Part Three: Perception of the Value of Human Rights Law from the View of Practitioners

Chapter One: Perceptions of Human Rights Law in a Diverse Professional Environment

The analysis of the cases of *ad hoc* tribunals throughout the earlier part of this work showed that the existing links between international criminal law and many parts of human rights law are at best rudimentarily used.[761] It also demonstrated the dangers and pitfalls of the decentralized production and diffusion of norms in international criminal law. Enormous freedoms and responsibilities are bestowed upon the judge in this field due its rudimentary nature. The variety of professional backgrounds and expertise of judges not only feeds into this fragmentation of norms but intensifies it. Because of the judges' preeminent role, interviews are crucial if one wants to understand what drives the actual practical application of human rights law or the lack thereof, how the preconceived perception of the relationship of human rights law in international criminal law shaped said application, the understanding of when judges are mandated to apply human rights law and to what benefit.[762] This part is predominantly based on a qualitative study including 14 semi-structured expert interviews conducted

761 An adapted version of this part of the research has been published in Mayeul Hiéramente and Patricia Schneider *The Defence in International Criminal Trials: Observations on the Role of the Defence at the ICTY, ICTR and ICC* (Nomos 2016). The contribution is entitled 'Arguing Human Rights from the Bench? How Judges in International Criminal Courts Perceive International Human Rights Law', 72-92.

762 Interviews with judges were chosen due to their distinguished role in the trial as envisaged by the Rome Statute and the ICTY Statute. In practice, judges also rely on the legwork done by their Legal Officers. The nature of the work and the degree to which Legal Officers shape the judges decisions varies from judge to judge. It would be interesting to focus on Legal Officers, their background and if judges choose Legal Officers with similar expertise and background as their own (as far as they have the opportunity to choose in the recruitment process) or if they chose Legal Officers with different, but complementing backgrounds. As, in any case, judges have the overall authority over their decision and the last say in them, coupled with the authority bestowed upon them by the Rome Statute,

with 12 judges at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICC between January 2010 and January 2012 (two judges agreed to be interviewed twice).[763] The questions on which these conversations were based can be found in the annex. As judges can sit in more than one Chamber, the seven of the judges were assigned to a Pre-Trial Chamber, five to a Trial Chamber and five to an Appeals Chamber. The selection of judges as interviewees was based on the following factors. The ICTY is the international criminal tribunal which assembled by far the largest body of case law (also exceeding the ICTR) and this case law fundamentally shaped international criminal law in the past and will continue to do so in the future. The ICC as the permanent forum of international criminal litigation will build up on this case law and further contribute to its development and sophistication. The research sought a balance between the two institutions, and includes judges with considerable experience acting as judges in international criminal courts and tribunals as well as those whose experience as judges in international criminal justice was fairly recent. In approaching the judges for an interview request, consideration was also paid to maximal possible diversity as to their professional background (academic, judge, prosecutor, diplomat etc), field of expertise (public international law/criminal law), national background, legal system in the country of origin or education as well as diversity in gender and age. That being said, the number of interview partners is comparably low as there are in fact only a limited numbers of judges practising international criminal law.[764] To these judges, access is restricted. There are a number of potential interview partners who generally declined to speak about the way their decision-making process is conducted. Given these

judges were deemed to be the appropriate interview partners for the terms of this study.

763 All interviews with ICC judges were conducted during a four months stay of the author as a visiting professional at the International Criminal Court from January 2010 until April 2010. This programme is specifically designed for professionals to do their own research project on international criminal law. Later on, the author worked at the International Criminal Court as a staff member. During her time as an ICC staff member, no interviews with ICC staff was conducted. The interviews with ICTY judges were conducted between January 2010 and April 2010 and between May 2011 and January 2012.

764 The ICC, for example, has 18 serving judges and 23 former judges. Of the 18 serving judges, six judges have only been appointed to the bench after the last round of interviews was conducted in 2012.

limitations, the present qualitative study does not claim to present a comprehensive picture of the perception of human rights law in international criminal law. However, the data can help identify major tendencies in how the background and experience of judges can influence their understanding and interpretation of legal problems surrounding the role and application of human rights law in international criminal law. Data from the interviews was analyzed in light of and juxtaposed with other sources, applying the concept of triangulation. These sources included the documents such as judgments, official court documents and records and participations, conversations with legal practitioners and other experts of international criminal law on formal and informal levels and trial observation. Furthermore, judges volunteered their assessment of the various approaches of their colleagues in relation to their backgrounds, which again allows more general inferences and tendencies. While the interviews were not tape-recorded, notes were made during the interviews. The interviewees were assured of their anonymity. Hence, the references to the anonymized interviews do not refer to transcribed records but to notes made during and immediately after the the interview. Particularly note-worthy statements, which are quoted directly in the following, were noted from memory.

