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International criminal tribunals and human rights law: Adherence and contextualization

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CHAPTER 8 SUMMARY AND CONCLUSION

This dissertation has investigated how the ICTs should interpret and apply international human rights norms in their procedural practice. The working hypothesis was that the specific context in which the ICTs operate has an impact on their interpretation and application of human rights norms. The analysis of the ICTs' approach to the right to privacy, the right to liberty, and the right to be tried without undue delay, has confirmed such an impact. For example, the ICTs have often referred to their necessary reliance on state cooperation, the gravity of the crimes within their jurisdiction, and the complexity of international criminal proceedings to justify departures from international human rights norms. One of the core purposes of this research has been to identify whether and under what conditions such deviation from IHRL and authoritative interpretations thereof are acceptable. This conclusion summarizes the main findings and recommendations formulated in the foregoing Chapters. In addition, it offers some suggestions for further research into possible avenues to improve the ICTs' procedural practice regarding their interpretation and application of human rights.

Part I Applicability of IHRL to the ICTs

The first question that this study has addressed is whether and how the ICTs are bound by IHRL. **Chapter 2** has shown that the ICTY, ICTR and ICC, as (organs of) international legal persons, are bound by general international human rights law *a priori*, in conformity with international law. Every international organization with legal personality is bound by the general international law as contained in the sources of custom and general principles of law. This conclusion is supported by the subject thesis – the theory that all subjects of international law are bound by the general rules of international law. This theory has been widely accepted in international legal theory and has been endorsed in legal practice as well, including by the ICJ. The functional application of the subject thesis implies that the ICTs are bound by those human rights norms contained in the sources of general international law that may apply to the exercise of their functions.

At the same time, however, it has been shown that the ICTs' inherent obligation to abide by norms of general international human rights law may have limited concrete implications for the determination of their actual human rights obligations. First, the indeterminacy of the law contained in the sources of general international law renders it difficult to derive specific human rights obligations from them, if only because the identification of the norms

contained in these sources is a difficult and laborious exercise, particularly in the field of human rights. Second, the inherently flexible nature of human rights norms leaves states a measure of discretion regarding the implementation of their human rights obligations. This flexibility makes IHRL under-determinative and limits its prescriptive capacity when it comes to the conduct of international criminal proceedings. Third and finally, IHRL has a fundamentally different relationship with international criminal procedure than with domestic procedure. While IHRL is superior to domestic law, the procedural law of the ICTs is also international law. As a result, states and ICTs may theoretically devise—and have indeed devised—‘special’ human rights law to govern the conduct of international criminal proceedings, which could be rationalized as *lex specialis* to general IHRL. It is therefore safe to conclude that while ICTs are bound by IHRL under international law, they have a leeway to contextually interpret and apply human rights norms in their procedural practice.

In **Chapter 3**, the same questions were examined as in Chapter 2, from the perspective of the internal legal instruments and procedural practice of the ICTs. Chapter 3 has shown that international human rights norms enter the ICTs’ legal frameworks in two ways. First, they can be found among the subsidiary sources of law before the ICTs. Second, and more importantly, the ICTs have an obligation to interpret and apply relevant law in a manner consistent with ‘internationally recognized human rights’. As such, their obligation to adhere to IHRL is not limited to human rights norms contained in the sources of general international law, but extends to all norms that can be considered as ‘internationally recognized human rights’. The Rome Statute explicitly provides for this obligation in Article 21(3), and a similar obligation has been developed in the case law of the ad hoc Tribunals. In addition, the case law of the ICTs confirms the significant normative force of human rights norms vis-à-vis the ICTs’ procedural practice. Their obligation to interpret and apply their applicable law in a manner consistent with ‘internationally recognized human rights’ has manifested itself in three ways. First, the ICTs have practiced simple consistent interpretation, by using IHRL to interpret and apply norms contained in their internal legal instruments. Second, they have created procedures and obligations that found no explicit support in their internal law, based on their obligation to adhere to IHRL. Third, the ICTs’ case law shows a degree of support for the duty to set aside obligations that arise from their internal legal instruments if their implementation could entail violations of internationally recognized human rights. IHRL can therefore be considered as a *lex superior* in the ICTs’ legal regimes.

