Introduction

I. Approach and Conceptual Framework

1. Overview of the Research Topic

The starting point of this research is the following: crimes under international law are, partly with the exception of war crimes, defined broadly and construed in a vague manner in the respective statutes of international criminal courts and tribunals.[1] As a practical consequence, it is up to the judges to fill the gaps left in the statutes by taking recourse to extra-statutory law. The nature and the hierarchy of these sources are stated in Article 21 Rome Statute of the International Criminal Court ('Rome Statute') for the Interantional Criminal Court ('ICC'), wheras for the ad hoc and hybrid tribunals, the sources are enshrined in the more general provision of Art. 38 Statute of the International Court of Justice ('ICJ Statute').[2] The application of extra-statutory sources and the interpretation that this application inevitable requires can lead to legal uncertainty and to the unequal application of the law within the same court or tribunal. While this is a problem with which all courts and tribunals applying international law are faced, international criminal courts and tribunals encounter this dilemma in an aggravated form because, as criminal courts, they have to adhere to procedural guarantees and fair trial standards. Applying extra- statutory sources, they run the risk of violating one of the cornerstones of the right to a fair trial, the principle of legality.

Hence, this book looks at one of the major external sources consulted by judges, namely international human rights law, in the context of this conflict. The book consists of three major parts: first, the dogmatic analy-

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1 See Arts 6-8 Rome Statute of the International Criminal Court ([adopted 17 July 1998, entered into force 1 July 2002] 2187 UNTS 90); Arts 2-4 Statute of the International Criminal Tribunal for Rwanda (UNSC Res 955 [1994] [8 November 1994] SCOR 49th Year 13) [Rome Statute]; Arts 2-5 Statute of the International Criminal Tribunal for the Former Yugoslavia (UNSC Res 827 [1993] [25 Mai 1993] SCOR 48th Jahr 29).

2 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

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sis of the differing doctrinal architecture of international criminal law and international human rights law and resulting problems in the application of international human rights law in substantive international criminal law; second, the analysis of case law to establish how various bodies of international criminal law have dealt with these problems and in which areas judges are most forthcoming in their reference to international human rights law; and third, the attitudes of judges concerning the relationship of international criminal law and international human rights law, the resulting interpretative practices in their decision and judgments and the factors which influence to what extent a practitioner is open to any form of reference to human rights law.

The thesis employs two major methodologies. A larger part of the research consists of doctrinal legal analysis of statutes, treaties, decisions of judiciary bodies both in the fields of human rights law and international criminal law, as well as various international soft law instruments. This is supplemented by a qualitative study of the interpretative practices of sitting judges of international criminal law courts of human rights laws, based on interviews.

The issue of broadly constructed and vague legislative texts is not unique to international criminal law. Many domestic criminal codes also include crimes the definition and elements of which are not apparent when solely consulting the letter of the law and require clarification. However, the problem is particularly pressing in modern international criminal law as an area of law still in its buildup-phase, an area which is frequently criticized as susceptible to the influence of international politics. The perimeters of many crimes often remain vague and unclear, due to fragmentary codification as well as the temporarily and substantively limited number of practical cases of application.

This vagueness in content is highly problematic regarding the principle *nullum crimen/nulla poena sine lege*, one of the most fundamental principles to be adhered to by a State or institution based on the rule of law. According to this principle, an act can be punishable only on the basis of a legal act and a person may not be punished arbitrarily and without sufficient legal basis.[3] For criminal law, including international criminal law, this implicates that at the time an act occurred, a written or unwritten norm

3 Erkin Gadirov und Roger S Clark in Otto Triffterer (hrsg) *Commentary of the Rome Statute of the International Criminal Court* (2nd edition CH Beck 2008) 506.

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has to establish its categorization as a crime for a person to be punished accordingly.[4]

In order to define crimes ‘with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)’[5] the ICC, pursuant to Art 9, introduced the Elements of Crime.[6] These help the Court in the interpretation and application of the crimes enlisted in Arts 6-8 Rome Statute. Judges at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) cannot take recourse to such elements according to their statutes.

Even though the introduction of Elements of Crimes at the ICC signaled awareness and a positive development, the Elements of Crime can only partially provide legal certainty to the practitioners and the subjects of international criminal law, because they are, again, phrased in a rather broad manner. For this reason, the judges at the ICC will continue to have to consult external sources of law for the interpretation of crimes.