A number of scholarly works, from legal, sociological and anthropological perspectives, have dealt with creation of prosecutorial and investigative strategies and judgments in courts and with the question what big a role a systematic exegesis really plays vs the role attributed to external factors.[765] Mainly, these works have been dealing with the interpretation of national constitutions, thus with legal norms that are by definition

765 Eg Christina Boyd, Lee Epstein and Andrew Martin 'Untangling the Causal Effects of Sex on Judging' (2010) 54 American Journal of Political Science 398-411; Nienke Grossmann 'Sex Representation on the Bench and the Legitimacy oft he International Criminal Courts' (2011) 11 Internationnal Criminal Law Review 643-653; John Hagan, Ron Levi and Gebrielle Ferrales 'Swaying the Hands of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia' (2006) 31(3) Law and Social Inquiry 585-616; John Hagan and Ron Levi 'War Crimes and the Force of Law' (2005) 83(4) Social Forces 1499-1534; Kimi Lynn King and Megan Greening ‚Gender Justice of Just Gender? The Role of Gender in the Sexual Assault Decisions at the International Criminal Tribunal of the Former Yugoslavia' (2007) 88 Social Science Quarterly 1049-1071; 'Uwe Kranenpohl ‚Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts' 48 (2009) Der Staat 387–409; Rüdiger Lautmann *Freie Rechtsfindung und Methodik der Rechtsanwendung* (C

rather broad in order to be flexible enough to be applied to a variety of cases. Naturally, the nature of a national constitutional court differs from that of an international criminal court. To name the most obvious difference, a criminal court has, at all times, to ensure that it operates within the limits imposed on it through the principle of legality. Whereas constitutional courts can, to a large extent, be self-referential in the way that they refer to principles of a constitutional order which the courts constructed themselves out of the constitution,[766] criminal courts, when concretising the given norms, need to refer to systems outside of their own legal discipline in a narrow sense. They consult, for instance, the answer found to similar questions posed to national legal systems or human rights law. Constitutional courts can deliberately maintain a certain dogmatic vagueness in their decision so as to keep the body of case law flexible enough for their predecessors to apply it to new situations and future challenges the court is faced with. Criminal courts, on the contrary, are faced with the obligation to define a certain text in light of what a person, at the time of his or her actions that lead to his/her indictment before the court, could have reasonably held to be legal or illegal.

However, as international criminal law is a rather new legal discipline, the judges can often not resort to a lot of scholarly literature, commentaries or preceding cases, but have to define the limits and the scope of a specific crime themselves. In order to make the general terms of the Rome Statute or the ICTY/ICTR Statute sufficiently concrete to work with them in criminal proceedings, the judges are obliged to interpret the terms, keeping in mind the principle of legality. The leeway that the courts naturally have with this new body of law, when examining its limits and the terms of its application, will decrease on its own due to the growing number of case law in the area. Even though the courts are not bound by precedents within their own institution, let alone by case law decided at another international criminal court or tribunal, they tend to either adhere to previ-

---

Schon München 1967); Rüdiger Lautmann *Justiz—Die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse* (Athenäum Verlag Frankfurt am Main 1972); Ernst Gottfried Mahrenholz 'Probleme der Verfassungsauslegung, Verfassungsinterpretation aus praktischer Sicht' in Hans-Peter Schneider (ed) *Verfassungsrecht zwischen Wissenschaft und Richterkunst: Konrad Hesse zum 70. Geburtstag* (Heideberg Müller 1990) 53–65;.

766 Uwe Kranenpohl ‚Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts' 48 (2009) Der Staat 387–409, 398.

ous decisions or, if the arguments used previously are dismissed, usually do so with an explicit explanation of why the court or tribunal decided not to follow what has previously been decided.

Furthermore, as determined above, international criminal law derives from the most serious violations of human rights, and human rights law, like constitutional law, is generally formulated in a very broad manner, and, indirectly, protects basic rights of a human person and therefore subject to extensive acts of interpretation by the judges who apply the law.

Additionally, both constitutional courts and international criminal Courts and Tribunals (or rather their Appeals Chambers) have to exercise an increased degree of self-control, as their judgements are not subject to the control by any other court of higher instance. When it comes to the ICC, an aggravating factor, which called for a particularly high degree of interpretation by the practitioners, is, that the Rome Statute is a compromise which has been drawn up by the States Parties under time pressure and therefore, at occasions, contains contradictory passages.

Hence, the tools available to the judges in order to interpret the normative framework in which they operate are similar, as is the inconsistency when it comes to working with those tools and methods. As has been observed in relation to the interpretation of national constitutions by national constitutional courts, 'the court, in truth, aims for the result which seems right to it. On the way to this [result], it adheres to basic exegetical rules or other principles of constitutional interpretation as pilot lights, but not as guarantees for the right result; they are buoys rather than pilots' (translation by the author).[767]

Therefore, the question, in the context of this work, is to what extent it can be expected that the way a judge evaluates the use of human rights law within substantive international criminal law is shaped by his or her professional and other background.