However, like international law, the ICTs’ internal law and practice leave room for the contextualization of human rights norms. First, the ad hoc Tribunals have been incon-

sistent in the terminology used to describe the category of human rights norms that they are bound by. Such inconsistency betrays uncertainty regarding the applicable norms and corresponding obligations of the Tribunals under IHRL. Second, the ad hoc Tribunals' obligation to adhere to IHRL is not enshrined in their legal instruments. As a result, their case law evinces occasional but persisting denials of the superior status of IHRL. Similar denials can be found in the case law of the ICC. Since the Court has not yet developed a coherent methodology for determining whether or not human rights norms are 'internationally recognized', it maintains a certain leeway to change the scope and content of the category of human rights norms that have such superior status. Finally, given the significant differences between the context in which human rights norms normally apply and the context of the ICTs, their interpretative practice will almost necessarily have to be a process of contextualization. In order to ensure the effective protection of human rights before them, the ICTs will have to take the specific context in which they operate into account and, where necessary, adapt the scope or normative content of these rights accordingly.

The first two Chapters developed the two components that jointly make up the theoretical framework of this study. On the one hand, the ICTs have an obligation to adhere to internationally recognized human rights. At the same time, they retain a measure of discretion regarding the way in which they interpret and apply these rights in their specific context. They may and arguably must sometimes contextualize their interpretation and application of these norms. However, an unbridled power for the ICTs to interpret and apply these norms in any way they see fit might undermine the protection of human rights before them. Therefore, the crucial question is what considerations and parameters should inform the ICTs' contextualized interpretation of human rights norms.

Part II Interpretation and Application of Human Rights by the ICTs

Chapters 4 to 6 analyzed and assessed the ICTs' interpretation and application of three human rights norms: the right to privacy, the right to liberty, and the right to be tried without undue delay. The analyses compared the way in which these rights are interpreted and applied in IHRL with their interpretation and application by the ICTs. In addition, the analyses focused on the ICTs' use of sources of IHRL in their interpretative practice, including the precedents from human rights courts and supervisory bodies.

Chapter 4 has shown that the right to privacy is absent from the ICTs' legal instruments. This omission is striking given the unavoidable interferences with persons' privacy in

the course of the ICTs' investigative activities. It is unclear why this right has not been included. Instead, the ICTs appear to rely fully on states for the protection of the privacy rights of persons implicated by their investigative activities. IHRL requires interferences with the right to privacy to be lawful, necessary, proportional, and to pursue a legitimate aim. This means that states must provide a legal basis for interferences with privacy and regulate such interferences by procedural guarantees. The legal instruments of the ICTs, however, barely provide for a legal basis for the execution of coercive measures and do not impose any formal or material safeguards. There are no *ex ante* checks that regulate the ICTs' use of such measures. In addition, the ICTs display a general reluctance to conduct strict *ex post facto* checks of the way in which evidence has been obtained. There are no strong safeguards in place to prevent the admission of evidence that has been gathered in possible violation of individuals' right to privacy. Where the ICTs have conducted such checks, they have uniformly resulted in the admission of the evidence in question. In that regard, the ICTs have at times relied on the importance of their mission to 'end impunity', which outweighed the possible negative repercussions of the admission of evidence for the right to privacy. The limited control by the ICTs over the way in which evidence is gathered has been cited as a justification for this lenient approach. Although it is expected that states requested to execute coercive measures will offer their regular domestic guarantees, it is questionable whether they will be willing and able to actually do so, particularly given their obligation to cooperate with the ICTs. Moreover, the practical ability of states to provide guarantees under domestic law in the course of executing coercive measures pursuant to an ICTs' request for assistance is questionable, because the requesting ICT is in a better position to assess the measure's necessity and proportionality, given the limited information at the disposal of the requested authorities.

Chapter 5 addressed the ICTs' interpretation and application of the right to liberty. There are significant differences between the ad hoc Tribunals' and the ICC's approach to this right in the context of provisional release. The legal framework applicable to provisional detention and release before the ad hoc Tribunals differs in a number of crucial aspects from IHRL. First, a reasonable suspicion suffices to arrest and detain a suspect while additional 'relevant and sufficient' reasons for detention are necessary in IHRL. Second, it is for the accused to request provisional release, while in IHRL it is for the detaining authorities to justify detention, which must also be reviewed periodically. Third, before the ad hoc Tribunals, the accused bears the burden of proving that, if released, s/he will *not* pose a flight risk, or obstruct the proceedings; whereas the approach is the opposite in IHRL. Fourth, the identifi-

