human rights precedents to give meaning to the provisions of their internal law. For example, the ICC has often referred to case law of the ECtHR in its interpretation and application of the conditions provided by its Statute for lawful provisional detention.<sup>28</sup> The second modality of consistent interpretation is the creation of procedural remedies that are absent from the ICTs' legal instruments, but that are. This has been called the 'power-conferring function' of human rights norms.<sup>29</sup> For example, the ad hoc Tribunals have held that they have an obligation to provide remedies for human rights violations because IHRL required this, even though their internal legal instruments did not provide for this possibility.<sup>30</sup> The third modality is overriding and setting aside the internal legal instruments of the ICTs because they conflict with an internationally recognized human right. For example, the ICC has set aside its statutory obligation to return witnesses to their country of origin subsequent to

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<sup>24</sup> See generally, *supra* Chapter 6, in particular sections 3.2.3., 3.2.4., and 4.1.

<sup>25</sup> See *supra* Chapter 6, sections 3.3 and 4.2.

<sup>26</sup> William Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 J Int'l Crim Just 609, p. 613, who explains this reliance on the ECtHR by noting that it 'offers the most detailed and sophisticated jurisprudence on international fair trial standards and related issues.'

<sup>27</sup> Similarly Gradoni (n 12), 92-94; Krit Zeegers, 'De Invloed van Mensenrechten op het Internationaal Strafrecht' in Denis Abels, Menno Dolman and Koen Vriend (eds), *Dialectiek van Nationaal en Internationaal Strafrecht* (Boom Juridische Uitgevers 2013), 386-392.

<sup>28</sup> See *supra* Chapter 5, in particular sections 4.3., on the ICC's interpretation and application of the conditions for detention, and section 4.7., where the ICC's use of IHRL is discussed in more detail.

<sup>29</sup> Gradoni (n 12), 93.

<sup>30</sup> See eg ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba* (ICTR-98-44C-T), 31 January 2007, 45.

their testimony, because their return would violate the effective enjoyment of their right to request asylum in the Netherlands.<sup>31</sup>

These modalities of consistent interpretation underline the broad scope of the ICTs' obligation to adhere to IHRL.<sup>32</sup> This duty not only requires the ICTs to interpret and apply the provisions in their legal instruments in a manner consistent with IHRL, but also requires them to fill the gaps in their legal instruments to ensure the effective protection of IHRL, and even to set their provisions aside if their application would conflict with internationally recognized human rights. However, in practice, this obligation of adherence to IHRL has not always been implemented in a ways that result in actual consistent interpretation. As has been seen, the procedural practice of the ICTs deviates from IHRL in many respects.

### 3. Contextualization

The second approach to IHRL that can be discerned from the ICTs' law and practice is a contextual one. The ICTs have given their own interpretation to certain human rights norms, often in a way that takes the specific context in which they operate into account. In a sense, the ICTs have thus developed 'special' human rights law that specifically governs the conduct of *international* criminal proceedings, and that differs from the way in which human rights norms are interpreted and applied by human rights courts and supervisory bodies assessing the conduct of domestic criminal proceedings.

Although the ICTs are bound by international human rights norms, the creation of a form of *lex specialis* in this area for and by the ICTs has been shown to be permissible from a legal perspective. Several justifications for such a contextual approach have been developed in the first two chapters of this study.<sup>33</sup> International law generally, and IHRL in particular, has developed to govern the conduct of states, not ICTs. The way in which these norms have been devised and operate presumes the existence of a state. As a result, they are not always easily transposable to the fundamentally different context of the ICTs. Human rights norms only have meaning in the context in which they are actually applied: therefore, the differences between domestic criminal proceedings and those conducted by an ICT may require the adaptation of the normative content of these norms, so that they can effectively fulfil their

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<sup>31</sup> 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-t(ENG)), 9 June 2011, 73; see further *supra* Chapter 3, section 3.2.2.

<sup>32</sup> See, more extensively, *supra* Chapter 3, sections 2 and 3.2.2.

<sup>33</sup> See *supra* Chapter 2, section 4, and Chapter 3, sections 4 and 5.

purpose in the context of the ICTs.<sup>34</sup> Second, states and ICTs are permitted to devise special law to govern the conduct of international criminal proceedings. Such law may deviate from existing international law.<sup>35</sup> With these considerations in mind, the contextualized human rights law and practice of the ICTs could be rationalized as *lex specialis* that governs the practice of the ICTs, which differs from the *lex generalis* of general international human rights law, which governs state practice.

However, the scope of the power to interpret rights contextually and to depart from existing norms and their interpretations is important to determine. The nature of human rights norms is incompatible with a complete freedom for the ICTs to reinterpret these norms in any way they see fit. An unbridled power to change human rights standards would make the ICTs' obligation to adhere to 'internationally recognized human rights' devoid of meaning and would undermine the protection of human rights norms in their context. Therefore, the important question is what factors and considerations should guide the ICTs' contextual interpretation and application of human rights norms. This section analyzes the practice of contextualization before the ICTs in order to identify its strengths and pitfalls. This will aid in the subsequent construction of a methodological framework for the proper contextualization of human rights norms before the ICTs.

### 3.1. The specific context of international criminal justice

The specific characteristics of international criminal proceedings have impacted on the ICTs' interpretation and application of human rights norms. This section shows what factors have had such an impact. It discusses instances of both explicit contextualization, where the ICTs admitted and justified their distinct interpretation, and implicit contextualization, where they have deviated from accepted interpretations of human rights norms without acknowledging or justifying this. The discussion is structured along the most prevalent contextual factors that can be discerned from the ICTs' law and practice regarding the three human rights norms that have been studied.<sup>36</sup> As will be seen, these factors have mostly been relied upon by the ICTs in justification of decreased human rights protection. At the same time, it must be emphasized that the ICTs have also increased the scope of protection of certain human rights norms in

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<sup>34</sup> 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), 194; see also *supra* Chapter 3, section 5.

<sup>35</sup> See *supra* Chapter 2, section 4.3.

<sup>36</sup> See also Christophe Deprez, 'Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: on Possible Reductive Factors' (2012) 12 Int'l Crim L Rev 721, who identified a set of 'reductive factors'.

their procedural practice, albeit primarily related to rights that have not been the subject of this study.<sup>37</sup>

### 3.1.1. Cooperation: the ICTs' necessary reliance on states

The first President of the ICTY famously compared the Tribunal to 'a giant without arms and legs'.<sup>38</sup> In order to be able to 'walk and work', he argued, the ICTY needed state authorities, 'artificial limbs', because without their cooperation, 'the ICTY cannot fulfil its functions'.<sup>39</sup> Unlike domestic courts, the ICTs do not have an entire state apparatus at their immediate disposal. They depend on the domestic authorities of a variety of states for the execution of their investigative measures and for the effectuation of their decisions to arrest suspects or to provisionally release them. Unavoidably, this dependence on states impacts on the practice of the ICTs, including on their interpretation and application of human rights norms.<sup>40</sup>

The ICC's dependence on states was allegedly relied upon by the drafters of the Rome Statute as a reason not to include the right to privacy in the Statute, and not to regulate the imposition of coercive measures.<sup>41</sup> It has been shown that the legal frameworks of the ICTs operate on the assumption that states are responsible for protecting the privacy rights of persons implicated by their investigative activities.<sup>42</sup> The absence of guarantees associated with the execution of coercive measures, which are required under IHRL for lawful interference with the right to privacy, can be attributed to this assumption underlying the legal frameworks of the ICTs. At the same time, both the ICC and the ICTY have cited their limited control over the investigation as a justification of their reluctance to conduct strict *ex post facto* checks of the manner in which evidence has been obtained. According to the ICTs, excluding evidence that has been obtained in breach of the right to privacy has no deterrent effect on domestic authorities.<sup>43</sup> As a result, the cooperation context has significantly contributed to the underprotection of the right to privacy in the law and practice of the ICTs.

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<sup>37</sup> See *infra* section 3.2.2. for an overview of the effects of the ICTs' contextualization practice.

<sup>38</sup> Antonio Cassese, 'On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *Eur J Int'l L* 2, 13.

<sup>39</sup> *Ibid.*

<sup>40</sup> See also Gregory Gordon, 'Towards an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 *Colum J Transnat'l L* 635, 671-680, where he described the impact of the 'fragmentation' of the ICTs' criminal procedure on the protection of several human rights norms.

<sup>41</sup> George Edwards, 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy' (2001) 26 *Yale J Int'l L* 323, 352, see *supra* Chapter 4, section 4.2.1.

<sup>42</sup> See *supra*, Chapter 4, section 4.

<sup>43</sup> Decision on the Admission of Material from the 'Bar Table', *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 46; ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 63; reiterated in: ICTY, Decision on the Accused's Motion to Exclude Intercepted

The cooperation context has had a similarly significant impact on the ICTs' law and practice regarding provisional release.<sup>44</sup> Since the ICTs have no territory of their own, they depend on states for the implementation of decisions to provisionally release accused persons. The ICTY has acknowledged that its strict approach to provisional release, including the original requirement that a defendant has to prove 'exceptional circumstances justifying release', departed from IHRL. The ICTY has held that this was justified by, *inter alia*, 'the unique circumstances in which the Tribunal operates': the Tribunal 'is not in possession of any form of mechanism, such as a police force, that could exercise control over the accused, nor does it have any control over the area in which the accused would reside if released.'<sup>45</sup> Although the requirement of exceptional circumstances was later removed from both ad hoc Tribunals' RPEs, it has been shown that their approach to provisional release continued to depart from IHRL, particularly, in imposing the burden of proof in such decisions on the defendant instead of the Prosecutor.<sup>46</sup> What is more, the necessity of state cooperation has led to state guarantees being raised to constitute a quasi-requirement for obtaining provisional release before all ICTs.<sup>47</sup> Although this requirement is not enshrined in their legal instruments, it is clear that the ICTs cannot and will not grant provisional release if no state is willing and able to receive the accused.

The unavoidable reliance on state cooperation for enabling provisional release has thus greatly impacted on the interpretation and application of the right to liberty before the ICTs. Interestingly, the ICTs have each taken a distinct approach to this issue. The different levels of cooperation can explain the difference in practice between the ICTY and the ICTR: while the latter has never granted provisional release, the ICTY has become increasingly permissive towards release. The ICTR has not provisionally released anyone due to the absence of states willing to receive ICTR accused, in contrast to the ICTY, where states of the former Yugoslavia have generally been willing and able to receive the provisionally released

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Conversations, *Prosecutor v. Karadžić* (IT-95-5/18-T), 30 September 2010, 10; see *supra* Chapter 4, sections 4.1.3. and 4.2.3.

<sup>44</sup> See also Andrew Trotter, 'Pre-Conviction Detention in International Criminal Trials' (2013) 11 J Int'l Crim Just 351, 365, 367-368.

<sup>45</sup> 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, 19-20; See also Antonio Cassese, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 4 Eur Hum Rts L Rev 329, 334, who argues that this different approach can be justified by the fact that the ICTY operates in conditions in which a state could justifiably derogate from its human rights obligations, based on the security situation, by the serious nature of the crimes, and because the host country refuses to allow defendants to move freely on its territory; see further *supra* Chapter 5, section 3.2.