Traditionally, the events leading to a judicial decision-making process are categorized in accordance with seven different phases.[768] In the first phase, the problem is identified and the judge familiarizes himself or her-

767 Ernst Gottfried Mahrenholz 'Probleme der Verfassungsauslegung, Verfassungsinterpretation aus praktischer Sicht' in Hans-Peter Schneider (ed) *Verfassungsrecht zwischen Wissenschaft und Richterkunst: Konrad Hesse zum 70. Geburtstag* (Heideberg Müller 1990) 53–65, 60.

768 Ernst Gottfried Mahrenholz 'Probleme der Verfassungsauslegung, Verfassungsinterpretation aus praktischer Sicht' in Hans-Peter Schneider (ed) *Verfassungsrecht*

self with the situation he or she is called upon to judge. In phase two, the judge explores the alternatives for a possible solution of the situation. In the third phase, the judge gathers the facts for the different alternatives, the judges explores the circumstances of the case out of the pleadings and hearings. In phase four, the judge looks at the normative framework applicable to the situation and explores whether the alternatives are legally correct. The judge chooses one of the alternatives in the fifth phase. In the sixth phase, the chosen alternative is explained, the judgment is reasoned and delivered. Finally, the post-decision process constitutes the seventh and last phase. The decision-maker receives criticism and learns for his or her decision in the future.[769] Even though this is simply a descriptive formula which does not apply to all cases, the phases cannot be clearly distinguished from each other and the decision-maker often does not consort to the different phases in a chronological order, the formula helps to categorize the different fundamental phases of judicial decision-making.[770]

In the following, phases four and five are primarily scrutinized in order to inquire to what extent the professional and or personal background of the judges can play a role in the decision-making process in relation to the judges perception of the importance of international human rights law in substantive international criminal law and the judges' general willingness to use human rights law in order to define crimes under international law. The most significant factors in relation to the background of the judges are highlighted and analysed based on the empirical data collected.

There are plenty of ways in which the composition of a bench can shape the outcome of the trial. This is not to assume that the individuals who serve as judges belong to different homogenous groups and can be defined or define themselves by belonging to this group first and foremost. This solitarist approach to groups of human beings ineligibly shortens the view on the individuals belonging to that group who, in fact, belong to different groups and do not exclusively define themselves as a member of a

---

zwischen Wissenschaft und Richterkunst: Konrad Hesse zum 70. Geburtstag (Heideberg Müller 1990) 53–65, 60.

769 Rüdiger Lautmann *Justiz—Die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse* (Athenäum Verlag Frankfurt am Main 1972) 15.

770 Rüdiger Lautmann *Justiz—Die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse* (Athenäum Verlag Frankfurt am Main 1972) 15.

single group.[771] Even less so, it would be possible for the individuals belonging to a certain group to define, in a fixed homogenous way, what are the components of which this group is made up.

Nevertheless, there are a number of dividing lines which could possibly be of relevance to the work of the ICC and the ad hoc tribunals and which could influence the decision-making of the judges. Apart from the professional or geographical background of the members of the bench, their understanding of the role of human rights law in their work of applying international criminal law could also be framed in terms of which basic legal system is used in their country of origin, whether it is Common Law or Civil Law and whether they have been working mostly as academics or practitioners.

I. Safeguarding Professional Diversity on the Bench at the ICC and the ICTY

Pursuant to Art. 36 (3) (b) Rome Statute, a judge at the International Criminal Court shall either

i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

At the ICC, the focus is, pursuant to Art. 36 (5) Rome Statute, explicitly put on the judges with a criminal law background. They shall, in the first election, make up the majority of at least nine judges whereas at least five of the judges shall have an international law background. In its first session between 3 and 7 February 2003, the Assembly of States Parties elected 18 judges for a term of office of three, six and nine years. Further ordinary elections took place in 2006, 2009, 2011 and 2014. At the time of the writing, the next ordinary election is scheduled for Deember 2017 at the

771 See Amartya Sen *Identity and Violence: The Illusion of Destiny* (WW Norton & Co New York 2006.).

17th session of the Assembly of State Parties.[772] Additionally, the Assemby of States Parties elected some judges in special elections, eg when a judge resigned or passed away. Currently, there are 13 judges from list A (criminal law) and five judges from list B (international law) serving at the ICC.[773] However, some of the individuals listed as experts under list A do also have considerable experience under international law, so the lists do not always clearly reflect the focus of a judge's experience.

The assessment of whether a judge has the necessary qualification is to a large degree driven by the Coalition for the International Criminal Court (CICC), an association of civil society organizations which, since 2006, asks candidates to fill in questionnaires establishing their competence and motivation and organizes public seminars with and debates amongst the candidates.[774] These measures seek to contribute to the raising the respective candidates' expertise and assist the Assembly of State Parties in deciding about the competence of a candidate.[775] The questionnaire provided to the judges asks them, inter alia, about the legal systems they were educated and have worked in.[776] It also asks in detail about the experience in either criminal law (for List A candidates) or international law (for List B candidates) and invites the candidates to share their experience which would qualify them for running on the list they are not appointed on.[777] Additionally the nomination process is addressed and the candidate is requested to lay down what qualification a person needs to have to be appointed to the highest judicial office in his or her respective country as stipulated in Art. 36 (3) (a) Rome Statute.[778] The CICC addresses the issue of further training and skill enhancement stating that at the ICC as 'unique

772 Further information can be found under < http://www.coalitionfortheicc.org/fight/icc-elections-2017> (31 October 2017).