cation of a state willing and able to receive the accused person has been raised to a quasi-requirement for provisional release. This requirement does not exist in IHRL, but relates to the specific context of the ICTs, which do not have a territory at their disposal where the accused persons can stay if provisionally released. Fifth and finally, the length of provisional detention has raised distinct issues. Although the Tribunals have at times confirmed that the length of detention may impact on provisional release determinations, in practice, this consideration has played a marginal role. The limited importance of the length of provisional detention can be criticized from a human rights perspective, particularly given the substantial periods that many ICTY and ICTR defendants have spent in such detention.

The ICC's legal framework governing provisional detention and release seems generally in line with IHRL. First, the ICC Statute requires a reason for detention in addition to the existence of a reasonable suspicion, and the relevant grounds for detention correspond to those recognized in IHRL: flight risk, risk of obstruction, and risk of reoffending. Second, the ICC Statute incorporates a duty for the Pre-Trial Chamber to periodically review the provisional detention of accused persons. Third, the Prosecutor bears the burden of proof with regard to the necessity of detention. However, two aspects of the ICC's approach to provisional release depart from IHRL. Generally, the Court has not been willing to attach consequences to the length of provisional detention, although the Statute recognizes delays as a separate reason for release, but only if those are attributable to the Prosecutor. However, in a recent decision, four persons accused of offences against the administration of justice have been provisionally released, primarily because of the relatively lengthy period of their detention. Nonetheless, the case related to persons accused of offences against the administration of justice, as a result of which its precedential value for core crimes cases may be limited. In addition, like before the ad hoc Tribunals, the presence of state guarantees constitutes a quasi-requirement for release. However, unlike the ad hoc Tribunals, the ICC has taken a proactive approach to this issue. It has concluded an interim release agreement with Belgium and claims to be in the process of concluding more such agreements. In addition, ICC Chambers have actively requested states' observations on the possibility of hosting on their territory the persons provisionally released by the ICC. The specific context in which the ICC operates has thus led the Court to take an active approach towards procuring state cooperation to effectively protect the right to liberty.

Chapter 6 assessed the ICTs' approach to the right to be tried without undue delay. This right is provided for in the Statutes of the ICTs. Although the average length of proceedings before them has been substantial, the ad hoc Tribunals have only once found that this

right was violated in their practice. This can partially be explained by their significantly different interpretation and application of this right, as compared to IHRL. In IHRL, a determination of whether or not there has been an undue delay hinges on an assessment of four factors: the conduct of the defendant, the conduct of the authorities, the complexity of the case, and what is at stake for the defendant. The prevailing approach before the ad hoc Tribunals, however, revolves around different factors: 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 accused. First, assessing the conduct of the Prosecutor as a party, instead of an authority, does not do justice to her/his responsibility as an organ of the Tribunals to protect the rights of the accused. Second, requiring defendants to show prejudice in order to establish that a delay has been undue is tautological and finds no support in IHRL. Third, the ad hoc Tribunals have overstated the relative importance of the complexity of the case as a blanket justification for any length of delay. This departs from IHRL, where the conduct of authorities is the most important factor in assessing whether delays have been undue. Fourth, the ad hoc Tribunals have not been consistent in their consideration of these criteria. Other decisions have also relied on the gravity of the crimes charged, and the fundamental purpose of the Tribunal, as factors militating against a finding of undue delay, which finds no support in IHRL. The ICC has issued a limited number of decisions related to the right to be tried without undue delay. However, its initial case law conveys the impression that it is following in the footsteps of the ad hoc Tribunals' problematic approach to this right. The Court has relied on the gravity of the charges and the complexity of cases as mitigating factors regarding the delays that had occurred, instead of assessing its own responsibility to ensure the expeditiousness of trials.

Part III Towards a Methodological Framework

Chapter 7 offered an analysis and synthesis of the findings arrived at in the foregoing chapters and formulated an answer to the research question of this study. The ICTs' interpretative practice regarding human rights norms has been driven by two approaches to IHRL: adherence and contextualization. These two approaches are not mutually exclusive but, on the contrary, proper adherence to IHRL may require the contextualization of human rights norms in order to ensure their effective protection in the specific context of an ICT.