<sup>46</sup> See *supra* Chapter 5, sections 3.3.1. and 3.4.

<sup>47</sup> See *supra* Chapter 5, sections 3.3.1. and 4.3.1.

persons.<sup>48</sup> The ICC's legal framework is generally in line with IHRL.<sup>49</sup> However, like the ICTR, the Court has generally been reluctant to grant interim release, which can partly be explained by the absence of states willing and able to receive accused persons.<sup>50</sup> Nevertheless, the ICC has adopted a more proactive approach towards procuring cooperation than its ad hoc predecessors. Not only is the Court in the process of concluding interim release agreements with states and has it concluded one such agreement with Belgium, there is some practice of Pre-Trial Judges actively requesting states' observations on the possible release of accused persons.<sup>51</sup> This has resulted in the only decision to date where the ICC has granted interim release, albeit in a case related to offences against the administration of justice, not to the core crimes under the Statute.<sup>52</sup> It will be interesting to see how this practice further unfolds, but the ICC's proactive approach is commendable from a human rights perspective. It shows that the ICTs can give a different interpretation to human rights norms, and that such interpretation can lead to the creation of distinct obligations for the ICTs that may not exist for states under IHRL, but that may be necessary to ensure the effective protection of human rights norms in the context of international criminal justice. With regard to the right to privacy, the ICTs seem to have concluded that their dependence on cooperation mandates a degree of indifference towards the protection of this right. But the recent developments in the ICC's approach to interim release show that a more proactive approach can result in a higher level of human rights protection.<sup>53</sup>

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<sup>48</sup> See *supra* Chapter 5, section 3.3.1.

<sup>49</sup> See *supra* Chapter 5, section 4.7.

<sup>50</sup> See *supra* Chapter 5, section 4.7.

<sup>51</sup> See eg ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. Bemba* (ICC-01/05-01/08-475), 14 August 2009; however, this decision was overturned on appeal because the Appeals Chamber did not agree that there were no grounds for further detention: ICC, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba* (ICC-01/05-01/08-631), 2 December 2009; ICC, Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, *Prosecutor v. Bemba et al* (ICC-01/05-01/13-683), 26 September 2014; see further *supra* Chapter 5, section 4.3.1.

<sup>52</sup> ICC, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Prosecutor v. Bemba et al* (ICC-01/05-01/13-703), 21 October 2014; see *supra* Chapter 5, section 4.4. for a more extensive discussion of this decision.

<sup>53</sup> Similarly Caroline Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) 60 Am U L Rev 1, 69, who calls upon the ICTs to actively seek cooperation to ensure provisional release.

### 3.1.2. Gravity of the crimes

The ICTs have a mandate to prosecute and try individuals allegedly responsible for the most heinous of crimes. The ICTs have often cited the particular gravity of the crimes charged as a justification for departing from IHRL, including in their law and practice regarding the rights that have been analyzed in this study.

Like the cooperation context, the ICTY has cited the gravity of the crimes as a justification for its strict approach to provisional release, which departs from IHRL.<sup>54</sup> It has held that the gravity of the crimes was ‘self-evident’, although it failed to explain why this gravity mandated a strict approach to provisional release.<sup>55</sup> These considerations have been reiterated in a number of cases.<sup>56</sup> At the same time, later case law evinces a lesser emphasis on the gravity of the crimes as a factor impacting on provisional release decisions as such. Instead, a general practice can be discerned from the case law of all ICTs, in which the gravity of the crimes charged is consistently cited as a factor to be considered when assessing the risk of flight, since the prospect of a high sentence is thought to increase the risk that the accused will attempt to abscond.<sup>57</sup> Although this consideration is recognized in IHRL, the extent of the ICTs’ reliance on it raises questions. Practically all accused persons before ICTs are charged with grave crimes, as a result of which the importance attached to the gravity of the crimes charged creates an almost irrebuttable presumption against release.<sup>58</sup> This presumption against release is further reinforced by a number of ICC decisions that initially refused interim release to suspects of offences against the administration of justice. These decisions relied heavily on the gravity of the crimes that these persons were charged with, despite the fact that they are undeniably less grave than the core crimes within the jurisdiction of the

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<sup>54</sup> See also Gordon (n 40), 692, 702, who notes a similar impact of gravity on the protection of the right to privacy.

<sup>55</sup> 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, 19-20, see *supra*, Chapter 5, section 3.2.

<sup>56</sup> ICTY, Decision Rejecting a Request for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 25 April 1996, 4; ICTY, Decision on Motion for Provisional Release Filed by the Accused Hazim Delić, *Prosecutor v. Delalić et al* (IT-96-21-T), 24 October 1996, 20; ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 4; ICTY, Decision on Motion for Provisional Release Filed by Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović and Dragan Papić (Joined by Marinko Katava and Vladimir Šantić), *Prosecutor v. Kupreškić et al* (IT-95-16-PT), 15 December 1997, 10; ICTY, Decision Denying a Request for Provisional Release, *Prosecutor v. Aleksovski* (IT-95-14/1-PT), 23 January 1998, 4; see *supra* Chapter 5, sections 3.1. and 3.4.

<sup>57</sup> See, regarding the ad hoc Tribunals, *supra* Chapter 5, section 3.2.1. Regarding the ICC, see *supra* Chapter 5, section 4.2.1. See also Trotter (n 44), 361-362.

<sup>58</sup> See also ICC, Decision on the Admission of Material from the ‘Bar Table’, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 44, where the ICC dismissed arguments in favour of the admission of evidence, based on the seriousness of the charges, because cases before it ‘will always be of high seriousness’.

Court.<sup>59</sup> Appeal Judge Ušacka dissented from the Appeals Chamber's confirmations of the decisions denying release, citing, among other things, the limited gravity of the offences in these cases as compared to the core crimes within the ICC's jurisdiction.<sup>60</sup>

The gravity of the crimes charged has also impacted on the ICTs' interpretation and application of the right to be tried without undue delay. The ad hoc Tribunals have weighed the gravity of the crimes charged as a factor that directly impacts on a determination of whether the right to be tried without undue delay has been violated.<sup>61</sup> IHRL recognizes no such role for gravity of the crimes in decisions on undue delay. Such an approach suggests that persons accused of more serious crimes are entitled to a lesser degree of human rights protection, whereas equality before the law is a cornerstone of IHRL.<sup>62</sup> A similar suggestion stems from some of the ad hoc Tribunals' decisions on undue delay that weighed possible prejudice to the accused as a factor impacting on the question whether the trial had been unduly delayed. According to the ICTR, the trials, which had lasted between eleven and thirteen years, were not unduly delayed because the length of the proceedings did not cause prejudice to the accused since they received life sentences.<sup>63</sup> As has been argued, such an approach to undue delay turns IHRL on its head, because it makes the protection of human rights norms dependent on the guilt or innocence of the accused, the seriousness of the crimes s/he has committed, and the sentence that has been imposed.<sup>64</sup> Initial case law of the ICC discloses a similar tendency to rely on the gravity of the crimes charged in determining whether the right

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<sup>59</sup> See eg ICC, Decision on the "Requête de mise en liberté submitted by the Defence for Jean-Jacques Mangenda", *Prosecutor v. Bemba et al* (ICC-01/05-01/13-261), 17 March 2014, 25; ICC, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", *Prosecutor v. Bemba et al* (ICC-01/05-01/13-560), 11 July 2014, 112; see further, *supra* Chapter 5, section 4.2.1.

<sup>60</sup> See eg ICC, Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu'", Dissenting Opinion of Judge Anita Ušacka, *Prosecutor v. Bemba et al* (ICC-01/05-01/13-559), 11 July 2014, 18.

<sup>61</sup> See eg ICTY, Decision on Oral Request of the Accused for Abuse of Process, *Prosecutor v. Šešelj* (IT-03-73-T), 10 February 2010, 30; ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi* (ICTR-96-15-T), 21 February 2001, 12; ICTR, Decision on Continuation of the Proceedings, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 6 March 2007, 78; see further: Chapter 6, section 3.2.6.

<sup>62</sup> Similarly, Deprez (n 36), 736-737, who deplores this reliance on gravity to justify a 'reduction' of human rights protection before the ICTs; see also Kelly Pitcher, 'Addressing Violations of International Criminal Procedure' in Denis Abels, Menno Dolman and Koen Vriend (eds), *Dialectiek van Nationaal en Internationaal Strafrecht* (Boom Juridische Uitgevers 2013), 287-304, for a convincing and critical assessment of the ICTs' approach of 'balancing' the seriousness of the crimes charged, and the public interest in the prosecution of individuals allegedly responsible for these crimes against the rights of the accused.

<sup>63</sup> ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 83; see further, *supra* Chapter 6, section 3.2.5.; interestingly, the sentences were significantly reduced on appeal, but the Appeals Chamber also did not find a violation of the right to be tried without undue delay: ICTR, Appeals Judgement, *Prosecutor v. Bagosora and Nsengiyumva* (ICTR-98-41-A), 14 December 2011.

<sup>64</sup> See *supra* Chapter 6, section 3.2.6.



to be tried without undue delay has been violated.<sup>65</sup> ICC Judge Christine van den Wyngaert has argued that the gravity of the crimes charged should actually warrant increased diligence on the part of the authorities in ensuring an expeditious trial, because any case before the ICC ‘necessarily involves very high stakes for the accused’.<sup>66</sup> In her understanding, the gravity of the crimes mandates an increase in human rights protection, not a decrease such as appears from standing case law of the ICTs.

### 3.1.3. Complexity of the cases

International crimes cases are inherently complex, both factually and legally. They tend to involve large numbers of victims and often pertain to a large numbers of crimes committed on a wide geographic scale and within a broad temporal range. As a result, the volume of the evidence is normally large, and a sizeable portion of such evidence is adduced through witnesses who, as a result of the conflicts, are often dispersed across the globe.<sup>67</sup> The legal complexity of these cases is further exacerbated because individual criminal responsibility of those allegedly responsible must be established through complicated modes of attribution, such as command responsibility, joint criminal enterprise, or indirect perpetration. This legal and factual complexity of the cases before the ICTs has impacted on the interpretation and application of human rights norms

This follows most clearly from the case law of the ad hoc Tribunals on the right to be tried without undue delay. Like in IHRL, the ICTs have cited the complexity of the case as one of several factors that must be assessed to determine whether or not this right has been violated.<sup>68</sup> The approach of the ICTs towards the interpretation of this parameter departs from IHRL. First, the ICTs clearly consider the complexity of cases as the most important factor in determining whether the right to be tried without undue delay has been violated. Second, instead of assessing whether and how the complexity of a case has impacted on its length, or

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<sup>65</sup> See eg ICC, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013, 41; see further, *supra* Chapter 6, section 4.3.

<sup>66</sup> ICC, Jugement rendu en application de l’Article 74 du Statut, Minority Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* ( ICC-01/04-01/07-3436 -AnXI), 7 March 2014, 125.