Hence, judges at international criminal law are often faced with a dilemma as, by adhering to the principle of *nullum crimen sine lege* and clearly defining the punishable acts in question, they might overextend the letter of the law, when they take recourse to conventions or legal concepts outside their own statures. In principle, judges at the ICC and other international criminal courts and tribunals are entitled to consult sources outside their statutes. When doing that, they have to respect the sources of international law pursuant to Art. 38 Statute of the ICJ (for the ICC Art. 21 Rome Statute, which also establishes a hierarchy of the sources).[7]

Apart from looking at the application of existing conventions and treaties in the specific case, judges will also consider customary international law. Due to the fragmentary codification of international law, customary international law, is of particular importance to judges at interna-

4 See eg Gerhard Werle *Völkerstrafrecht* (2. Auflage Mohr Siebeck 2007) 44; fundamental regarding nullum crimen sine lege in international law: Otto Triffterer *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (E. Albert 1966) 124.

5 Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court 25 March – 12 April 1996 UN Doc A/AC.249/1 (7 May 1996) para 13.

6 Elements of Crimes (9 September 2002) Doc ICC-ASP/1/3 (Pt. II-B).

7 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

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tional courts and tribunals. A norm of customary international law is generated through State practice in the in the belief that the act in question is legally binding (*opinio juris*).[8]

In order to determine these two elements, it is common practice to examine, *inter alia*, the acceptance of specific standards of international law within the international community. These standards cannot only be extracted through legally binding conventions or treaties, but can also be deducted from jurisprudence, decisions of treaty bodies or the UN General Assembly.[9]

With respect to international standards relevant to the work of international courts and tribunals, the reference to human rights law, especially, seems obvious and even self-evident as international criminal law and human rights law hold common roots and complement each other.[10] Practically all relevant crimes under international law also contain violations of international human rights law and can be systematized accordingly.[11]

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8 See eg Malcom N. Shaw *International Law* (6. Auflage Cambridge University Press 2008) 72 ff.

9 See eg *Prosecutor v Delalić et al (Judgment)* IT-96-21 (16 November 1998) paras 453 ff; *Prosecutor v Furundžija (Judgment)* IT-95-17 (10 Dezember 1998) paras 160 ff; *Prosecutor v Kvočka (Judgment)* IT-98-30 (2 November 2001) paras 137 ff; *Prosecutor v Krnojelac (Judgment)* IT-97-25 (15 März 2002) para. 186; *Prosecutor v Kunarac (Judgment)* IT-96-23 (Juni 2002) paras 469 ff.

10 The tribunals also were faced with the problem that a treaty provision to which the parties wree bound or which was part of customary international law provided for the prohibtion of a certain act, but not necessarily for its criminalization. For this reason, the tribunals then had to look at customary law to define the circumstances under which a prohibited act triggered penal consequences: see *Prosecutor v Galić (Appeal Judgment)* IT-98-29-A (30 November 2006) para. 83.

11 It was this knowledge that led the States negotiating the Rome Statute to include several so-called 'treaty crimes' in the Statute (as modalities of crimes against humanity or war crimes), crimes which were listed as violations of international human rights law in the respective human rights instruments but were, up until then not to be found in the statutes of international criminal tribunals; see See Andreas Zimmermann 'Article 5: Crimes within the jurisdiction of the Court' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed Beck Munich 2008) 129-142, 130-131; see also Anja Seibert-Fohr *Prosecuting Serious Human Rights Violations* (OUP Oxford 2009) 1ff; Alette Smeulers and Fred Grünfeld *International Crimes and Other Gross Human Rights Violations* (Nijhoff Leiden 2011); Gerhard Werle ‚Menschenrechtsschutz durch Völkerstrafrecht' (1997) 109(4) Zeitschrift für die gesamte Strafrechtswissenschaft 808-829; Carsten Stahn ‚Internationaler Menschenrechtsschutz und Völkerstrafrecht' 82 (3) Kritische Justiz (1999) 345-355.

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The area of conflict between the need to consult international human rights law as an external source and the need to adhere to the principle of *nullum crimen sine lege* are the subject of this book. The common roots, but also the substantive differences between the areas of human rights law and international criminal law, which allow for recourse to human rights law only under specific, dogmatically well-justified and defined conditions, will be explored. The work scrutinizes the advantages as well as the dangers that such recourse entails. It highlights the preconditions under which human rights law is most likely to be referred to in a coherent and methodologically sound manner. As such, the project seeks to contribute to the dogmatic understanding of international criminal law and its dynamic development.