773 See < https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/default.aspx#> (31 October 2017).

774 Coalition for the International Criminal Court 'Judges' <http://www.coalitionfortheicc.org/topics/judges> (31 October 2017); See for the 2017 election of judges http://www.coalitionfortheicc.org/fight/icc-elections-2017 (31 October 2017).

775 < http://www.coalitionfortheicc.org/topics/judges> (31 October 2017).

776 Questions 7 a) and b); the questionaires with the anwers of the candiates for the 2017 Elections can be accessed under Coalition of the ICC 'Questionnaire for ICC Judicial Candidates: December 2017 Elections' <http://www.coalitionfortheicc.org/fight/icc-elections-2017> (31 October 2017).

777 Ibid Questions 8 a) and b).

778 Ibid Question 4.

institution', 'even judges with significant prior experience …may not necessarily possess requisite skills and knowledge to manage these challenges'.[779] The questionnaire therefore explores the candidates' attitude towards the idea of 'ongoing workplace training aimed at promoting legal innovation and coordination amongst all judicial chambers in adjudicating complex questions of the human rights relating to law and policy'.[780] Finally, the CICC questionnaire explicitly addresses advocating for, reference to and application of human rights law. Question 16 of the questionnaire asks 'Do you have any experience working with or within international human rights bodies or courts and/or have you served on the staff or board of directors of human rights or international humanitarian law organizations?'[781] Since 2011, Question 17 is included to specifically ask about the reference to human rights law: 'Have you ever referred to or applied any specific provision of international human rights or international humanitarian law treaties within any judicial decision you have issued within the context of your judicial activity or legal experience?'[782]

In addition, an independent high-expert panel was established by the CICC in 2010, which, for the first time, conducted assessments on whether each individual candidate matched the qualifications outlined in Art. 36 Rome Statute. Before the 2011 elections of judges during the Tenth Session of the Assembly of States Parties, the Independent Panel, consisting of experts of international law and criminal law, most of them former international criminal judges or prosecutors, found that four of the nineteen candidates lacked sufficient qualification to be elected as judges of the ICC.[783] None of the candidates assessed as 'not qualified' by the Independent Panel were under the six judges elected to the bench by Assembly of States Parties between 12 and 21 December 2011. In 2011, the Assembly of States Parties set up an Advisory Committee on the Nomination of Judges which builds on the work of the Independent Panel and which also

779 Ibid Question No. 11.
780 Ibid.
781 Ibid Question 15.
782 Ibid Question 16.
783 Coalition for the ICC http://iccnow.org/documents/CICC_Press_Release_Report_of_the_Independent_Panel_on_ICC_Judicial_Elections_271111_EN.pdf (1 October 2015).

evaluates candidates prior to elections to the ICC bench.[784] This goes to show the increasing influence and importance that NGOs have in the area of international criminal law, where civil society has continuously pushed for the improvement and enhanced implementation of international criminal law.[785]

The majority of current judges under list A (experts of criminal law and procedure) does have no or only limited experience of the other category of relevant law. The same holds true for judges under list B (relevant areas of international law) regarding their expertise in criminal law. However, some judges indicate extensive expertise in both categories and could therefore have appeared under a different list. Article 39 (1) of the Rome Statute states that 'the Trial and Pre-Trial Divisions are composed predominantly of judges with criminal trial experience.' Insofar the focus on criminal experience and expertise in the chambers is a deliberate move and mirrors the merit that the court attaches to criminal law as opposed to international law in its everyday work. One reason for this might be that some of the interviewed judges saw the real challenges for the court in its procedural aspects, for which an expertise in criminal law and procedure and a mindset for the potential pitfalls of criminal trials in this respect is vital.[786] As one judge formulated it: 'the devil is in the procedure'.[787] The group of international law experts is generally more heterogeneous than the criminal law group. Whereas some of the judges previously to serving at the bench, held high positions in international organizations pertaining to human rights or humanitarian law, others were scholars, diplomats or worked in fields related to international law which are, at first sight, more detached from international criminal law.

At the ICTY the situations is slightly different, as there is no explicit quota system dividing the bench into international law and criminal law

784 Coalition for the ICC < http://www.coalitionfortheicc.org/news/20141009/expert-panel-reports-qualifications-icc-judicial-candidates > (31 October 2017); http://www.coalitionfortheicc.org/news/20171011/asp-committee-all-12-icc-judicial-candidates-pass-test-six-are-particularly-well (31 October 2017).

785 A good example of this was the recent attempt by the Southern Africa Litigation Centre to prevent Sudanese President Omar al-Bashir, for who the ICC issued a standing arrest warrant, from leaving South Africa where he travelled for a meeting of the African Union.

