Conclusion

The examination pursued in this work was divided into three encompassing parts, which led to results that can be used independently as well as in conjunction. They map out the relationship between human rights law and substantive international criminal law in terms of *de lege lata* and dogmatic conception; the chances, pitfalls and prerequisites for an application of human rights law in substantive international criminal law; areas which present themselves as particularly well-suited for said application as well as taken and missed opportunities in this respect in the current jurisdiction; and the understanding of human rights law and its use by practitioners of international criminal law and what shapes this understanding.

Part One examined the reciprocal relation between human rights law and international criminal law, a subject that despite a multitude of research in both areas is still largely under-researched and not dealt with conclusively. This part acts as the legal theory basis of the research project. It outlines the similarities of both areas as law, starting from M. Cherif Bassiouni's Five-Stages-theory of the emergence and development of human rights, the criticism voiced against it as well as its relevance for a practical application of human rights law. It further follows up on the developments in jurisprudence and scholarly work since Bassiouni's model was published. It is concluded that, as a whole, Bassiouni's model of the evolution of human rights leading to a core group of rights whose mass violation is sanctioned by means of international criminal law, is not necessarily incorrect, but of limited value to practitioners applying substantive international criminal law.

Hence, as a first step, this book delves into explaining the dogmatic framework of how human rights law emerged and where international law fits in. This is crucial as a first step in determining how the two areas relate, how they evolved and to what degree they overlap or can even be considered to be congruent. As a next step, it is examined how the two areas are framed differently from the standpoint of legal policy, the addressee of the areas as well as the rights and obligations the areas convey to or demand of the addressee. Structural differences and similarities here decide to what degree human rights law can legitimately be used in international criminal law. Surely, both fields of law complement each other

and their cross-fertilization leads to further developments in both areas. On the other hand it is shown that international criminal law and human rights law are in some way exact opposites. Their way of development, the precision which its terms and instruments are defined, the legal principles which they have to adhere to, the behaviour (of States or individuals) which the law seeks to trigger (in terms of rights or obligations), all this differs to a substantive degree and has to be kept in mind by practitioners seeking to apply extra-statutory law. Furthermore, structural differences between the areas of human rights law and international criminal law do, without doubt, exist and have to be taken into account when recourse to human rights law is taken in international criminal law. The argument brought forward that for the sake of universality, no such differences should be acknowledged, is of particular importance when it comes to the application of human rights law in procedural international criminal law, where these differences could easily undermine the rights of the accused. In substantive international criminal law, however, there is already a different scope of protection due to the limited jurisdiction of international court and tribunals in cases of widespread mass commission of crimes.

However, while caution is advised against an uncritical application of human rights law in international criminal law in the judgments of its courts and tribunals, this study argues that the structural and dogmatic differences of both areas are often up for discussion and fewer in number than sometimes argued by scholars of both fields.

More than conceptional differences, it is a potential violation of *nullum crimen sine lege* which can make the application of human rights in substantive international criminal law a risky exercise.

This work also concludes that there exists confusion as to what are the valid provisions which allow the ICC to apply human rights in the first place. Whereas Art. 21 (3) Rome Statute is deemed to be an appropriate gateway for human rights to be applied before the court in procedural matters, substantive extra-statutory law, including human rights law, needs to be applied pursuant to Art. 21 (1) (b) Rome Statute. Reference to human rights as mere 'guidance' or 'inspiration', without a conclusive and methodologically coherent determination of the status of a concept under customary international law, is deemed problematic as it can violate *nullum crimen sine lege*.

The last section of Part One delves deeper into the significance and construction of the principle of *nullum crimen sine lege* in the area of international criminal law. International criminal law in this respect offers a

unique field of research as it combines criminal law with elements of public international law and hence implants an area in which legal certainty is of utmost importance for any proceeding to be legitimate in an area which is characterized by gradual evolvement of the ways States‘ behaviour changes into legal norms. The concept of *nullum crimen sine lege* has to be construed conservatively and narrowly in international criminal law so as to not violate the defendant's rights. Therefore, judges may only apply extra-statutory substantive law if it is part of customary international law. This still gives judges enough flexibility to take into account developments of the law.

Part Two examines this practical application of extra-statutory human rights law. It must be emphasised that many of the judgments analysed do indeed lack a degree of critical examination of whether the part of human rights law that the chamber seeks to apply is applicable in international criminal law and is indeed part of customary international law. The depth of the analysis employed by the respective chambers in this respect varies greatly and there is no coherent methodology to determine the applicability of a certain area of human rights law in the definition of crimes under international law or said category's status under customary international law.

The case-law analysis focuses on aspects in jurisprudence concerning the prohibition of torture, minority rights law and sexual crimes/gender issues. These three areas of law were chosen because they exhibit differing degrees of elaboration in human rights law as well as different level of connections with crimes known to most national legal systems. The prohibition of torture as such is a universally accepted fundamental part of customary international law,[850] widely recognized as a *ius cogens* norm[851] and prohibited not only in major international conventions but also mirrored in many national laws.[852] The rights of minorities, while protected in major international and regional conventions, are frequently misunderstood, looked upon with suspicion by many States for reasons rooted in history or practical policy, which is mirrored by reservations issued to Ar-

850 C Tofan (ed) *Torture in International Criminal Law* (Wolf The Hague 2011) 1.

851 Machtheld Boot, Rodney Dixon and Christopher K Hall 'Article 7: Crimes against Humanity' in Otto Triffterer Commentary on the Rome Statute of the International Criminal Court (2nd edition Beck Munich 2008) 159-273, 205.