2. Approach and Demand for Research

As examined in the following, the current practice in jurisprudence is characterized by a condition of legal uncertainty in which dogmatic ambiguity led to a situation where similar acts are at times evaluated differently by different Chambers of the same court or tribunal, leading to an unequal legal categorization of the acts in question. This problem has presented itself, for example, in the categorization of torture as a crime against humanity before the ICTY. Whereas one Chamber required the perpetrator to be a State official or at least having acted with the consent or acquiescence of a State official, another Chamber of the same tribunal deemed this requirement not necessary for the definition of torture under international law.[12] Pointing out these ambiguities, their causes and consequences, contributes to the unification of international criminal law and therefore its legal security. Furthermore, the project explicitly focuses on substantive international criminal law and its interconnection with human rights law. The connection between these two fields is currently underresearched, as priority, in legal research as well as in practice, is often given to the importance of 'procedural' human rights law, in particular, to safeguarding the rights of the accused. While this is no doubt a vital part of applying international criminal law and its violations endanger the the credibility of the

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12 See *Prosecutor v Delalić et al (Judgment)* IT-96-21 (16 November 1998) para 473 and *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) paras 488-96; see in detail at Part Two Chapter One I. 1. b. and f. below.

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field as a whole, the Rome Statute brings about numerous legal innovations with regards to substance. Hence, recourse to extra-statutory sources will be inevitable for judges in the future. Thereby, the ICC, as the single permanent court in the field of international criminal law, has the unique opportunity to counteract fragmentation of the practical application of the law and focus on the development of coherent jurisprudence. This research project points out the preconditions for such development.

II. Scope and Methodology

This book aims at answering the following central research questions:

– How do substantive international criminal law and human rights law relate to each other and how does this relationship allow for or preclude recourse to international human rights law in substantive international criminal law?
– Under which circumstances (status of a specific concept under human rights law, status of a specific crime under international and/or national criminal law, composition of chambers etc.) and within which dogmatic framework do judges of international criminal courts and tribunals refer to international human rights law?
– What are the factors (professional background, legal system in which the judge was educated/was acting professionally) that determine if and how judges refer to international human rights law?
– What are the conditions under which it is appropriate for judges of international courts and tribunals to refer to human rights law and what are the benefits of such reference?

According to the hypotheses underlying this research project, recourse to international human rights law is necessary and helpful for judges in international criminal tribunals due to a variety of reasons:

– International criminal law and international human rights law have common roots; international criminal law developed, in a large part, out of the human rights discourse. However, the differences in scope, the scenarios covered, the actors, addressees and the general framework of a penal system versus a rights- based system do often allow only for limited recourse.
– Reference to international human rights law is often indispensable for judges who have to shed light on the scope of a certain crime under

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customary international law, highlighting *opinio iuris* and State practice in a certain area of human rights law. This is due to the area of conflict between the broadly sketched definitions of crimes under international law on the one hand and the judges' obligation to adhere to the principle of *nullum crimen sine lege* on the other hand. Recourse to human rights law is more likely in areas of human rights which are well-established and governed by 'robust' conventions rather than soft law. For crimes which have a counterpart in national criminal legislation, human rights law is more often consulted.

– Experts in public international law are more open to the application of extra-statutory law in general and human rights law in particular.
– Reference to international human rights law strengthens legal arguments and the persuasive power and therefore raises the legal weight of judgments in an area of law which continues to be under construction by drawing from a field of law which offers a sophisticated and well-established convolute of legal dogmatic theory and jurisprudence.
– Reference to international human rights law is a suitable tool for judges to determine the content of a crime under customary international law. However, currently, recourse to human rights law often appears as a necessary box to be ticked in judgments without a deeper understanding of the legal concept in question. In the absence of streamlined international criminal law education, a balanced composition of the Chambers, taking into account various backgrounds, as well as continuous training for judges is advisable.

Generally, reference to human rights law offers international courts and tribunals the opportunity to benefit from decades of work and experience of international human rights courts and committees and their jurisprudence.