<sup>67</sup> See Gaetano Best, ‘De Positie van de Verdediging in het Vooronderzoek van WIM-zaken’ in Denis Abels, Menno Dolman and Koen Vriend (eds), *Dialectiek van Nationaal en Internationaal Strafrecht* (Boom Juridische Uitgevers 2013), for a brilliant account of how these particularities of international crimes cases impact on Dutch criminal procedure and the rights of the defence.

<sup>68</sup> See eg ICTR, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; see further, *supra* Chapter 6, section 3.2.2.

assessing the possible responsibility of the authorities for such complexity, the ICTs often simply cite the case's complexity as an almost absolute justification for any amount of delay.<sup>69</sup> This departs from IHRL, according to which the conduct of the authorities is the most important factor in establishing undue delay and they bear the burden of proving that they acted diligently in ensuring an expeditious trial.<sup>70</sup> The limited practice of the ICC regarding the right to be tried without undue delay thus far discloses a similar overreliance on the complexity of cases.<sup>71</sup> The ICTs have thus departed from IHRL regarding the right to be tried without undue delay because of the complex nature of the cases before them.

#### 3.1.4. *Fundamental purpose of the ICTs*

Finally, the ICTs have relied on the fundamental importance of their mission in their interpretation and application of human rights norms.<sup>72</sup> International criminal justice is a project with ambitious goals such as ending impunity, enforcing the rule of law globally, and strengthening respect for human rights. For example, the preamble of the Rome Statute refers to the importance of 'ending impunity' for the commission of serious crimes that are 'of concern to the international community as a whole'. At times, the ICTs have relied on this 'fundamental purpose' of international criminal justice to justify departures from IHRL.<sup>73</sup>

For example, regarding the right to privacy, the ICTs have held that excluding evidence that has been obtained through 'minor breaches of domestic procedural rules' would endanger their mission. Citing its 'mandate to bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further

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<sup>69</sup> See *supra* Chapter 6, sections 3.2.2. and 3.3., see also section 3.2.4., which shows that the ad hoc Tribunals have neglected to assess the responsibility of the authorities for the complexity of cases before them.

<sup>70</sup> See eg ECtHR, Judgement, *Sizov v. Russia* (App. No. 58104/08), 25 July 2012, 60; IACtHR, Judgement, *Valle Jaramillo et al v. Colombia* (Case No 12.415), 27 November 2008, 156; HRC, *Francis et al v. Trinidad and Tobago* (Comm No 899/1999), CCPR/C/75/D/899/1999, 25 July 2002, 5.4.

<sup>71</sup> See eg ICC, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013, 41; ICC, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, *Prosecutor v. Kenyatta* (ICC-01/09-02/11-908), 31 March 2014, 97; see further *supra* Chapter 6 section 4.3.

<sup>72</sup> 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, 257, who deplores the ICTs' usage of the fight against impunity as an interpretative tool; similarly Sergey Vasiliev, 'International Criminal Trials – a Normative Theory' (PhD Thesis, University of Amsterdam 2014), 130: 'the use of the VCLT has sometimes been marred by a narrow understanding of the 'object and purpose' as being equal to the punitive objective of the Tribunal.'

<sup>73</sup> See also George Fletcher and Jens Ohlin, 'The Commission of Inquiry on Darfur and its Follow-up: a Critical View – Reclaiming Fundamental Principles of Criminal law in the Darfur Case' (2005) 3 J Int'l Crim Just 539, who note, at 540, that '[t]reating the avoidance of impunity as a foundational value in the ICC highlights the difference between international and domestic criminal law and indicates the relative importance, in the former, of victims' rights. Similarly, they note, at 552, that a 'pro-prosecution mentality pervades the Rome Statute'.

similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia', the ICTY has held that it has an important responsibility towards 'the international community'.<sup>74</sup> The ICC has reiterated these considerations.<sup>75</sup> Similarly, the ICTY has declined to exclude evidence because it had to 'balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law'.<sup>76</sup>

The ICTs have made similar arguments in the context of the right to be tried without undue delay. The ICTR has held that the 'right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the accused is charged'.<sup>77</sup> Similarly, it has held that the protection of this right 'must be reconciled with the fundamental purpose of the Tribunal, and should be interpreted and applied within the sphere of the Tribunal's sole purpose'.<sup>78</sup> These considerations were proffered to justify the ICTR's finding that the accused's right to be tried without undue delay had not been violated. Although the ICTR Appeals Chamber quashed one of these decisions,<sup>79</sup> the ICC has employed a similar line of reasoning. The Court acknowledged that its decision to recharacterize the facts charged against Katanga might cause delays, but held that the right to be tried without undue delay had to be viewed in the context of the importance of 'closing accountability gaps', which could outweigh possible delays.<sup>80</sup>

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<sup>74</sup> ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 7.

<sup>75</sup> See eg ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 89.

<sup>76</sup> ICTY, Decision on the Accused's Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić* (IT-95-5/18-T), 30 September 2010, 7; similarly ICTR, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 25 January 2008, 11; see further, *supra* Chapter 4, section 4.1.3.

<sup>77</sup> ICTR, Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 12; ICTR, Decision on Prosper Mugiraneza's Application for a Hearing or other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 3 November 2004, 30; ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 29.

<sup>78</sup> ICTR, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Prosecutor v. Mugenzi et al* (ICTR-99-50-I), 8 November 2002, para 30; ICTR, Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-I), 2 October 2003, 11.

<sup>79</sup> ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; reiterated in: ICTR, Decision on Continuation of Trial, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 3 March 2009, 29.

<sup>80</sup> ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3319-tENG/FRA), 21 November 2012, 45.

The so-called fundamental purpose of the ICTs has thus been employed as a counterweight against which certain rights of accused persons have been balanced. Unsurprisingly, the ‘interests of the international community as a whole’ in ‘ending impunity’ generally outweigh the rights of persons who are accused of committing international crimes.<sup>81</sup> The ICTs have thus departed from IHRL regarding the right to privacy and the right to be tried without undue delay based on this contextual factor.

### 3.2. Modalities of contextualization

Different modalities of contextualization can be discerned from the interpretation and application of human rights norms in the procedural practice of the ICTs. This section explores three manners in which these distinct modalities of contextualization can be classified. The first pertains to the methods of contextualization that the ICTs have used for the incorporation—or non-incorporation—of aspects of IHRL in their procedural law and practice. The second mode to classify different modalities of contextualization pertains to their effect on the level of human rights protection offered by the ICTs. It relates to the question whether the ICTs increase or decrease the scope of their human rights obligations, compared to IHRL. The third mode pertains to the quality of the ICTs’ reasoning to justify their contextualization of human rights norms, which distinguishes between instances of contextualization based on their substantiation and whether or not this is convincing. The description and assessment of these modalities will enable the identification of best (and worst) practices in the ICTs’ current procedural practice and thus aid in the construction of an improved methodological framework for the proper contextualization of human rights norms by the ICTs.

#### 3.2.1. *Methods of contextualization*

This study has identified three different methods of contextualization: disregard, selectivity and adaptation. The legal instruments of the ICTs sometimes disregard IHRL, in that they do not incorporate certain human rights norms that seem relevant to their practice. Similarly, the case law of the ICTs has disregarded IHRL where the ICTs have, for example, asserted the primacy of their own legal frameworks over IHRL, or have failed to respond to defence allegations of possible violations of IHRL. The second method is selectivity. This occurs when the ICTs profess their adherence to IHRL by relying on specific aspects of IHRL to justify their own approach, while ignoring other aspects of the same human rights norms with which

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<sup>81</sup> See also Pitcher (n 62), 287-304.

their approach is not in line. The third method is the adaptation of the legal test that applies to the right in question in IHRL. This method acknowledges the applicability of IHRL, but adapts the normative content of a specific human rights norm before the ICTs resulting in the change of the scope of respective obligation, or applies a different test to determine whether or not the right in question has been violated.

The almost complete absence of mechanisms to protect the right to privacy is a primary example of how the ICTs sometimes disregard IHRL. The ICTs' legal frameworks do not incorporate this right, nor do they regulate the imposition of coercive measures or other interferences with this right, as would be required under IHRL.<sup>82</sup> Furthermore, the ICTY has often failed to address defence arguments regarding alleged violations of the right to privacy.<sup>83</sup> Generally, the ICTs assess alleged violations of the right to privacy only insofar as those might affect the right to a fair trial.<sup>84</sup> This disregards IHRL because the right to privacy is a distinct and independent right. It also fails to acknowledge the fact that the activities of the ICTs may interfere with privacy rights.

Another example of disregard for IHRL can be found in the ad hoc Tribunals' case law on provisional release. The ICTR has often refused to assess whether its provisional release regime was in line with IHRL, despite recurrent defence allegations that it was not.<sup>85</sup> This disregards IHRL, because the question whether the Tribunal's legal framework is in line with IHRL was not even considered, and the legal instruments of the ICTs were applied regardless.<sup>86</sup> Similarly, several ICTY decisions have noted that the instated requirement of 'sufficiently compelling humanitarian reasons' for provisional release was at odds with IHRL.

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<sup>82</sup> See *supra* Chapter 4, sections 3.1. and 3.2.

<sup>83</sup> See eg ICTY, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999; ICTY, Decision on Application for Leave to Appeal, *Kordić and Čerkez* (IT-95-14/2- AR73.4), 23 August 1999, 3; ICTY, Mladen Naletilić's Revised Appeal Brief, *Prosecutor v. Naletilić and Martinović* (IT-98-34-A), 6 October 2005, 23, where the defence called for the application of 'some standard of review' for search warrants, but the Appeals Chamber subsequently failed to address their arguments: ICTY, Appeals Judgement, *Prosecutor v. Naletilić and Martinović* (IT-98-34-A), 3 May 2006; for an extensive discussion, see *supra* Chapter 4, sections 3.1.1. and 3.1.3.

<sup>84</sup> See *supra* Chapter 4, sections 3.1.3. and 4.1.3.

<sup>85</sup> See eg ICTR, Decision Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana* (ICTR-95-1-B-1), 1 October 2002, 4; ICTR, Decision on Bizimungu's Motion for Provisional Release pursuant to Rule 65, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 4 November 2002, 27; ICTR, Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002, *Prosecutor v. Bizimungu* (ICTR-99-50-A), 13 December 2002, 4; ICTR, Decision on Leave to Appeal Against the Refusal to Grant Provisional Release, *Prosecutor v. Sagahutu* (ICTR-00-56-I), 26 March 2003, 5; ICTR, Decision on the Defence Motion on a Point of Law, *Prosecutor v. Bicomumpaka* (ICTR-99-50-I), 8 April 2003, 13; see further *supra* Chapter 5, section 3.2.

<sup>86</sup> See eg ICTR, Decision Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana* (ICTR-95-1-B-1), 1 October 2002, 4; ICTR, Decision on Bizimungu's Motion for Provisional Release pursuant to Rule 65, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 4 November 2002, 27, where the Chamber simply reiterated that the RPE was binding, and refused to assess possible conflicts with IHRL.