786 Interview No 2.

787 Interview No 2, p. 1.

experts in a provision which is otherwise very similar to the one in the Rome Statute. The respective provision in the ICTY Statute reads:

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

The ICTY is currently composed of 7 judges.[788] Compared to that of the ICC, the present composition of the ICTY is somewhat more homogenous. The majority of the present judges have served as judges in their respective national jurisdictions before being appointed as judges of the ICTY. Most of the judges additionally had experience with criminal trials and a certain expertise in criminal proceedings prior to coming to the ICTY.

1. General attitude of judges towards the importance of HRL in ICL

When asked about the general importance attributed to human rights law in international criminal law, most judges, at first sight, display a conviction that human rights law has a high degree of importance to their work. Many judges referred to the development of international criminal law and, the common roots of human rights, humanitarian law and international criminal law, as well as to crimes under international law as severe violations of human rights.[789] Some describe human rights as always present in the work of the court. Even if that might not always be visible in the decisions that are produced and might not be explicitly mentioned there, these judges claim human rights issues are always underlying and present in the internal discussions. [790]

However, even in this generally framed question on the importance of human rights law on international criminal law, one can already spot differences between judges whose expertise lays primarily in the area of in-

788 At the ICTY, the numbers of judges are declining due to the imminent conclusion up of trials of first instance.

789 Eg Interview No 6; Interview No 7; Interview No 12.

790 Interview No 13; Interview No 7.

ternational criminal law and those who are first and foremost international lawyers. Whereas several judges, no matter which background, emphasized that their courts are criminal courts and not human rights courts and that therefore human rights play a somewhat ancillary role as compared to aspects of criminal law and procedure,[791] the criminal law experts often explicitly emphasized that their foremost task is to sit on a criminal court and some argue that the 'international element' is given too much weight, at least at the ICC.[792] It has also been stated that cases should be dealt with in a less academic manner, that the primary tasks of the ICC is to punish the perpetrators and help the victims, not 'to write beautiful decisions for academics'.[793] One judge describes human rights issues as 'not very urgent'.[794]

Interestingly, some of the judges pointed to the reciprocal effects of an increase in the use of human rights law in international criminal law for the field of human rights law. One judge used the example of the UN Commissioner for Human Rights, Navanethem Pillay, who, as a former judge of the ICTY and the ICC, draws from her practical experience in international criminal law by stirring up discussions about the impunity of human rights violations in her work as UN High Commissioner for Human Rights[795]. However, the answer to questions regarding the mutual effect of an increased interlinkage between the areas of international criminal law and human rights law is not always positive. One judge, for example, wondered whether international criminal law could also have a negative influence on human rights law, as is attached to human rights an 'aura of punitivity' which could hamper practical human rights work and keep States from enter into human rights commitments in the first place.[796]

791 Interview No 2; Interview No 5; Interview No 8; Interview No 10, Interview No 11.
792 Interview No 5, Interview No 10.
793 Interview No 5.
794 Interview No 2, p 1.
795 Interview No 3.
796 Interview No 4.

2. Specific relevance of the recourse to human rights law in substantive international criminal law

When asked about what areas of international criminal law could be most appropriate for the use of human rights law, most judges, criminal and international law experts alike, first pointed to procedural points, mostly to the right to a fair and expeditious trial, including the right to defend oneself, questions regarding the disclosure of evidence or to procedural rules for the protection of victims.[797] Whereas the international law experts usually by themselves referred also to the relevance of human rights law in the substantial aspects of defining a crime and exploring the boundaries of customary international law on a certain crime, most of the criminal law experts agreed that human rights law could be used in such way after it had been suggested to them by the interviewer. Some, however, dismissed the importance of international human rights law in substantive international criminal law altogether and claimed that most of the problematic issues in these regard had already been solved.[798]

When asked about what parts of human rights law would be the most obvious to take recourse to in substantive matters, the prohibition of torture was one of the areas most often referred to.[799] Here, judges mentioned concrete and widely ratified conventions like the CAT[800] or the ICCPR.[801] Minority rights law was generally not mentioned by any of the judges initially. Some judges agreed, after the suggestion by the interviewer that international criminal law can draw from minority rights law.[802] Yet, a certain confusion regarding what the concept of minority rights entails could be observed: whereas one judge rightly pointed out that the recognition of genocide and apartheid were influenced by concerns about minority protection,[803] one judge incorrectly claimed that minority rights law also covers the protection of women and could therefore be of value to the Court.[804] One can easily see how such a confusion about what the concept

797 Eg Interview No 2; Interview No3; Interview No 7; Interview No 8; Interview No 9; Interview No 11; Interview No 12.
798 Interview No 2; Interview No 6; Interview No 7.
799 Interview No 7; Interview No 10; Interview No 12.
800 Interview No 10; Interview No 12.
801 Interview No 10.
802 Interview No 7; Interview No 10; Interview No 12.
803 Interview No 12.
804 Interview No 7.

could prevent the court from seeking assistance in the case extra-statutory human rights law would have to be consulted.