This book focuses on the influence of international human rights law on the development and practical application of *substantive* international criminal law. While the majority of scholarly research in the area concentrates on the application of human rights law in procedural international criminal law, in particular the right to a fair trial,[13] this work examines why and how human rights law can be and is used in substantive law in

13 See recently eg Jessica Almqvist 'Complementarity and Human Rights: A Litmus Test for the International Criminal Court' (2008) 30 Loyola of Los Angeles International and Comparative Law Review 20 (2008) 336-366; Segun Jegede 'The

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order to define crimes under international law. However, procedural international criminal law and how it is influenced by international human rights law will be also touched upon for two reasons: the first reason is that the two concepts are frequently blurred in the approaches of the persons applying the law as well as in academia. When one asks the question of recourse to human rights law in international criminal law, most of the practitioners interviewed were zooming in on one of the two aspects, procedural or substantive, dismissing or disregarding the other. The second reason why it is impossible to delve into substantive law without having first considered the rules regarding the application of human rights law in procedural matters is that both set of rules are intertwined and frequently misunderstood even by the practitioners. It is important to disentangle the provisions and rules of international law allowing recourse to human rights law in international law and scrutinize which type of recourse, procedural or substantive, they allow for.

The work will not deal with the issue of deterrence of crimes and the potential use of human rights law to further any deterrent effect of international criminal law. This limitation is set despite the repeated (self-) assertion of international criminal *ad hoc* tribunals of their work contributing to the prevention of conflict and crime under international law.[14] Apart from exceeding a feasible scope of a research project, the issue of deterrence is

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Right to A Fair Trial in International Criminal Law' in Chile Eboe-Osuji *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Nijhoff Leiden 2010) 519-548; Manoj Sinha *International Criminal Law and Human Rights* (Manak Delhi 2010); Thomas Kruessmann (ed) *ICTY: Towards a Fair Trial?* (Vienna Neuer Wissenschaftlicher Verlag 2008); Damien Scalia 'Long-term sentences in international criminal law: Do they meet the standards set out by the European Court of Human Rights?' (2011) 9(3) Journal of International Criminal Justice 669-687; Rebecca Young '"Internationally Recognized Human Rights" Before the International Criminal Court' (2011) 60 International and Comparative Law Quarterly 189-208.

14 Eg *Prosecutor v Aleksovski (Appeal Judgment)* IT-95-14/1 (24 March 2000) para. 185; *Prosecutor v Delalić et al (Celebići Case Appeal Judgement)* IT-96-21-A (20 February 2001) para. 806; *Prosecutor v Todorović* (Judgment) IT-95-9/1-S (31 July 2001) paras 28-30; *Prosecutor v Krnojelac (Judgment)* IT-97-25 (15 March 2002) para. 508; *Prosecutor v Furundžija (Judgment)* IT-95-17 (10 December 1998) para. 288; *Prosecutor v Erdemović (Sentencing Judgement)* IT-96-22-T (29 November 1996) para. 64; *Prosecutor v Hadžihasanović et al* (Judgment) IT-96-22-T (29 November 1996) para 64; *Prosecutor v Perišić (Judgment)* IT-04-81-T (6 September 2011) para 2204; *Prosecutor v Ntakirutimana (Judgment)* ICTR-96-10 and ICTR-96-17-T (21 February 2003) para 882; *Prosecutor v*

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a controversial subject, it is hard to measure and many doubt the existence of any deterrent effect of international criminal law altogether.[15] As the author of this study is a public international lawyer by training, the subject will generally be approached from the entry point of public international law in general and international human rights law in particular. Ultimately, the study aims at pointing out synergies between the two areas and seeks to narrow the gap that often prevents further synthesis.

Niyitegeka (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Rugambarara (Judgment)* ICTR-00-59-T (16 November 2007) para 11; *Prosecutor v Ntawukulilyayo (Judgment)* ICTR-05-82-T (3 August 2010) para. 463; *Prosecutor v Kalimanzira (Judgment)* ICTR-05-88-T (22 June 2009) para. 741; the ICC lists deterrence as one of its goals in the Preamble to the Rome Statute but has been remarkably quiet about the presumed deterrent effect of its work and has not referred to deterrence in its so far only two judgments *Prosecutor v Thomas Lubanga Dyilo (Judgment)* ICC-01/04-01/06 (14 March 2012) and *Prosecutor v Mathieu Ngudjolo (Judgment)* ICC-01/04-02/12 (18 December 2012).