Nonetheless, the Trial Chambers in question felt bound by their legal framework and the case law of the Appeals Chamber, which was apparently accorded a status higher than human rights law, and applied this requirement despite an explicit finding that it was not in line with the right to liberty.<sup>87</sup>

Second, many of the ICTs' decisions evince a selective approach to IHRL. The ICTs often profess adherence to IHRL and support this with citations of human rights precedents, while failing to acknowledge other aspects of such authoritative interpretations of human rights norms, or IHRL generally, with which their chosen approach is not in line. The ICTs' approach to the right to privacy evinces such selectivity. The ICTY has held that IHRL does not strictly require judicial authorization for coercive measures as a justification for the absence of such authorization.<sup>88</sup> However, it failed to acknowledge that IHRL does impose other strict requirements for the execution of coercive measures, and that its legal framework incorporates none of those requirements.<sup>89</sup>

Furthermore, the ICTs' case law on undue delay often reaffirms that IHRL allows for the complexity of cases to impact on their length. Both the ICTR and the ICTY have cited case law of the ECtHR in support of this contention.<sup>90</sup> As has been noted, the case law of the ICC in this regard evinces a similar tendency to focus on the complexity of a case in the context of assessing the character of delay.<sup>91</sup> Similarly, the ICTR has consistently emphasized that the length of the proceedings as such does not determine whether the right to be tried without undue delay has been violated. In fact, all three ICTs have cited case law of the ECtHR to support the contention that the reasonableness of the period of detention must be assessed on a 'case-by-case basis'.<sup>92</sup> Although it is true that in IHRL alleged undue delay must

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<sup>87</sup> See eg ICTY, Decision Denying Mićo Stanišić's Request for Provisional Release during the Break after the Close of the Prosecution Case, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), 25 February 2011; ICTY, Decision on Jadranko Prlić's Motion for Provisional Release, *Prosecutor v. Prlić et al* (IT-04-74-T), 21 April 2011, 30; ICTY, Decision Denying Mićo Stanišić's Request for Provisional Release during the Upcoming Summer Court Recess, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), 29 June 2011, 18; see further *supra* Chapter 5, sections 3.3.5. and 3.5.

<sup>88</sup> ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 2; see *supra* Chapter 4, section 3.1.

<sup>89</sup> See, *supra* Chapter 4, section 3.1. and 4.1.1.

<sup>90</sup> See eg ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 24-25; ICTR, Decision on the Defence Motion for Separate Trial, *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 25 April 2001, 18; ICTR, Decision on the Motion for Separate Trials, *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), 8 June 2001, 23; see further *supra* Chapter 5, sections 3.2.2. and 3.3.

<sup>91</sup> See *supra* Chapter 6, section 4.1.

<sup>92</sup> ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, *Prosecutor v. Kanyabashi* (ICTR-96-15-I), 23 May 2000, 68, a passage that has been reiterated in numerous cases, see eg ICTR, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Prosecutor v. Mugenzi et al* (ICTR-

be assessed on a case-by-case basis, and a case's complexity may impact on its length, human rights precedents equally emphasize that the authorities bear the burden of proof in justifying *prima facie* lengthy proceedings. In addition, the conduct of the authorities is the most important parameter in IHRL to determine whether the right to be tried without undue delay has been violated.<sup>93</sup> The ICTs have failed to acknowledge these crucial aspects of the right to be tried without undue delay. Instead, they present their approach as adhering to IHRL and selectively quote aspects of human rights precedents that fit with this. Such a selective approach distorts the meaning of the international human rights norm in question and creates the false impression that the ICTs adhere to IHRL.

The third method that can be discerned from the ICTs' law and practice is adaptation. It consists of adjusting the normative content of human rights norms when applied in the context of the ICTs. This may include adapting the legal test that applies under IHRL to determine whether a given right has been violated or whether a person is entitled to the protection of the right in question. It can consist of adapting the legal test as such by changing the criteria used to assess the lawfulness of restrictions of the right in question, or of interpreting these criteria in a different manner.

The ad hoc Tribunals' interpretation and application of the right to be tried without undue delay is a prime example of this. In IHRL, assessments of possible violations of this right hinge on four parameters: the complexity of the case, the conduct of the defendant, the conduct of the authorities, and what is at stake for the defendant.<sup>94</sup> The Tribunals have adapted these parameters, and added one. As has been noted, they have not been consistent, but their prevalent approach is to weigh five factors in determining whether this right has been violated: the length of the delay, the complexity of the case, the conduct of the parties, the conduct of the authorities, and the prejudice to the defendant.<sup>95</sup> The Tribunals have never

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99-50-I), 8 November 2002, 33; ICTR, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 29 May 2007, 26; similarly ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskić* (IT-95-14-T), 20 December 1996, 6-7; ICC, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-432), 3 June 2013, 39; see further *supra* Chapter 6, sections 3.3. and 4.1.

<sup>93</sup> See *supra* Chapter 6 section 2.2.

<sup>94</sup> See *supra* Chapter 6, section 2.2.

<sup>95</sup> ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3; for further examples, see eg ICTR, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 14 June 2007, 11; ICTR, Judgement, *Prosecutor v. Bagosora et al* (ICTR-98-41-T), 18 December 2008, 75; ICTR, Appeals Judgement, *Prosecutor v. Ndindiliyimana et al* (ICTR-00-56-A), 11 February 2014, 43; ICTY, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, *Prosecutor v. Perišić* (IT-04-81-PT), 23 November 2007, 12; ICTY, Decision on Appeal against Decision on

acknowledged or justified this departure from IHRL and have even quoted human rights precedents in support of certain aspects of their approach. Two departures from IHRL are of particular interest. The first is that the Tribunals consider the conduct of the Prosecutor under the heading of the conduct of the parties, not of the authorities, like in IHRL. Assessing the conduct of the Prosecutor as a party instead of an authority fails to acknowledge her/his responsibility as an organ of the Tribunal for the protection of the rights of suspects and accused persons. More fundamentally, the Tribunals have added the requirement of prejudice. This addition finds no support in IHRL, and has been shown to virtually nullify the protection offered by the right to be tried without undue delay.<sup>96</sup>

The legal frameworks of the ICTs have also adapted the legal test for determining whether provisional detention is in line with the right to liberty. The ad hoc Tribunals' approach departs most significantly from IHRL. Instead of requiring a distinct ground for provisional detention, their legal instruments only require a reasonable suspicion. On top of that, it is for the accused to request provisional release and s/he bears the burden of proof to show that there are reasons justifying release, instead of the Prosecutor bearing the burden to prove that there are reasons justifying detention.<sup>97</sup> The Tribunals have justified this departure by relying on the specific context in which they operate, citing in particular their dependence on state cooperation and the gravity of the crimes with which accused persons are charged.<sup>98</sup> In addition, the presence of guarantees from a state willing and able to receive provisionally accused persons constitutes a quasi-requirement for the granting of provisional release before all ICTs. Although the case law of the ICTs evinces unease with this requirement, it is clear that without a state willing to receive the accused, no provisional release will be granted.<sup>99</sup>

### 3.2.2. *Effects of Contextualization*

The second way to classify modalities of contextualization goes to the effect of such contextualization on the level of human rights protection offered by the ICTs. The contextualization of human rights norms can result either in overprotection or underprotection of a given human right. Overprotection occurs when the ICTs invent new and distinct obligations that they themselves must bear to ensure the protection of a given right in their specific context that

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Continuation of Proceedings, *Prosecutor v. Šešelj* (IT-03-67 –AR15bis), 6 June 2014, 63; see *supra* Chapter 6, section 3.2.

<sup>96</sup> See *supra* Chapter 6, section 3.2.5.

<sup>97</sup> See *supra* Chapter 5, in particular sections 3.3. and 3.5.

<sup>98</sup> See *supra* sections 3.1.1. and 3.1.2.

<sup>99</sup> See *supra* Chapter 5, sections 3.3.1. and 4.3.1.



may not apply to states under IHRL, or when the ICTs ensure a higher level of human rights protection than appears required by IHRL. Underprotection occurs when the ICTs change the legal test applicable in IHRL to determine the violation of a given right in a way that makes it more difficult to establish a violation of a right, or to be granted protection of the right in question. It must be emphasized that the terms under- and overprotection are intended in a primarily descriptive sense, and are used to describe the respective decrease or increase in protection that may result from the ICTs' contextualization of human rights norms.

The only example of overprotection that can be discerned from the ICTs' law and practice regarding the rights that are subject of this study has occurred in the ICC's approach to interim release. As has been shown, the ICTs' almost complete dependence on states has generally resulted in a strict approach to provisional release, and all ICTs apply a quasi-requirement of state guarantees in order for accused persons to be granted provisional release. The ICC, however, has adopted a proactive approach towards protecting the right to liberty. The Court has concluded an interim release agreement with Belgium and is engaged in efforts to conclude more of such agreements with other states in order to facilitate interim release of accused persons. At the same time, some ICC Pre-Trial Judges have specifically requested observations from states regarding the possibility of hosting provisionally released persons on their territory.<sup>100</sup> This approach has resulted in the only ICC decision to date that granted interim release to several suspects. This suggests that the ICC has given a broad interpretation to the scope of their obligations under the right to liberty so as to include the active seeking of state cooperation in identifying a host-state for possible interim release.

The ICTs' practice regarding the rights that are subject of this study did not disclose further examples of overprotection. However, there are such examples with respect to other human rights. One oft-cited example is the fact that all ICTs unequivocally grant suspects the right to be questioned in the presence of counsel.<sup>101</sup> This exceeds the minimum requirements

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<sup>100</sup> See eg ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. Bemba* (ICC-01/05-01/08-475), 14 August 2009; however, this decision was overturned on appeal because the Appeals Chamber did not agree that there were no grounds for further detention: ICC, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba* (ICC-01/05-01/08-631), 2 December 2009; ICC, Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, *Prosecutor v. Bemba et al* (ICC-01/05-01/13-683), 26 September 2014; see further *supra* Chapter 5, section 4.3.1.

<sup>101</sup> Art 55(2)(d) ICC Statute; Rule 42(B) ICTY RPE; Rule 42(B) ICTR RPE; the ICTY has even gone so far as to exclude evidence obtained during an interrogation without the presence of counsel for the accused, even

of IHRL in this regard.<sup>102</sup> Another example is the ICC's decision to fund family visits of detainees, a positive obligation that it derived from the accused persons' right to family life.<sup>103</sup> In this instance, the particular context of international criminal justice, where accused persons are detained far away from their families, mandated a broad interpretation of the obligations of the Court in connection with the right to family life.

This study has identified several instances of underprotection of human rights as a result of contextualization. The right to privacy is significantly underprotected in the legal frameworks of the ICTs as a result of the ICTs' disregard for IHRL in this context. The complete absence of *ex ante* guarantees for the imposition of coercive measures that may interfere with privacy is coupled with a general reluctance to conduct *ex post facto* checks of the way in which evidence has been collected.<sup>104</sup> The ICTs operate on the assumption that it is for states to ensure the protection of the right to privacy in the context of their investigations. However, there are significant obstacles to the protection of human rights in the context of international cooperation in criminal matters, and these obstacles are exacerbated in the context of state assistance to the ICTs.<sup>105</sup> This has resulted in the underprotection of the right to privacy before the ICTs.