Women's rights were the issue, which was most often mentioned by judges when asked areas of human rights of interest to substantive international criminal law.[805] However, the judges seemed to have only a vague idea where to find helpful instruments in this area. One judge mentioned CEDAW, in all other cases, the mention of women's rights seemed to have been guided merely by a vague idea of usefulness without any concrete provisions or concepts to draw from.[806]

The question of how it can be used and what are the limits of a use of human rights law in light of the principle of legality is characterized by a certain dogmatic vagueness. Whereas basically all the judges mentioned Art. 21 (3) Rome Statute as the provision which allows them to use human rights so to a certain extent, the exact meaning of that provision and the possibilities it opens for judges to make reference to human rights seems to be rather unclear. In particular, no judge mentioned that Article 21 (3), as examined above, may not be the right provision for including human rights law into substantive international criminal law.[807] Many judges seemed to be satisfied with Art. 21 (3) Rome Statute as a sufficient legal basis for applying international human rights law. In particular, customary international law as a source seemed to not be of particular relevance to the judges and was rarely brought up. Asked about how human rights can be used in international criminal law, particularly with regard to Art. 21 (3) Rome Statute, the judges gave a variety of different answers many of which contradicted each other. Human rights were seen as 'underlying principles'[808], 'sources of inspiration'[809] 'almost binding principles'[810] 'persuasive, but non-binding inspiration'[811], 'sources of brainstorming on

805 Interview No 2; Interview No 7; Interview No 10; Interview No 11; Interview No 13.
806 Inerview No 7.
807 See Part One Chapter Three above.
808 Interview No. 7; one judge additionally mentioned Art. 21 (2).
809 Interview No. 10.
810 Interview No. 7.
811 Interview No. 8; Interview No. 12.

a legal issue'[812], 'guiding principles'[813] and 'underlying constitutional provision'[814].

Some judges saw it as 'two sides of the same coin'[815], others dismissed this rhetorical figure and instead insisted on a 'qualitative difference'[816] of the two regimes, which they saw as not being of equal value, but which 'complement and reinforce each other'[817] or 'complement and inform each other'.[818]

II. Professional and Personal Factors Contributing to the Attitude towards International Human Rights Law

1. Public International Law Experts/(National) Criminal Law Experts

As can be inferred from the analysis of the previous sections, the dividing line between public international law experts and experts of criminal law was found to be one of the most decisive factors regarding the attitude towards human rights law. Experts of criminal law often seemed to be somewhat dismissive of the 'international element' of international criminal law and stated that this element is given too much weight in international criminal practice.[819] Human rights law in international criminal law was for most of the criminal law experts mostly a procedural issue, though most, but not all,[820] agreed that human rights law could also be used in the substantive definitions of crime when so suggested.

Generally, the criminal lawyers seemed to have less of a dogmatic problem with recourse to international human rights law in order to define

812 Interview No. 9.
813 Interview No. 9.
814 Interviews No. 5, 7, 8 and 10; in Interviews Nos 5 and 7, the term 'underlying constitutional provision' was brought up by the interviewer who asked the judges whether this is a term they could agree to in relation to human rights in international criminal law.
815 Interview No. 10.
816 Interview No. 11.
817 Interview No. 11.
818 Interview No 12.
819 Interview No 5, Interview No 10.
820 Interview No 2; Interview No 6; Interview No 7.

crimes, which, in general, they saw as not problematic.[821] In particular, they did often not see a dogmatic difference in the application of human rights law in substantive as opposed to procedural law. This might partly be due to the fact that the criminal lawyers interviewed also tended to have a purely practical background, whereas many of the international law experts have been working as academics prior to becoming judges at the ICTY or the ICC. One judge simply held that if the ECtHR came up with a decision which 'can equally work for the ICC' and can be used there, it becomes part of international criminal law.[822] One judge suggested to narrow down the quota in Art. 36 (3) (b) (i) to experts of international criminal law as opposed to general criminal law and procedure as a way to ensure quality throughout the bench.[823] In light of the limited number of established experts in the field on the one hand coupled with geographical quota requirements on the other hand, this suggestion does not seem viable at this point in time.

One judge stated that 'reference to human rights law is made to support already existing convictions and views' on a certain topic.[824] In the same vein, another judge said that what she was interested in is the impact of her decisions 'on the people' and not so much where they stem from.[825] This is congruent with the sociological findings regarding the decision-making process of judges in national legal systems[826] and also confirms an observation made by Antonio Cassese regarding the use of comparative law as an extra-statutory source of law at the ICTY.[827]

821 Interview No 5; Interview No 6;Interview No 7; Interview No 9.
822 Interview No 9.
823 Interview No 7.
824 Interview No 1.
825 Interview No 9.
826 Rüdiger Lautmann Justiz—Die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse (Athenäum Verlag Frankfurt am Main 1972) 101.
827 'Mon experience est que souvent le droit comparé est utilisé pour confirmer une solution que l'on avait déjà trouvée' Antonio Cassese in Mireille Delmas-Marty and Antonio Cassese (eds) *Crimes Internationaux Et Jurisdictions Internationales* (Presses Unversitaires de France Paris 2002) 140.