15 See further Payam Akhavan ‘Beyond Immunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95(1) American Journal of International Law, 7-31; Payam Akhavan ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ (1998) 20(4) Human Rights Quarterly, 737-816; Mirjan Damaška ‘What is the Point of International Criminal Justice?’ (2008) 83 Chicago-Kent Law Review 329-369; Hunjoon Kim and Kathryn Sikkink ‘Explaining the Deterrence Effect for Human Rights Prosecutions for Transitional Countries’ (2010) 54(4) International Studies Quarterly 939-963; Julian Ku and Jide Nzelibe ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?’ (2006) 84(4) WashingtonUniversity Law Review 777-833; Christopher W Mullins and Dawn L Rothe ‘The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment’ (2010) 10(5) International Criminal Law Review 771-785; Robert D Sloane ‘The Expressive Capacity of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43(1) Stanford Journal of International Law 39-94; Immi Tallgren ‘The Sensibility and Sence of International Criminal Law’ (2002) 13(3) European Journal of Public International Law 561-595; David Wippman ‘Atrocities, Deterrence and the Limits of International Justice’ (1999-2000) 23 Fordham International Law Journal 473-488; Danilo Zolo ‘Peace through Criminal Law?’ (2004) 2 Journal of International Criminal Justice 727-734.

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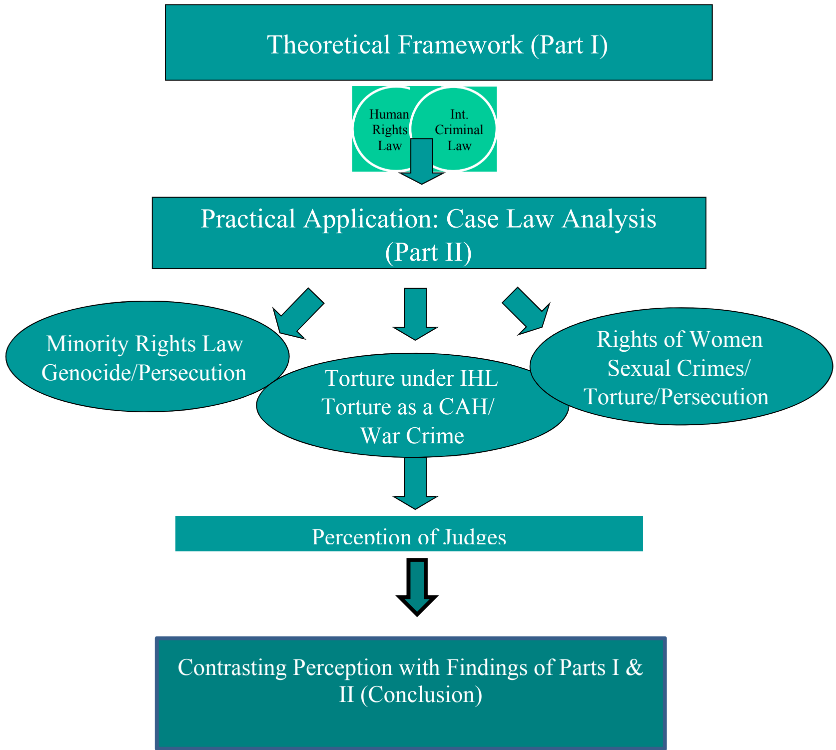

The study is divided into three broad parts which broadly correlate to three different methodological approaches. Traditional analysis and interpretation of positive norms as well as literature exegesis lay the theoretical framework of the research project in Part One. Starting from case law analysis, an inventory of the use of human rights law in substantive international criminal law is created in Part Two regarding the areas of the prohibition of torture, minority rights and sexual violence. Together with the empirical part (Part Three) consisting of interviews with judges at the ICC and the ICTY, this deductive deficit analysis illustrates the perception practitioners in international criminal law have of the relationship between human rights law and international criminal law. Furthermore, it shows how their respective perception shapes the willingness of the judges to refer to human rights law in their jurisprudence and points out which dogmatic considerations are undertaken. Thereby, the study points out to what degree a recourse to human rights law is likely in the future of internation-

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al criminal courts and tribunals. It further illustrates under which conditions such recourse is appropriate and helpful for the practical application of international criminal law.

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