Adherence has manifested itself in two main ways. The first is the legislative influence of IHRL on the internal legal instruments of the ICTs. Several human rights norms have been incorporated in their Statutes and RPEs, such as the right to a fair trial and several rights

of suspects in a criminal investigation. In addition, the ICTs' legal instruments incorporate procedures that aim to protect the rights of persons implicated by their activities, without explicitly enshrining the right in question. For example, the regulation of arrest and detention serves to protect the right to liberty, although this right is not enshrined in the legal instruments of the ad hoc Tribunals. Second, the ICTs have practiced consistent interpretation of their legal instruments with IHRL. Often, the ICTs rely on IHRL norms and their interpretations by human rights courts and supervisory bodies when interpreting and applying their own legal instruments. The three modalities of the ICTs' adherence to IHRL illustrate the normative force of human rights norms in their procedural practice. First, the ICTs have practiced simple consistent interpretation, when they use or refer to IHRL when interpreting their own legal instruments. Second, they have created procedural remedies or additional obligations based on IHRL, regardless of the fact that these found no explicit support in their internal legal instruments. Third, the ICTs have shown a willingness to set aside their internal legal instruments in case of conflict with internationally recognized human rights.

The second approach to IHRL that can be discerned from the ICTs law and practice is contextualization. This interpretative practice has been analyzed from several angles. Chapter 7 assessed the contextual factors that the ICTs have relied on in their interpretation and application the right to privacy, the right to liberty, and the right to be tried without undue delay. Four contextual factors in particular have been subject of this study: the unavoidable reliance on state cooperation, the gravity of the crimes with which accused persons are charged, the complexity of cases before the ICTs, and, finally, the fundamental importance of the ICTs' mission to 'end impunity'. Furthermore, Chapter 7 distinguished three criteria for the classification of contextualization practices: methods, effects, and the quality of legal reasoning offered to justify such contextualization.

First, three methods of contextualization have been identified: disregard, selectivity, and adaptation. The ICTs sometimes disregard IHRL, for example by asserting the primacy of their own legal frameworks over IHRL or by failing to address human rights issues in their decisions. In addition, the ICTs have employed a selective method, for example by professing 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 their approach is not in line. Finally, the ICTs have adapted the legal test that would apply to the right in question in IHRL, either by adapting the normative content of a specific human rights norm before the ICTs, resulting in the change of the scope of the respective obligation, or by applying a different legal test to determine whether or not the right in question has been violated.

Second, the contextualization practice of the ICTs can be classified based on its effects on the level of human rights protection they offer. Contextualization can result either in an increased or a decreased level of human rights protection. Overprotection occurs when the ICTs invent novel and distinct obligations for themselves to ensure the protection of the relevant human right in their specific context that do not apply to states under IHRL, or when the ICTs ensure a higher level of human rights protection than what is required by IHRL. Underprotection occurs when the ICTs change the legal test applicable in IHRL to determine the violation of a given right in the way that makes it more difficult to establish a violation, or to be granted protection of the right in question. This study has disclosed one example of increased protection, which is the ICC's proactive approach towards ensuring state cooperation to enable the provisional release of accused persons to protect their right to liberty. There are other examples of overprotection, but these do not relate to the rights that have been subject of this study. The ICTs' approach to the right to privacy and the right to be tried without undue delay discloses a significant degree of underprotection of human rights before the ICTs.

Third and finally, the quality of the legal reasoning proffered by the ICTs in support of their contextualization of human rights norms constitutes another modality to classify the ICTs' practice in this regard. The propriety of their interpretative practice hinges on the reasoning employed in justification of their approach. However, it has been shown that the ICTs often fail to acknowledge or justify their contextualized interpretation of human rights norms. Such absence of legal reasoning renders it difficult to assess the quality of the ICTs' contextualization practice. In addition, the ICTs often insufficiently substantiate the legal reasoning provided in support of their contextual interpretation of human rights norms. Decisions that employ a selective method for the use of IHRL constitute primary examples of such insufficiently substantiated contextualization.

Chapter 7 concluded that the ICTs' contextualization practice generally lacks a coherent methodology, too often results in the underprotection of human rights norms, and is sometimes insufficiently justified. Therefore, this Chapter developed a methodological framework for the interpretation and application of human rights norms. This framework draws upon the best practices that can be distilled from the ICTs' jurisprudence. It consists of several parameters and interpretative steps that, if followed consistently, would enable the ICTs to properly contextualize human rights norms in their procedural practice.