2. Common Law/Civil Law

The question whether they were educated in a common or in a civil law system was explicitly posed to the interviewees and some expressed opinions on whether and how this background influenced their work and the collaboration with their colleagues. Pursuant to Art. 36 (8) (a) (i) Rome Statute, the principle legal systems of the world shall be taken into account in the selection of the judges. Several of the judges emphasized that they see a dividing line between judges coming from civil law countries and judges with a common law background in their work.[828] This perception is backed by analyses of the deciding attitude of judges at the ICTY, which found clear differences between civil and common law judges in the way they refer to sources outside of international criminal law in order to back their arguments.[829]

One judge mentioned that there is more 'separation' by judges from common law countries: the judge was of the opinion that judges educated in common law systems were generally more willing than their colleagues from civil law countries to apply human rights regarding procedural, formalistic issues (rights of the accused regarding deadlines for submissions etc.) but that the strive for 'clean, clear criminal law' without referring to extra-statutory provisions.[830]

For another judge, the common law/civil law divide was interlinked with question of whether a judge came from a country which was a former British colony. This judge was of the opinion that judges coming from former British colonies applied Common law in a more dogmatically strict fashion than colleagues from the United Kingdom.[831] For most judges, List A and List B judges alike, this issue did, however, not pose a particular problem, even though one could suspect that judges with an expertise in international law might be more used to a flexible approach in this respect.

---

828 Interview No 1, Interview No 6.

829 Michael Bohlander and Mark Findlay ,The Use of Domestic Sources as a Basis for International Criminal Law Principles' (2002) 2 Yearbook of International Law and Jurisprudence 3–26.

830 Interview No. 1.

831 Interview No 6.

3. Academics/Practitioners

Closely related to whether judges are criminal law or international law experts is the question whether they have a theoretical, academic background or expert a purely practical one. This issue was brought up by several judges on their own account, as it was not part of a question put to the judges, and the ones who brought it up usually felt strongly about the subject.[832] All the judges who brought up this topic were appointed on List A as experts of criminal law and they were all practitioners who had served as judges or prosecutors in their respective countries. These judges emphasized that the courts and tribunals needed more practitioners and deemed work with practitioners easier than with 'professors'.[833] Two of these judges criticised the way of evaluation and decision-writing: judges were writing 'too much', [834]facts should be dealt with in a 'less academic manner'[835] but in a more practical way ('help victims, punish perpetrators'[836]) as it was not about 'writing beautiful decisions for academics'[837] or writing 'for the public'.[838] Additionally, a desire to 'write history' and 'lay down principles' at the expense of efficiency and goal-oriented action' was criticized.[839] Another List A judge, however, stressed the importance of keeping up with developments in academic scholarly literature in decision-making.[840] None of the judges appointed through List B did express any views on the distribution of practitioners and more theory-focused individuals on the bench.

4. Developing Country/Industrialized Country

Application of human rights law might also depend also on the geographical background of the judge. According to Art. 36 (8) (a) (iii) Rome Statute the Court shall take equitable geographical representation into ac-

832 Interview No 5; Interview No 6; Interview No 13.
833 Interview No 13.
834 Interview No 6.
835 Interview No 5.
836 Interview No 5.
837 Interview No 5.
838 Interview No 6.
839 Interview No 5.
840 Interview No 9.

count when selection the judges. One European judge argued that human rights did not play a major role in practical international criminal law, but since they, as he argued, gained importance in the European legal discourse they receive more attention.[841]

However, the geographical background of the judge might not necessarily play a role in whether or not human rights law is referred to but rather which system of human rights protection is referenced. Several judges from the global south stated that international courts and tribunals frequently refer to case law of the ECtHR and underused jurisprudence and provisions from other regional systems of human rights protection. One judge argued that in terms of usefulness to international criminal law, the American system of human rights protection was more advanced than the European one as the IACtHR and the Commission dealt with massive human rights violations on a regular basis and therefore, their case law had more to offer to international criminal law.[842] Another judge argued that due to the fact that all cases before the court dealt with situations in African countries (at the time of the interview), more reference should be made to the African system of human rights protection and the use of human rights jurisprudence and rules should generally be more diversified.[843]

Additionally, one judge saw age as another decisive matter in how open a judge was to extra-statutory sources or input from outside he or her initial area of expertise.[844] This judge saw a generational shift in international criminal law and argued that older judges from the same generation generally had a more conservative approach to applying human rights law. The same judge argued that judges, in their decision-making process, are influenced by their personal experiences. Examples of these factors which were mentioned by this judge to be of influence were gender, sexual orientation and disability.[845]