The ad hoc Tribunals' departure from IHRL regarding the right to liberty in the context of provisional release decisions has also resulted in the underprotection of this right. Despite changes in their legal frameworks, the Tribunals still employ a *de jure* presumption in favor of detention, where the only ground necessary for detention is a reasonable suspicion and the accused bears the burden of proof to demonstrate grounds justifying provisional release. The legal test that the Tribunals apply for the protection of the right to liberty in the context of provisional release decisions has thus resulted in the underprotection of this right.

Similarly, the legal test designed by the Tribunals to determine whether the right to be tried without undue delay has been violated reveals a degree of underprotection. The addition

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though the domestic procedures in question did not include such a requirement: ICTY, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al* (IT-96-21-T), 2 September 1997, 55.

<sup>102</sup> None of the international human rights conventions include an explicit right to be assisted by counsel during questioning, although developments before the ECtHR indicate a move towards stronger protection of assistance by counsel at least prior to questioning; see generally: ECtHR, 'Factsheet Police Arrest and Assistance' (October 2014) < [http://www.echr.coe.int/Documents/FS\\_Police\\_arrest\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Police_arrest_ENG.pdf) > accessed 24 October 2014, and the case law mentioned there.

<sup>103</sup> ICC, Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008", *Prosecutor v. Katanga and Ngudjolo* (ICC-RoR217-02/08-8), 10 March 2009, 31; see generally: Denis Abels, 'Positive Obligations and the International Criminal Tribunals' Law of Detention: Funding Family Visits and the ICC Presidency's *Ngudjolo* Decision' (2013) 60 *Netherlands Int'l L Rev* 51.

<sup>104</sup> See, generally, *supra* Chapter 4, section 5.

<sup>105</sup> See, in particular, *supra* Chapter 4, sections 2.2., 4.1.2., and 4.2.2.

of the requirement of prejudice has proven an almost insurmountable obstacle for the defence to obtain a finding of a violation of this right. In addition, the ICTs' case law evinces a selective over-emphasis on the complexity of the proceedings at the expense of in-depth discussions of the responsibility of the Tribunal authorities for delay. This has further contributed to the ICTs' reluctance to find violations of undue delay, despite substantial criticism, including from within the ICTs.<sup>106</sup>

The rights that have been analyzed in this study are generally underprotected in the legal frameworks of the ICTs, with the partial exception of the right to liberty before the ICC. Several commentators have noted that contextual interpretation and application of human rights before the ICTs too often resulted in a loss of protection.<sup>107</sup> By contrast, 'upward' modifications of human rights norms have been relatively rare. The ICTs' tendency to rely on factors specific to the context of international criminal justice as a justification to downgrade human rights protection exposes the pitfalls inherent in a contextual approach to human rights norms. This tendency calls their abiding by their obligation to adhere to internationally recognized human rights into question. These concerns are further exacerbated by the complete absence of external review of the ICTs' law and practice regarding human rights norms; when it comes to their human rights obligations, the ICTs are judges in their own cause.

### 3.3.3. *Quality of Contextualization*

Finally, it is possible to distinguish between different modalities of contextualization based on the quality of the legal reasoning proffered by the ICTs in support of their interpretation of human rights norms. The propriety of the ICTs' contextualization practice hinges on the reasoning that is employed in justification of their approach.

First, however, it must be noted that a large portion of the contextualization practice of the ICTs is not explicitly acknowledged as such in their legal reasoning. Many decisions that develop interpretations of human rights norms that deviate from IHRL do not

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<sup>106</sup> Several Judges of the ICTR and of the ICC have voiced their disagreement with the respective ICTs' approach to this right. See eg ICTR, Judgement and Sentence, Partially Dissenting Opinion of Judge Emile Francis Short, *Prosecutor v. Bizimungu et al* (ICTR-99-50-T), 30 September 2011; ICTR, Appeals Judgement, Partially Dissenting Opinion of Judge Patrick Robinson, *Prosecutor v. Mugenzi and Mugiraneza* (ICTR-99-50-A), 4 February 2013; ICC, Jugement rendu en application de l'Article 74 du Statut, Minority Opinion of Judge Christine van den Wyngaert, *Prosecutor v. Katanga* (ICC-01/04-01/07-3436 -AnxI), 7 March 2014; see *supra* Chapter 6, sections 3.2.4. and 4.1.

<sup>107</sup> 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* (Koninklijke Brill NV 2009), 461; Masha Fedorova and Göran Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings' (2009) 3 Hum Rts & Int'l Legal Discourse 9, 30; Vasiliev (n 72), 148.

acknowledge such departure, let alone justify it. A good example is the ICTR's approach to undue delay, which is based on five parameters that differ from the parameters used to assess violations of this right in IHRL.<sup>108</sup> The Tribunals adapted the legal standard from IHRL, but failed to acknowledge this adaptation or engage with IHRL. There are further examples of such an approach, many of which coincide with the above-mentioned examples of disregard for IHRL in the practice of the ICTs.<sup>109</sup> In the absence of judicial reasoning that explains the contextualization of human rights norms, it is difficult to assess its propriety. This significantly detracts from the quality of the ICTs' contextualization practice.

Furthermore, there are examples of unconvincing instances of contextualization. The ICTs often do not sufficiently substantiate the legal reasoning underlying their contextual interpretation of human rights norms. For example, the ad hoc Tribunals have noted that the right to privacy is derogable and can be limited, which was relied on as a justification for their refusal to conduct an in-depth assessment of the way in which evidence had been obtained.<sup>110</sup> Similarly, the ICC has noted that the right to liberty can be limited and derogated from, which was relied on to justify the Court's refusal to review the detention of three witnesses in the *Katanga* case.<sup>111</sup> Both instances are also examples of contextualization that resulted in underprotection: the ICTs reinterpret the right in question in a manner that reduces the level of protection normally offered by IHRL. Here, the ICTs ostensibly cite the concepts of derogations and limitations in support of this diminished protection. However, the decisions fail to explain how these concepts justify the specific interpretation that is subsequently arrived at. Instead, the decisions simply mention these concepts. IHRL indeed allows for limitations of the rights to liberty and privacy, but requires, among other things, that these be non-arbitrary and lawful. Similarly, these rights can be derogated from, but only in times of a national emergency that threatens the life of the nation, and the existence of which is officially proclaimed.<sup>112</sup> The ICTs have failed to properly engage with these requirements for lawful limitations and derogations and to examine whether and how these could apply in their con-

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<sup>108</sup> ICTR, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza* (ICTR-99-50-AR73), 27 February 2004, 3.

<sup>109</sup> See *supra* section 3.2.1.

<sup>110</sup> ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 30; ICTY, Decision on the Accused's Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić* (IT-95-5/18-T), 30 September 2010, 11; ICTR, Decision on Exclusion of Testimony and Admission of Exhibit, *Prosecutor v. Renzaho* (ICTR-97-31-T), 20 March 2007, 16; see *supra* Chapter 4, section 4.1.3.

<sup>111</sup> ICC, Decision on the Application for the Interim Release of Detained Witnesses DRC02-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, stating that 'there are numerous exceptions to the right to liberty (and its corollary, the prohibition on arbitrary arrest and detention; for a full discussion of this case law, see *supra* Chapter 3, section 3.2.5.

<sup>112</sup> See eg Art 4 ICCPR; Art 15 ECHR; Art 27 ACHR.

text. It therefore remains unclear what consequences the ICTs attach to the argument that these rights are subject to exceptions. Do they consider themselves to be allowed to limit and/or derogate from these human rights standards? Or do they simply invoke these concepts rhetorically, to emphasize the flexible nature of the human right at issue? These essential questions are generally left unanswered.

Decisions that rely on IHRL selectively, as discussed above, constitute further examples of unconvincing contextualization. The ICTs have emphasized certain aspects of IHRL that fit well with their own approach, while failing to address other important aspects with which their approach is not in line.<sup>113</sup> Such selectivity detracts from the methodological quality of the ICTs' contextualization practice. Although the ICTs are permitted to contextualize human rights norms, they should do so in a coherent and consistent manner and offer sound legal reasoning in support of their approach.

#### **4. Proper Contextualization of Human Rights Norms: a Methodology**

Although there are reasons to criticize the ways in which the ICTs have contextualized human rights norms in their procedural practice, it can be both justified and necessary for the ICTs to practice such contextualization in their interpretation and application of human rights norms. As has been noted by Damaška, 'fairness in the fledgling international criminal tribunals may legitimately be molded against the background of their specific environment.'<sup>114</sup> Departures from existing standards, he argues, can be justified by the *sui generis* goals of international criminal justice, the complexity and gravity of the crimes charged, and the innate 'weaknesses' of these tribunals, ie their complete reliance on state cooperation.<sup>115</sup> However, the above sections have shown that the ICTs' practice often lacks a cogent and coherent methodology, sometimes results in unwarranted underprotection of human rights norms, and is often improperly justified, either due to inadequate legal reasoning or to the complete absence thereof. This 'erratic' and inconsistent approach poses 'a serious threat to the requirements of reliability and foreseeability ... As much as law is a dictate of reason, it can quickly turn into a pure execution of power if it is not applied in a uniform way.'<sup>116</sup> In an endeavor to assist the ICTs in remedying these deficiencies, this section provides an answer to the main

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<sup>113</sup> See *supra* section 3.2.1.

<sup>114</sup> Mirjan Damaška, 'The Competing Visions of Fairness: the Basic Choice for International Criminal Tribunals' (2011) 36 N C J Int'l & Com Reg 365, 379.

<sup>115</sup> *ibid.*

<sup>116</sup> Christoph Safferling and others, *International Criminal Procedure* (OUP 2012), 111.

research question of this study: How should the ICTs interpret and apply international human rights norms in their procedural practice?

There is no clear-cut answer to this question. Instead, certain methodological parameters and interpretative steps will be recommended that, if employed consistently by the ICTs, will better enable them to properly contextualize human rights norms. As will be seen, these steps can partly be traced back to the ICTs' interpretative practice. In a way, they constitute best practices from the ICTs' interpretation and application of human rights norms.

#### 4.1. Determining the applicable human rights norm

It has been shown that the ICTs' approach to the determination of the applicable human rights norm has not been consistent. Essentially, three obstacles that complicate such determinations can be discerned.

The first pertains to the ad hoc Tribunals, which do not have an explicit statutory obligation to adhere to IHRL. As has been shown, the Tribunals generally reaffirm that they are bound by internationally recognized human rights norms, but they have not done so consistently. Certain decisions evince persisting uncertainty regarding the hierarchical relationship between their legal instruments and IHRL.<sup>117</sup> This can be partially attributed to the unclear legal basis for the ad hoc Tribunals' obligation to respect IHRL. This obligation has been founded on a variety of legal bases, including the UNSG Report and general international law, and has also been regarded to be self-imposed by the Tribunals in their case law.<sup>118</sup> Furthermore, the ad hoc Tribunals have not been consistent in the terminology used to describe the category of human rights norms binding on them.<sup>119</sup> They have labeled it in a variety of ways, which creates a degree of uncertainty regarding the class of human rights standards that apply to them.