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ticle 27 ICCPR.[853] The issue of hate crime, which, to some extent, is an instrument of minority protection on a national level, is controversial and not embraced by many national legislators. Finally, the topic of violence against women has not been addressed in a binding international human rights instrument so far. The CEDAW Committee took on the issue by declaring that violence against women falls under its auspice, but its recommendations are not legally binding and its elaborations on why violence against women is discrimination are not shared by many countries. Hence, in the area of sexual violence as a matter of international criminal law, courts and tribunal have mostly soft law instruments at their disposal, in an area which is also intertwined with social mores and unfavourable attitudes. Hence the three areas provide three excellent points of departure to see under what circumstances human rights law is most often and most convincingly invoked.

The study finds that the definition and subject-matter or torture under international human rights law is referred to regularly. Here, courts have not missed many opportunities where pointing to human rights law would have strengthened or facilitated their argument. The reasons for this are manifold. First, the high-profile nature of the prohibition of torture as a *ius cogens* norm and in the fact that the prohibition of torture in human rights is governed by a widely ratified, robust convention make the relevance of the concept obvious also to experts of criminal law which might not be entirely familiar with the intricacies of public international law. The crime also has counterparts in many national legislations as a sanctioned prohibition which makes it further accessible to practitioners of various backgrounds. Concerning torture, the problem lies in how human rights law is referenced. There is no coherent method within or across the tribunals to determine the status of customary law of the subject. This leads, in the worst case, to an unequal application of the law. In comparison, minority rights law is less frequently referred to. The concept itself is less clear and more controversial and many of the crimes that have a relevance to minority rights, such as persecution, do not or not often find an equivalent in national law. The issue of minority protection seems somewhat abstract and foreign to many of those practitioners, which are criminal lawyers and do

853 See the Declarations of France, Turkey Declarations and Reservations of the States Parties to the International Covenant on Civil and Political Rights https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (27 July 2015).

not have academic or practical experience in an area of public international law that includes human rights. The role of accessibility is most clear in the case of women's rights: at first glance, judges in international criminal cases do relatively often refer to human rights in cases of gender-based violence. However, such references are often superficial and leave the impression that the judges feel obliged to mention human rights law before moving on to areas like comparative law in their search for extra-statutory sources. This is despite the fact that, in particular, the rhetoric of crimes against humanity and that of women's rights as enshrined in the CEDAW are often quite similar. Both, in their subject-matter, deal with systematic, structural oppression. However, in the case of women's rights, three problems come together which aggravate an application: controversy, fragmentation and the nature of the instruments in question. Many controversies surround gender issues and women's rights, so that often, judges do not feel like human rights law in this field can answer to their legal needs or be of any assistance at all. Additionally, there are many different bodies and instruments that deal with women's rights, which makes it difficult the one main instrument which deals with the subject. Often, gender issues are formulated in soft law documents in a variety of different forms.

Generally, this study concludes that the best and most appropriate preconditions for an application of human rights in substantive international criminal law are given when two elements come together: first, an area of human rights law is governed by a well-established, robust and widely ratified convention. Second, the area of human rights law is mirrored by a direct or indirect counterpart in national criminal law. 'Classic' first generation rights are generally more accessible then up and coming, yet to be established concepts. In contrast, crimes which do not have a national criminal equivalent (like persecution) and concepts which are controversial in nature and governed by soft law (violence against women as discrimination) most problems in terms of reference can be expected.

The analysis of the relevant case law leads to the conclusion that the jurisprudence offers a multitude of unrealised opportunities to raise the legal as well as, in some cases, the political weight of the judgments through reference to human rights law. This is particularly obvious in the jurisprudence on persecution as a crime against humanity regarding the definition

of persecution[854] or the delimitation of the protected groups.[855] With a view to the definition of persecution the definition of persecution if international refugee law was considered and, due to systematic differences in the two areas of law, rejected, without even mentioning international minority rights law, which dogmatically is much closer.[856] In the cases in which human rights law was referred to, there is no systematic approach identifiable and no dogmatically sound methodology. It is exclusively up to each chamber if and to what extent they engage in a discussion about the status of customary international law regarding a specific issue. In the extreme case, this leads to the paradoxical result that one and the same crime is punishable according to different requirements in one and the same forum.[857]

Part Three dealt with the perception of this problem by the judges. This part examined the preconditions under which judges deem a reference to human rights law helpful or compelling and for which sort of crimes such recourse is appropriate in their opinion.

Connecting to Parts One and Two, Part Three scrutinized how the perception of the interplay between human rights law and international criminal law, which dominates the discourse amongst practitioners, determines the extent to which they are ready to seek recourse to human rights law. The interviews have drawn up a very broad spectrum of partly diametrically opposite views on the relation between human rights law and international criminal law.