841 Interview No. 1.
842 Interview No 7.
843 Interview No 8.
844 Interview No. 1.
845 Interview No. 1.

Chapter Two: Concluding Remarks

The answers given by the judges in the interviews conducted were often characterized by a certain dogmatic vagueness. This vagueness is by no means surprising given the multitude of diverse education and professional experiences of the judges which lead to different priorities in their work and differing degrees of attention given to the issue of human rights in international criminal law. Furthermore, in an area as vast as international criminal law which combines a plurality of different fields, it is nearly impossible to possess the same degree of expertise on all up and coming issues in academia and practice. For this reason, a bench consisting of several individuals whose expertise complements each other is of higher importance than in national criminal law where education is streamlined. On the other hand, due to the immense freedom that judges possess in the still emerging discipline of international criminal law, judges are under enormous pressure and their judgements regularly come under critical scrutiny. Therefore, it is even more important that the presence of international law experts on the bench is ensured. Currently, there are four Trial Chambers at the ICC in which only judges appointed from List A (experts in criminal law and procedure) are serving (even though one has to observe that most of these Trial Chambers have judges amongst them that do indeed also possess expertise in human rights law). It is also not evident why the ICC explicitly states that in its Trial Chambers, criminal law expertise is focussed on, whereas in the Appeals Chamber, most judges are appointed from List B (experts in international law).

The judges with an expertise predominantly rooting in criminal law often pointed to the need for a more practical approach at ICC proceedings and to the fact that the court was not established to write 'beautiful decisions' which are well-reviewed in academic circles.[846] Whilst the truth within this perception is the fact that the ICC and the *ad hoc* and hybrid courts, like any other criminal courts, decide on the guilt of individuals for specific actions, the problem that these new sorts of courts face is that they, at the same time, have to constantly justify the existence of their area of law and need to bring their reasoning in line with the principle of legality. This requires an enormous effort of justification on behalf of the judges, which might be something that international lawyers, as opposed

846 Interview No 5.

to criminal lawyers coming from national criminal justice systems, are used to.

Several times, the judges seemed to harbour scepticism towards the usefulness of human rights for their substantive work, in helping them to define crimes under international law. Several judges emphazised the importance of human rights law in international criminal procedure while, at the same time, downplaying its significance in terms of substantive law. Judges mentioned that according to them, the big problems regarding the definition of crimes are solved and the ICC will not have to deal with this issue majorly.[847] From a defence perspective, these statements should trigger a substantive amount of skepticism. On the one hand, it should be received positively by defence teams that the human rights of the accused in the pre-trial and trial period seems to have such a prominent role in the perception of the judges. This is particularly true for the ICC which has a chance to avoid some of the mistakes the ad hoc tribunals made in this respect, for example concerning the length of the trials. However, when one looks at the numerous innovations that the Rome Statute brings in comparison to previous statutes, stating that human rights law does not have any more to contribute to the substantive definition of crimes seems to be inaccurate. Particularly with regard to 'treaty crimes' which have previously been enshrined in human rights treaties only (such as the crime of apartheid [crimes against humanity, Art. 7 (1) (j) Rome Statute] or intentional attacks on UN personnel or other personnel or material involved in an assistance or peacekeeping mission [war crimes, Art. 8 (2) (b) (iii) Rome Statute], and to a lesser degree, forced disappearance [crimes against humanity, Art. 7 (1) (i) Rome Statute]) or regarding gender-based persecution will the ICC have to result sources outside the Rome Statute itself and will not be able to resort to case law issued by any other international criminal court or tribunal. This can lead to serious collisions with the principle of legality to the detriment of the accused. The very nature of the ICC as an international court, seen by some purely as a court functioning like any other criminal court and portrayed by others as an international court established to protect victims against mass violations seems to be disputed amongst judges.. The vagueness and the conflicting ideas portrays a spectrum of divergent opinions and dogmatic murkiness that should be worrisome to the attorneys representing accused persons.

---

847 Interview No 2; Interview No 6; Interview No 7.

As such, the approach of the CICC to assess candidates and work towards a comprehensive skill enhancement of judges seems to be the way forward. Incoherence in jurisprudence and legal norms in international law stems mostly from increasingly more separate legal regimes with a limited mandate.[848] International criminal courts and tribunals are few in numbers and with the establishment of a permanent International Criminal Court the numbers are likely to stagnate or, with the completion of the trials before the ICTR and the ICTY go down. As such, by ensuring that the question of how extra-statutory sources, in particular human rights law, can be used in international criminal law and what he limits of such an application are, international criminal law is confronted with the unique opportunity to counteract incoherent or conflicting jurisprudence at least to a certain degree and thereby avoid the level of fragmentation prevalent in more established fields like the law of the sea, human rights law or world trade law.[849] This is particularly crucial in international criminal law as enhanced fragmentation is likely to undermine the defendant's right to a fair trial.

848 Oliver Diggelmann and Tilman Altwicker 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 ZaöRV 623-650, 630.

849 Oliver Diggelmann and Tilman Altwicker 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 ZaöRV 623-650, 630; see also as referenced by Diggelmann and Altwicker Gerhard Hafner 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 849-863; George Abi-Saab 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 NYU Journal of International Law and Politics 919-932.