The ICC Statute unequivocally provides that the Court must interpret and apply its applicable law in a way consistent with 'internationally recognized human rights'.<sup>120</sup> Although this has not preempted ambiguities regarding the superiority of IHRL over the legal instruments of the Court,<sup>121</sup> the ICC does generally acknowledge such superiority and pledges to interpret and apply its law in a manner consistent with internationally recognized human

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<sup>117</sup> See generally *supra* Chapter 3, section 4.

<sup>118</sup> For an overview, see *supra* Chapter 3, section 2.

<sup>119</sup> See *supra* Chapter 3, section 4.

<sup>120</sup> Art 21(3) ICC Statute.

<sup>121</sup> For an overview of academic literature that denies the superiority of IHRL over the Statute of the ICC, see *supra* Chapter 3, section 3.2.1.; for an overview of the ICC's case law that discloses persisting confusion regarding the superiority of IHRL over the Statute, see *supra* Chapter 3, section 3.2.3.

rights.<sup>122</sup> It is therefore recommended that the legal instruments of all ICTs include an explicit and unequivocal obligation to interpret and apply their applicable law in a manner consistent with ‘internationally recognized human rights’.<sup>123</sup>

The second obstacle to the determination of the applicable human rights standards relates to the persisting ambiguity as to what norms constitute such ‘internationally recognized human rights’ and are therefore binding on the ICTs. What makes a human rights norm ‘internationally recognized’? The ICTs have not developed a coherent methodology for the determination of whether a human rights norm is internationally recognized.<sup>124</sup> As a result, the ICTs can theoretically escape their duty to respect any specific internationally recognized human right by determining that it falls beyond the scope of this category of norms. This is illustrated by the ICC’s decision that it did not have to interpret and apply its Statute consistently with the right to liberty because this right was derogable.<sup>125</sup> The leeway ICTs have in determining the applicable standard may interfere with the proper interpretation and application of human rights norms. It is therefore recommended that the ICTs develop and follow a coherent methodology for determining whether or not a human rights norm qualifies as being ‘internationally recognized’.

As has been shown, the drafters of the ICC Statute did not intend to limit the obligation of consistent interpretation to human rights norms with a customary status.<sup>126</sup> Requiring a rigorous identification of customary international law would arguably be too cumbersome in any case. It has generally been noted that the ICTs’ approach to identifying applicable rules of procedural law has not been very source-driven, or formalist.<sup>127</sup> It is appropriate for

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<sup>122</sup> See generally *supra* Chapter 3, section 3.2.

<sup>123</sup> See also Vasiliev (n 72), 136-137, who notes that the legal frameworks of the ECCC and the STL contain provisions similar to Article 21(3).

<sup>124</sup> See *supra* Chapter 3, section 4.

<sup>125</sup> See *supra* Chapter 3, section 3.2.3. for a critical analysis of this case law.

<sup>126</sup> See *supra* Chapter 3, section 4.

<sup>127</sup> See eg Frédéric Mégret, ‘The Sources of International Criminal Procedure’ in Göran Sluiter and others (eds), *International Criminal Procedure - Principles and Rules* (OUP 2013), 73, who notes that the ICTs’ ‘exercise of thinking about the right procedure has often been less source- than it has been goal-driven.’ See also William Schabas, ‘Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals’ in José Doria, Hans-Peter Glaser and Mahmoud Bassiouni (eds), *The Legal Regime of the ICC: Essays in Honour of Prof I P Blishchenko* (Koninklijke Brill NV 2009), 90, who notes that the ICTs have generally not engaged in doctrinal exegesis to determine any norm’s customary status: ‘many of the references to customary international law are rather perfunctory and provide little or no authority in support of a finding that some specific norm is recognized as customary international law.’ See also Fedorova and Sluiter (n 107), 27, who note a similar tendency regarding the identification of general principles of law: ‘the tribunals have been criticized for not having elaborated a coherent methodology for ascertaining general principles. In fact, to date the prevalent method employed amounts to cherry picking certain domestic provisions or case law on the basis of which the decision is made – or a principally made decision substantiated.’ See also Vasiliev (n 72), 98, who notes that ‘it would appear that the compliance with internationally recognized human rights operates as an ideological setup and

the ICTs to adopt a more pragmatic approach to identifying relevant internationally recognized human rights norms.<sup>128</sup> They can establish such international recognition based on an assessment of a human rights norm's recognition in human rights conventions. The ratification status of a treaty, coupled with the amount and content of reservations attached to a specific right, can legitimately be employed to determine whether a right has been subject to sufficient international recognition so as to bind the ICTs.<sup>129</sup> It is thus recommended that the ICTs adopt a treaty-based approach to determining whether or not any given human rights norm is 'internationally recognized'.

The third obstacle to the determination of the applicable human rights standard pertains to the question whether a human rights issue arises in a particular case. In each specific situation, an ICT must determine whether or not there is a human rights norm that is relevant to the decision at hand. This relates to the methodological obstacles discussed in the first chapters of this study.<sup>130</sup> Not all human rights norms have a *prima facie* relevance to the law and practice of the ICTs. It seems unlikely that the ICTs will have to adjudicate on matters related to, for example, the right to freedom of movement on their territory, given the fact that they have no territory of their own. Similarly, many economic, social, and cultural rights, such as the right to housing or the right to education, seem to bear less *prima facie* relevance to the practice of an ICT. Generally, a functional approach to the determination of applicable human rights norms is thought to solve these questions.<sup>131</sup> According to this approach, the functions of an ICT should determine which human rights norms can give rise to their respective obligations. Human rights norms that constrain states' exercise of public power should also apply to the ICTs when they exercise similar powers.

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overarching framework for the tribunals' operations, which cannot readily be squared into the formalist legal source-based approach.'

<sup>128</sup> Vasiliev (n 72), 129: 'the source-based discourse has a lesser explanatory power when it comes to the evolution of procedural law and practice. In the tribunals, this has been more about the judicial effort of devising fair and workable solutions through the interpretation and reliance on the standards selected based on their relevance and persuasiveness rather than based on their origin in certain sources... essentially, it allows the tribunal judges to overcome the difficulties of establishing the content of human rights law as customary law or general principles of law.'

<sup>129</sup> Similarly Gerhard Hafner and Christina Binder, 'The Interpretation of Article 21 (3) ICC Statute - Opinion Reviewed' (2004) 9 *Austrian Rev Int'l & Eur L* 163, 187-189; if a specific right has been subject to many reservations, this should be taken into account as mitigating the 'international recognition' of the right in question. Alternatively, the scope and content of the reservation can be considered in the course of determination of the nature, scope, and content of the internationally recognized human right in question; see *infra* section 4.2.

<sup>130</sup> See *supra* Chapter 3, section 5.

<sup>131</sup> See eg Henry Schermers and Niels Blokker, *International Institutional Law - Unity within Diversity* (5th edn, Koninklijke Brill NV 2011), 993; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010), 394; see also, for an elaboration of this functional approach, *supra* Chapter 3, section 5.



However, the practice of the ICTs thus far has shown that they may have to adjudicate human rights issues that bear a limited to no obvious connection to their function as criminal courts. Essentially, the function-based approach is therefore insufficient to predict which human rights issues may arise before them and to identify them exhaustively in advance. For example, the ICTs have had to adjudicate upon matters related to the right to request asylum, the right to family life, and freedom of expression.<sup>132</sup> Instead of a functional approach, this study proposes an impact-based approach: the impact of the ICTs' exercise of functions on individual rights should be employed as the main criterion to determine whether or not a human rights issue arises. If a decision of an ICT may have an effect on the protection or enjoyment of any human right of individuals, whether accused, witnesses, or other participants, the ICTs must take the respective human rights norm into account in their decision-making process and may not discard it as irrelevant. This allows for a case-by-case assessment of the effect of the ICTs' law and practice on the protection of human rights and prevents any gaps in this respect that might result from a strict functional approach.

The risk of such gaps is neatly illustrated by the ICC Appeals Chamber's decision in the case of three detained witnesses to return them to the DRC, despite the fact that the asylum proceedings in the Netherlands had not yet been finalized.<sup>133</sup> According to the Appeals Chamber, the human rights issues at stake in that case pertained to the witnesses' legal relationship with the Netherlands, not with the Court.<sup>134</sup> It then narrowly interpreted its obligation to adhere to IHRL and decided to return the witnesses, even though the Trial Chamber had previously held that it was unable to order the return of the witnesses pending the asylum proceedings, because this would violate their right to request and, if granted, obtain asylum.<sup>135</sup> An impact-based approach to the determination of applicable human rights standards

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<sup>132</sup> See eg 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, 67, for a discussion of the right to seek asylum; ICC, Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008", *Prosecutor v. Katanga and Ngudjolo* (ICC-RoR217-02/08-8), 10 March 2009, 38, for a discussion of the right to family life; ICTY, Judgment on Allegations of Contempt, *Prosecutor v. Hartmann* (IT-02-54-R77.5), 14 September 2009, 68-74, for a discussion of the right to freedom of expression.

<sup>133</sup> See *supra* Chapter 1, section 1, and Chapter 3, section 3.2.3. for more extensive discussions of this case.

<sup>134</sup> ICC, Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded pursuant Article 93 (7) of the Statute, *Prosecutor v. Ngudjolo* (ICC-01/04-02/12-158), 20 January 2014.

<sup>135</sup> ICC, Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-3128), 24 August 2011, where the Chamber held that its concerns for the safety of the witnesses had been alleviated due to the DRC's agreement to several protective measures, yet still refused to return the witnesses to the DRC because their effective enjoyment of their right to request asylum would be nullified if they would be sent back.

would have prevented this narrow interpretation of the ICC's obligation to adhere to IHRL. Such an assessment would have forced the ICC to acknowledge that, although the human rights issues at stake related *primarily* to the witnesses' legal nexus with the Netherlands, the decision of the ICC to return the witnesses could nonetheless impact on their effective enjoyment of the right to request asylum. Therefore, it is recommended that, as a first step in their interpretative process, the ICTs adopt an impact-based approach whenever determining the applicability of any given human rights standard.

#### 4.2. Determining the nature, scope, and content of the applicable right

The ICTs have not used a consistent methodology for determining the nature, scope and content of human rights norms. As has been shown, their approach to identifying the relevant norms of IHRL and their treatment of human rights precedents has often been selective.<sup>136</sup> Such selectivity detracts from the coherence of the ICTs' interpretation and application of human rights norms. At the same time, it has been noted that the ICTs' reasoning on human rights norms is 'sometimes based on their incomplete knowledge or flawed understanding of' human rights precedents.<sup>137</sup> It is therefore recommended that, as a second step in their interpretative process, the ICTs should conduct a thorough analysis of the nature, scope, and content of the applicable human rights norm. In doing so, the ICTs should assess the principles and interests that the right in question is meant to protect and analyze the legal test used to determine whether or not the right in question has been violated.