The statements regarding the relation between the two areas of law move between two extreme, irreconcilable stances on the subject. One opinion voiced was that human rights law has no place in international criminal jurisprudence and that international criminal law 'does not apply human rights law, this court applies its statute'.[858] Another judge set up

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854 Eg *Prosecutor v Duško Tadić, (Judgment)* IT-94-1 (7 Mai 1997) para 654; paras 695-697.

855 Eg *Prosecutor v Dragan Nikolić (Review of Indictment Pursuant to Rule 61 Decision of Trial Chamber I)* IT-94-2-R61 (20 Oktober 1995) para. 27; *Prosecutor v. Goran Jesilić (Judgment)* IT-95-10 (14 Dezember 1999) paras 70-72.

856 *Prosecutor v Zoran Kupreškić et. Al (Judgment)* IT-95-16 (14 Januar 2000) para 589.

857 Eg *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).

858 Statement made during a presentation about judges as law makers by a former judge of an international criminal tribunal.

the equation Human Rights Law + Criminal Law = International Criminal Law, making human rights law the decisive factor which differentiates national criminal law from international criminal law and held the view that definitions enshrined in the international bill of human rights that is the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, social and Cultural Rights can be used in her court with no further dogmatic consideration..[859]

Several factors related to the professional background of the judges had an influence on how they viewed the reference of human rights law. Criminal law experts, in theory, had less dogmatic misgivings about using human rights law in both procedural and substantive international criminal law, but they were often weary of the potential benefits and advantages of doing so: Criminal law experts often complained that the 'international element' was given too much weight at the ICC and the ICTY and that decisions should be dealt with in a less academic manner. As a consequence, experts on criminal law and procedure were less ready to apply human rights law than their counterparts appointed as criminal law experts and several of them argued that substantive problems which could ask for the applications of extra-statutory law have all been solved. This result is not particularly surprising given that judges appointed on List B (or, with regards to the ICTY, judges with international law expertise) are, in general, more familiar to public international law including human rights law. However, there is a considerable number of judges who do have a certain expertise in both areas and could have been appointed on either list. Throughout the benches, a certain vagueness as to the relationship between human rights law and international criminal law and, intertwined with that, the legal basis of applying human rights law could be observed. Some judges openly admitted that they only to resort to international human rights law when it supports their opinion which they have already previously formed, showing that they do not see the undertaking as a mandatory part of their work. A lack of in-depth knowledge in human rights law that could be referred to as well as insecurity as to how far such recourse can go and what its advantages are common. Regarding minority rights, a particular reluctance has been observed. Other dividing lines which were explored concern the legal system in which the judge was ed-

859 Interview No. 7.

ucated, whether they follow an academic or a more practical approach due to their prior work experience and their geographic background

The research project mapped out the practical influence of human rights in the jurisprudence of international court and tribunals and the dogmatic framework applied in the application. It explored the reasons for the reference to human rights law as well as the reason for a lack thereof and as such points to areas of possible synergy between international human rights and international criminal law.

The importance of ongoing workplace training and skill enhancement for judges and the necessity for diverse chambers able to fall back on expertise in criminal law and relevant fields of international law is increasingly promoted. The CICC's Independent Panel as well as the Advisory Committee set up by the Assembly of States Parties assess the experience of candidates through interviews and questionnaires. The CICC, additionally, explores their attitude towards continuous training. Since 2011, the CICC explicitly asks candidates about their prior experience with the application of human rights law. The results of this study show that this increasing understanding of the necessity of a comprehensive training of judges is vital for the further success of international criminal law. International criminal law as it stands conveys upon judges an enormous freedom to apply extra-statutory sources. This freedom is mirrored by a huge responsibility for an emerging field faced with loud and consistent criticism. This criticism focuses, *inter alia*, on the selectivity of international criminal law in terms of situations, cases and charges.

On the other hand, there is probably no other area of international law which can resort to a group of highly experienced senior experts with such a vast number of different fields of expertise. As the Rome Statute brings about numerous legal innovations, there will be plenty of instances in the future where judges will be forced to consult extra-statutory sources.

One of the biggest challenges, but also, a unique opportunity of the ICC as the one single permanent handler of international criminal law will be to benefit from its array of expertise and channel and streamline it into a more comprehensive and methodological approach in international criminal law that takes into account relevant fields of international law. What is necessary to work towards a more coherent and methodologically sound application of extra-statutory sources? This study has identified three main elements: First, an understanding of the best preconditions for an application of human rights law (robust convention + equivalent in national criminal codes). Second, a balanced composition of chambers is necessary, in-

cluding members with various backgrounds. Third, a more streamlined education or, at a minimum, continuous training for judges in the areas of extra-statutory law that might be of relevance. These factors will foster a correct application of human rights law in substantive international criminal law in the future and will guarantee that the synergies between the two areas are not left untapped.

As it stands, international criminal law feels like an unfinished mosaic in which all the needed parts are present, but have not yet been employed to reassemble a complete coherent picture.