First, all ICTs' legal instruments should include a provision like that of Article 21(3) of the ICC Statute in order to formalize their obligation to adhere to 'internationally recognized human rights'. In addition, this study recommended a treaty-based methodology for the

identification of human rights norms that are ‘internationally recognized’, which will ensure adherence by the ICTs to all relevant human rights norms that generally apply in the domestic context.

In addition, the ICTs should consistently take four interpretative steps in their interpretation and application of human rights norms. First, in answering the question whether a human rights issue arises in the matter before them, the ICTs should adopt an impact-based approach. This means that if their decision is likely to affect the protection or enjoyment of an individual’s human right, the ICTs must take this norm into account in their decision-making process. Second, the ICTs should methodically analyze the human right in question by assessing its nature, the interests it seeks to protect, its scope, and its normative content. The interpretation of the right in question by human rights courts and supervisory bodies should have persuasive authority vis-à-vis the ICTs’ interpretative practice. Third, the ICTs should conduct an objective analysis of which aspects of the context in which they operate may affect the interpretation and application of this right. This means that the ICTs should analyze the differences between their own contexts, including the circumstances of the case at hand, and compare these to the domestic contexts in which the right is normally applied. Fourth and finally, the ICTs should come up with a contextualized interpretation of the right in question. The goal of this final step is to ensure the effective protection of the human right in question, given (and despite) the different context in which they operate. The ICTs should offer proper and convincing justifications for their 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 ICTs’ interpretation and application of international human rights norms in their procedural practice should thus consist of two components. The first is their obligation to adhere to internationally recognized human rights, and the second is the need to take the specific context in which they operate into account and, where necessary, to adapt their interpretation of these norms accordingly. This study has recommended a methodological framework that could guide the ICTs’ interpretative practice and that could ensure the proper contextualization of international human rights norms in their procedural practice.

One outstanding issue is the fact that the ICTs are essentially judges in their own cause when it comes to the interpretation and application of their own human rights obligations. Where states are often subject to the external review of human rights courts and super-

visory bodies, the legal systems of the ICTs are closed off from external supervision.¹ The only recourse available to individuals who allege that their rights have been violated by an ICT is before that same ICT. The protection of human rights before them is thus built upon the assumption that the ICTs are able correct themselves and to prevent or remedy possible human rights violations resulting from their practice themselves. However, such trust in the ICTs' capacity to correct themselves may not be conducive to the effective protection of human rights norms. This study has shown that the ICTs' practice in the interpretation and application of human rights norms is far from perfect. Although the ICC has learned from the strengths and weaknesses of its ad hoc predecessors, there are still reasons to be critical of the protection of human rights norms before all of the ICTs. Subjecting the ICTs' compliance with their obligation to adhere to internationally recognized human rights to external and independent review would strengthen the protection of human rights norms before them. There have been several attempts to subject states' cooperation with the ICTs to the review of the ECtHR in particular, but these have all been unsuccessful.² The possibility of subjecting the ICTs to a form of external review would therefore constitute a valuable avenue for further research. Arguably, the ICTs could accede to human rights conventions, like the EU is in the process of doing with respect to the ECHR.

This research has shown that the ICTs clearly take their obligation to respect human rights norms seriously. At the same time, there is definitely room for improvement. The consistent adoption of the proposed methodological framework for the interpretation and application of human rights norms would aid the ICTs in their endeavour to give effect to their obligation to adhere to IHRL, in a way that takes due account of the specific context in which they operate.

¹ See eg Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 J Int'l Crim Just 137, 164, who similarly calls for the need to subject the ICTs' adherence to human rights norms to external supervision; see also Gideon Boas, 'The Case for a New Appellate Jurisdiction for International Criminal Law' in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure – Towards a Coherent Body of Law* (Cameron May 2009).

² William Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 J Int'l Crim Just 609, 610; See eg ECtHR, Decision, *Djokaba Lambi Longa v. the Netherlands* (App No 33917/12), 9 October 2012; ECtHR, Decision, *Naletilić v. Croatia* (App No 51891/99), 4 May 2000; see generally: Jean D'Aspremont and Catherine Brölmann, 'Challenging International Criminal Tribunals before Domestic Courts' in August Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (OUP 2010).