In their analysis, the ICTs should in principle recognize the persuasive authority of interpretations of a norm by human rights courts and supervisory bodies.<sup>138</sup> As has been explained, legal norms derive their specific meaning from the way in which they have previously been interpreted and applied. The ICTs are not strictly bound to follow the interpretations of human rights norms as developed by human rights courts and monitoring bodies. However, the value of such precedents is reflected by the fact that human rights norms have been incorporated in the ICTs' legal systems and have been recognized to be superior to the ICTs' legal instruments. In addition, the ICTs are bound by customary international law, which is another source of human rights norms.<sup>139</sup> Case law of human rights courts and supervisory bodies thus provides authoritative interpretations of norms that the ICTs are bound by, either

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<sup>136</sup> See, particularly, *supra* section 3.2.1.

<sup>137</sup> Vasiliev (n 72), 122.

<sup>138</sup> Fedorova and Sluiter (n 107), 51; Vasiliev (n 72), 152: 'there is—and must be—a presumption of the relevance of human rights jurisprudence for the purpose of the tribunals' definition of their parameters of fairness.'

<sup>139</sup> See *supra* Chapter 2, in particular section 3.2.

based on their customary status, or because they constitute ‘internationally recognized human rights’. As has been noted, human rights norms occupy ‘the uppermost position’ in the ICTs’ legal frameworks. These norms thus constitute a ‘common starting point for legal reasoning’ that the ICTs share with human rights courts and supervisory bodies, as a result of which the former must take the decisions of the latter into account.<sup>140</sup> The language generally used by the ICTs when they refer to external decisions on human rights reflects this, as they have at times suggested that ‘those rulings have the force of precedent.’<sup>141</sup> However, given the importance of contextualization by the ICTs, international human rights precedents should not have a strict binding force in the ICTs’ law and practice. Instead, the persuasive authority of such precedents implies that a proper determination of the scope and content of a human rights norm must take existing interpretations of that norm by authoritative bodies such as the ECtHR, the IACtHR and the HRC as its starting point. What is more, such a holistic approach precludes selectivity and ensures a proper understanding of the human right norm in question, which is a necessary first step in ensuring the proper interpretation and application of human rights norms by the ICTs. The ICTs will have to analyze international human rights instruments and interpretations thereof ‘from the perspective of whether and to what extent the normative positions stated therein are relevant and can serve as a valid and useful analogy in arriving at the tribunals’ own legal finding.’<sup>142</sup>

For example, decisions on undue delay can validly take the added complexity of international crimes cases into account as impacting on their length, provided this is based on a proper analysis of the actual complexity of the case at hand. However, the ICTs’ overreliance on this factor as a blanket justification for any delays does not do justice to the nature of the right to be tried without undue delay under IHRL. The ICTs should equally acknowledge that IHRL provides that the authorities have a responsibility to prevent delays, even in complex cases. Where delays ensue, for example, due to the inefficient distribution of resources and the fact that judges are expected to sit on new cases prior to the finalization of the judgment in their previous cases, the ICTs should candidly acknowledge this, and take this into consideration when assessing this right.<sup>143</sup>

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<sup>140</sup> Gradoni (n 12), 90.

<sup>141</sup> *ibid.*, 91.

<sup>142</sup> Vasiliev (n 72), 152.

<sup>143</sup> See *supra* Chapter 6, section 3.2.4.

### 4.3. Analyzing the context in which the right must be applied

The third interpretative step should encompass a compressive analysis of the specific context in which the ICT is called upon to interpret and apply the right in question, and of the way in which this context may impact on the interpretation and application of this right. Instead of simply citing a contextual factor, like the ICTs have often done, they should engage in a thorough analysis of how the specific context of the matter at hand may affect the interpretation and application of the right in question, and how it may affect the principles and interests that this right seeks to protect. The ICTs should assess the relevant differences between the domestic context in which the right is normally applied, and the circumstances of the case at hand. In doing so, the ICTs should identify the contextual factors that may complicate the protection of the right in question, and they should do so in an objective manner. Often, decisions of the ICTs that rely on contextual factors show a preconception and a thinly veiled intention to depart from IHRL. They selectively rely on a specific set of contextual factors to justify such a departure. Instead, it is recommended that the analysis of the impact of the context of the ICTs be done in an objective manner. This means, in particular, that decisions should also assess the relevant contextual factors that may warrant an increase in human rights protection.

For example, decisions on interim release should arguably take into account a broader range of contextual factors than those that the Tribunals have considered thus far. Arguably, the fact that the proceedings before the ICTs have, on average, been very lengthy should militate in favor of a more permissive approach to provisional release. If it is true that the inherent complexity of these cases, the ICTs' dependence on states, and insufficient resources unavoidably lead to lengthy proceedings, this should be taken into consideration in decisions on provisional release. This is even more so given that IHRL specifically protects against lengthy periods of provisional detention.<sup>144</sup> Similarly, the fact that provisional detention before the ICTs occurs far away from the defendants' homes and families would arguably militate in favor of a more lenient approach to provisional release than the current one.

Furthermore, it bears noting that the reliance on certain contextual factors is by definition more problematic than reliance on others. For example, balancing the protection of human rights of an individual accused against the fundamental purposes of international criminal justice is an inherently unfair interpretative tool, because it will almost automatically re-

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<sup>144</sup> See *supra* Chapter 6, section 2.2.5.

sult in the former being outweighed.<sup>145</sup> Similarly, it is well-established in IHRL that every person is entitled to the same degree of human rights protection. It is therefore problematic to offer a lesser degree of protection to persons suspected of the commission of heinous crimes.<sup>146</sup> Reliance on the gravity of the crimes charged for the purpose of reducing human rights protection has been criticized because it is ‘averse to the presumption of innocence and would effectively be a form of punishment before judgment is passed.’<sup>147</sup> It is recommended that the ICTs be particularly cautious when they rely on these contextual factors.

#### 4.4. Interpreting and applying the right in the ICT context

The fourth and final step in the interpretative process is the actual contextualization of the right in question. This means that the ICT should formulate the legal test to be relied upon for determining whether the right in question has been violated, or the degree of protection of the right an individual is entitled to, in their specific context. This step should be informed by the previous interpretative steps and should draw their results together in order to arrive at a properly contextualized interpretation of the human right in question. The ICTs’ current practice of contextualization too often results in the reduced protection of international human right norms. This tendency calls the ICTs’ observance of their obligation to adhere to internationally recognized human rights norms into question. Instead, this fundamental obligation should lie at the core of their contextualization practice. The goal of contextualization should be to assess how the ICTs can adhere to IHRL and protect the right in question, despite the contextual factors that may necessitate an adaptation of the interpretation and application of this right. Such an approach will prevent over-reliance on contextual factors as a blanket justification for diminished human rights protection. At the same time, it does justice to the ICTs’ obligation to adhere to IHRL and to the normative force that these norms should be granted in the ICTs’ law and practice.

Thus, the ICTs should properly justify their specific interpretations of human rights norms, based on the nature and content of the human right in question placed within the context in which they operate.<sup>148</sup> If the ICTs follow the interpretative steps developed in this

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<sup>145</sup> See *supra* section 3.1.4.

<sup>146</sup> See *supra* section 3.1.2.

<sup>147</sup> Yvonne McDermott, ‘The Right to a Fair Trial in International Criminal Law’ (PhD Thesis, National University of Ireland Galway 2013), 74; see also Deprez (n 36), 733: who notes that international human rights law strongly posits that ‘the gravity of the offence does not influence the level of protection granted to individuals.’

<sup>148</sup> Vasiliev (n 72), 154: the compliance by the tribunals with their human rights obligations is ultimately the matter of supplying proper reasoning for their acceptance of, and deviation from, foreign legal tests and minimum thresholds and the full consideration of all relevant circumstances of the case and of the institutions,

methodological framework, they are more likely to ensure that the contextualization of human rights norms in the ICTs' procedural practice is proper. Ultimately, the correctness of the outcome of this process depends on the quality of the reasoning proffered by the ICTs.

#### 4.5. The methodological framework in practice

It is important to emphasize that the four interpretative steps that form part of the above-described methodological framework can often be discerned from the ICTs' existing interpretation and application of human rights norms. This is neatly illustrated by the ICC's initial decision in the case of the three detained witnesses to set aside its statutory obligation to return them to the DRC, based on their right to request asylum, the principle of *non-refoulement*, and their right to an effective remedy. This decision represents a good example of proper contextualization, and each interpretative step described in the methodological framework above, can be discerned from it, either im- or explicitly. In that decision, the Court first identified the relevant human rights norms that were at stake in this case, not based on the Court's function as a criminal court, but on the impact of its possible decision on the individual rights of these witnesses. In addition, the Court reiterated its obligation to adhere to IHRL, enshrined in Article 21(3), and identified the relevant human rights norms at stake: the right to request asylum, the principle against *non-refoulement*, and the right to an effective remedy.<sup>149</sup> The ICC held that these rights constituted 'internationally recognized human rights' based on an assessment of international and regional human rights treaties, customary international law, and UN General Assembly (UNGA) Declarations.<sup>150</sup> The applicable human rights norms were thus properly determined. Second, the Chamber assessed the nature, scope and content of these rights based on the aforementioned sources of IHRL. For

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whether or not they are unique to the tribunals'; See also McIntyre (n 34), 214: 'in the development of its contextual approach to universal human rights principles, the Tribunal should be concerned with showing how the procedure it has adopted is justified by the context in which it must work.'; Fedorova and Sluiter 2009, 51: '[i]t may be expected that the Chamber a) establishes the core and universal value of the right; b) analyses the structural and contextual differences between cases submitted to the ECtHR and international criminal proceedings; and c) offers an interpretation that is consistent with the right's core and does not result in a reduction of protection.'

<sup>149</sup> 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, 67-69.

<sup>150</sup> *ibid*, specifically, the Court relied on the Convention Related to the Status of Refugees (28 July 1951), to the Protocol to the Convention Related to the Status of Refugees (31 January 1967), to UNGA, Declaration on Territorial Asylum (14 December 1967) UN Doc A/Res/2312, to the Charter of Fundamental Rights of the European Union, the International Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment, the ICCPR, the ECHR, the ACHR, and the ACHPR. It must be noted that the ICC simply stated that the principle of non-refoulement constituted customary international law, without substantiating this proposition.

example, the Chamber held that states are ‘prevented from expelling or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’<sup>151</sup> Similarly, the Chamber held that, pursuant to the right to an effective remedy, there had to be open recourse to an asylum procedure, ‘both in law and in practice’.<sup>152</sup> Third, the Chamber provided an analysis of the context in which it operates, and its possible impact on the interpretation and application of these rights. For example, it held that since the ICC does not possess territory, it could not maintain long-term jurisdiction over these individuals and therefore was unable to implement the principle of *non-refoulement* ‘within its ordinary meaning’.<sup>153</sup> The same can be said about the ICC’s obligations under the right to request asylum: the Court cannot grant citizenship, as a result of which its interpretation and application of this right must differ from that of states.

Fourth and finally, the Chamber interpreted and applied these rights in the specific context of the case at hand. The fact that the ICC could not have the same obligations as states under these rights was not held to imply that the Court could disregard them. Instead, the Chamber held that pursuant to the right to an effective remedy, ‘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.’<sup>154</sup> In addition, the Chamber considered that if it were to oblige the host-state to assist in the witnesses’ return to the DRC, ‘it would be constraining the Netherlands to violate the witnesses’ rights to invoke the nonrefoulement principle.’<sup>155</sup> The Court thus applied the right to request asylum, the principle of *non-refoulement*, and the right to an effective remedy in its own specific context, resulting in an interpretation of these rights that gave rise to new and distinct obligations on its own part, which differed from the obligations borne by states. By properly contextualizing these rights, the Court thus adhered to IHRL and ensured the protection of the rights of these witnesses.<sup>156</sup>

This decision neatly illustrates how the methodological framework that has been set out in the above can, and has been applied in the practice of the ICTs. However, as has been shown, the ICTs have not consistently employed such a proper contextual methodology in their interpretation and application of human rights norms. It is therefore instructive to apply the methodological framework, developed in the above, to one further example in order to illustrate how the ICTs may employ it in their procedural practice.

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<sup>151</sup> *ibid.*, 67.

<sup>152</sup> *ibid.*, 69.

<sup>153</sup> *ibid.*, 64.

<sup>154</sup> *ibid.*, 69.

<sup>155</sup> *ibid.*, 73.

<sup>156</sup> For a full discussion of the case of these detained witnesses, see *supra* Chapter 3, sections 3.2.2. and 3.2.3.

If an accused person, detained at the seat of an ICT pending her/his trial, submits a request for provisional release, the Chamber deciding on this should be able to immediately determine that the right to liberty applies to this situation. The Chamber will see that this right is enshrined in both quasi-universal and regional human rights treaties, as a result of which it constitutes an ‘internationally recognized human rights’.

The second step in its interpretation process will involve an assessment of the content of this right as applicable to situations of provisional detention. This will result in awareness that IHRL permits liberty deprivations, but requires these to be lawful and non-arbitrary. In addition, the Chamber will find that human rights courts and supervisory bodies have interpreted these requirements to mean that provisional detention is subject to several conditions: there must be a reasonable suspicion and there must be additional ‘relevant and sufficient reasons’ that justify detention: flight-risk, risk of interference with the investigation or trial, risk of reoffending, or the risk of public disorder. It is also important that the ICT be aware of the way in which these reasons have been interpreted and applied by human rights courts and supervisory bodies. For example, the ECtHR requires states to thoroughly and concretely substantiate the existence of any of these risks. In addition, IHRL incorporates a strong presumption in favor of liberty and it is for the prosecuting authority to prove that there are reasons to detain a suspect. Finally, IHRL protects against lengthy periods of provisional detention, and the authorities’ burden to justify detention becomes more stringent as the period of detention prolongs.<sup>157</sup>

The third interpretative step involves an analysis of the way in which the context of the ICT may impact on its interpretation and application of, in this case, the right to liberty. Primarily, this will result in an awareness of the fact that the ICT has no territory at its immediate disposal to which it could provisionally release the accused person. This also means that it depends on states for the enforcement of possible conditions attached to release. In addition, the specific circumstances of international crimes cases may impact on the interpretation and application of the ‘relevant and sufficient reasons’ for detention. For example, an accused person before an ICT is usually charged with the commission of very serious crimes, which normally entails the prospect of a substantial sentence if he is convicted. This could constitute an increased incentive to attempt to abscond.<sup>158</sup> Similarly, many accused persons before the ICTs held influential positions in their country of origin, which may render it more likely that they are in a position to obstruct the investigations by threatening or bribing witnesses or

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<sup>157</sup> For a full overview of the right to liberty in IHRL, see *supra* Chapter 5, section 2.

<sup>158</sup> See further, *supra* Chapter 5, section 3.2.1.



tampering with evidence.<sup>159</sup> Furthermore, the Chamber should assess the period that the suspect has already been provisionally detained, and also estimate how much longer he will have to remain in provisional detention. The length of provisional detention is an important component of the right to liberty, and ICT proceedings have been shown to generally be very lengthy.<sup>160</sup> Such length should therefore be included in an assessment of contextual factors impacting on the ICTs' interpretation and application of the right to liberty.<sup>161</sup> Finally, liberty deprivations before the ICTs arguably cause additional hardship to defendants, compared to provisional detention in the domestic context, because international criminal defendants are detained far away from their homes and families.

The scope and content of the right to liberty and the context of the ICT, including the specific circumstances of the case, should then inform the fourth step: the Chamber's interpretation and application of the right in the context of the case at hand. This means that the Chamber will assess whether the specific context in which it operates requires the adaptation of the legal test applicable in IHRL to determine whether there is a ground for detention. This should result in an awareness that many contextual factors, cited above, can be accommodated within the four 'relevant and sufficient reasons' for provisional detention that are recognized in IHRL. The gravity of the crimes may impact on the risk of flight, and the influential position of the accused may impact on the risk of obstruction. However, it must be stressed that the Chambers can only rely on such considerations if there is concrete and specific evidence that such danger could materialize in the case at hand. These contextual factors therefore do not require an *a priori* adaptation of the legal test to determine whether provisional detention is necessary. Furthermore, if the accused in question has been provisionally detained for a lengthy period, and/or if the proceedings can be anticipated to be prolonged further, this should militate towards a more lenient approach to provisional release. Finally, the additional hardship of detention at the seat of an ICT should have a similar effect.

Essentially, there is no need to fundamentally adapt the legal test to determine whether a suspect is entitled to provisional release, as such. The specificities of cases before the ICTs can largely be accommodated within the existing test that emanates from IHRL. Contrary to the position of the ad hoc Tribunals in particular, there is therefore no need to devise a provisional release regime that is *a priori* more strict than in IHRL. The sometimes excessive length of provisional detention before the ICTs, and the fact that such international detention

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<sup>159</sup> See further, *supra* Chapter 5, section 3.2.2.

<sup>160</sup> See generally, *supra* Chapter 6.

<sup>161</sup> See also Trotter (n 44), 372-373.

causes additional hardship for defendants may actually warrant a more lenient approach to granting provisional release. In addition, the ICTs' dependence on states should not be relied upon as a reason to deny release. Instead, their obligation to adhere to the internationally recognized human right to liberty could warrant an additional obligation to proactively engage with states to increase their willingness to receive provisionally released persons on their territory. As has been shown, the ICC seems to have followed this approach. The principled decision whether or not there are grounds to detain an individual should not be made dependent on the availability of state cooperation. Instead, the contextualized right to liberty should entail an additional obligation on the part of the ICT to ensure that, if it decides that provisional detention is no longer justified, it will strive to ensure that a state willing and able to receive the accused is identified. Ultimately, the outcome of such an interpretation and application process will depend on the specific circumstances of the case at hand.

## 5. Conclusion

In order to truly adhere to IHRL, the ICTs must sometimes contextualize their interpretation and application of human rights norms. The circumstances in which an ICT operates can fundamentally differ from the circumstances in which international human rights norms normally apply. To ensure the effective protection of these norms in the context of an ICT, this specific context must be taken into account in the interpretation and application of human rights norms. As has been noted, 'genuine fairness and justice are contextually defined.'<sup>162</sup>

However, the ICTs do not employ a coherent methodology for the interpretation and application of human rights norms in their procedural practice. In addition, when they contextualize human rights norms, this too often results in underprotection. This is of particular concern because the ICTs' practice of contextualization is often improperly justified, either because their legal reasoning is inadequate, or because they fail to offer any legal reasoning to substantiate their deviation. It has been noted that 'the ICTs have not sufficiently focused on providing a proper analysis in which both the concrete human rights norm and the unique position of ICTs are adequately deconstructed.'<sup>163</sup>

This Chapter has developed a methodological framework for the interpretation and application of human rights norms in the ICTs' procedural practice that, if employed consist-

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<sup>162</sup> Vasiliev (n 72), 153.

<sup>163</sup> Fedorova and Sluiter (n 107), 55; similarly Frédéric Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 *UCLA J Int'l L & Foreign Aff* 37, 53: who notes that 'the tribunals' use of international human rights precedents is a little opportunistic and haphazard, determined less by a sense of obligation than by function adaptation.'

ently by the ICTs, should result in proper interpretation and application of human rights norms. The ICTs should employ a legally rigorous approach. As has been argued by Cassese, a legally rigorous approach ‘reduces the margin for arbitrary decisions’ and enhances the foreseeability of the decisions of the ICTs.<sup>164</sup> This methodological framework allows for the contextualization of human rights norms, and attempts to ensure that this is done properly, for adequate reasons, and will not by definition result in underprotection of human rights norms by the ICTs.<sup>165</sup>

First, it is recommended that all ICTs’ legal instruments include a provision similar to Article 21(3) of the ICC Statute that unequivocally enshrines the ICTs’ obligation to adhere to IHRL. This study has further recommended that the ICTs employ a treaty-based methodology for the identification of human rights norms that are ‘internationally recognized’. Such an approach is both pragmatic and reflective of the ICTs’ status as criminal courts. There is no need for them to conduct in-depth assessments of the scope and existence of customary international human rights law or general principles of law. Establishing the internationally recognized character of a given human rights norm based on its recognition in human rights treaties will ensure adherence by the ICTs to all relevant human rights norms that generally apply in the domestic context.

The methodological framework that has been developed in this Chapter consists of four interpretative steps that the ICTs should consistently take in the interpretation and application of human rights norms in their procedural practice. The first pertains to the way in which the ICTs should answer the question whether a human rights issue arises in the matter before them. It has been recommended that, in answering this question, the ICTs should employ an impact-based approach. If a decision of an ICT may affect the protection or enjoyment of a human right of an individual, the ICTs must take this norm into account in their decision-making process. The second step pertains to the determination of the nature, scope, and content of the human rights norm in question. Here, the ICTs must methodically analyze this right, by assessing the interests it seeks to protect. Precedents of human rights courts and monitoring bodies must be presumed to have persuasive authority in the ICTs’ analysis. The third step relates to the analysis of the context in which the ICTs must interpret and apply the right in question. Here, the ICTs must conduct an objective analysis of which aspects of the

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<sup>164</sup> Antonio Cassese, ‘The Influence of the European Court of Human Rights on International criminal Tribunals - Some Methodological Remarks’ in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Down-trodden - Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003), 21.

<sup>165</sup> Sluiter, ‘Human Rights Protection in the ICC Pre-Trial Phase’ (n 107), 463, who notes that ‘[w]hat matters is not that human rights cannot be re-interpreted, but that this exercise should be conducted on adequate reasons, cautiously and not by definition result in loss of protection.’

specific context in which they operate may affect the way in which the right in question is interpreted and applied. The ICTs should assess the differences between the domestic context in which the right is normally applied and the circumstances of the case at hand. That brings us to the fourth and final step, which is the actual contextualization of the human rights norm. The goal of this final interpretative step is to assess how the ICTs can abide by their obligation to adhere to the human rights norm in question, given (and despite) the different context in which they operate. Ultimately, the ICTs should offer proper and convincing justifications for their specific and contextual interpretations of human rights norms, based both on the context in which they operate and on the scope and content of the human right in question. The soundness of their legal reasoning provides an ultimate benchmark for the propriety of the contextualized interpretation of human rights norms.