

Julia Gebhard

Necessity or Nuisance?

Recourse to Human Rights in
Substantive International Criminal Law



Nomos

Vereinigung für Recht und Gesellschaft
Law and Society

– vormalige Vereinigung für Rechtssoziologie –

Herausgegeben von

Prof. Dr. Susanne Baer, Prof. Dr. Kai-D. Bussmann,
Prof. Dr. Galf-Peter Calliess, Prof. Dr. Susanne Karstedt
und Prof. Dr. Matthias Mahlmann

Band 9

Julia Gebhard

Necessity or Nuisance?

Recourse to Human Rights in
Substantive International Criminal Law



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Hamburg, Univ., Diss., 2017

ISBN 978-3-8487-4427-5 (Print)
 978-3-8452-8644-0 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-4427-5 (Print)
 978-3-8452-8644-0 (ePDF)

Library of Congress Cataloging-in-Publication Data

Gebhard, Julia

Necessity or Nuisance?

Recourse to Human Rights in Substantive International Criminal Law

Julia Gebhard

296 p.

ISBN 978-3-8487-4427-5 (Print)
 978-3-8452-8644-0 (ePDF)

1st Edition 2018

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2018. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

Preface and Acknowledgements

This book is based my doctoral thesis at the University of Hamburg. It was written between 2009 and 2015 and updated in October 2017. More recent legal developments could unfortunately not be taken into account.

The research on which this book is based, as well as the writing itself, could not have been made possible without a multitude of different people and institutions which provided me with incredible research opportunities and environments, criticized and encouraged my research with their feedback and granted me their time to answer all my questions.

First and foremost, I owe my gratitude to my supervisor, em. Prof. Dr. Dr. h.c. Rüdiger Wolfrum for believing in my work, providing me with freedom and time to research while working as a researcher at the Max Planck Institute for Comparative Public and International Law and for supporting me on numerous occasions on which my research took me outside the library and outside of Heidelberg. For his thorough report, kind words and valuable suggestions, I would also like to thank my second supervisor, Prof. Dr. Stefan Oeter.

One of the opportunities which Prof. Wolfrum provided me with was to conduct my research as part of the International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS-REMPP). I want to thank Prof. Dr. Dr. h.c. mult. Hans-Jörg Albrecht and Prof. Dr. Günther Schlee for their investment in this interdisciplinary research group which offers its students a unique environment to test and develop their research. Thank you, Prof. Dr. Anja Seibert-Fohr, for your guidance and your feedback. Furthermore, I would like to thank Prof. Dr. Günther Schlee and the Max Planck Society for the generous financial contribution towards the publication of this work. Thank you, Dr. Carolin Hillemanns, for the smooth operation of our group and for all your support and encouragement throughout the years.

I would like to thank the FAZIT-Stiftung for granting me a scholarship enabling me to concentrate on finalizing my dissertation.

The libraries of the Max Planck Institute for Comparative Public and International Law in Heidelberg, Germany, the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany and the Central European University in Budapest, Hungary and their excellent,

helpful and welcoming staff I thank for unearthing every publication I was looking for and for extending kind words. I am furthermore grateful for the support received by Prof. Dr. Michael Anderheiden and Prof. Dr. András Jakab while finalizing my thesis in Budapest.

The insights that this book provides would not have been possible without the judges at the International Criminal Court and the International Tribunal of the Former Yugoslavia who agreed to answer my questions and let me in on their thoughts regarding the significance of international human rights law on their work while working as a Visiting Professional at the ICC in 2010. I owe particular gratitude to the late Judge Hans-Peter Kaul for accepting me as a Visiting Professional and for his curiosity and interest in my research. Furthermore, I am grateful to Xabier Agirre Aranburu, Eleni Chatidou and William Rosato for discussing my research and for the opportunities and the support extended.

I thank Professor William Schabas for inviting me to Galway and guiding my research in more scholarly sound and realistic ways when it was still at the very beginning and Professor Gudmundur Alfredsson, for his enthusiasm for this project and for irregularly checking in and inquiring about its progress.

I want to thank the editors of “Recht und Gesellschaft – Law and Society” for their decision to accept my research within their series. In particular, I am grateful to Prof. Dr. Susanne Karstedt for her support and her comments on the empirical part of this book.

Over the years, I had countless discussions, got so much excellent and honest feedback and the support without which this book might have never been finished. I am indebted to Andreas Armbrorst, Stephanie Berry, Berit Beyer, Kristina Blohm, Olivia Danai, Mikael Ekman, Julia Breslin Foster, Kiyomi von Frankenberg, Andrea Furger, Johannes Fuchs, Anne Giebel, Jenny Grote-Stoutenburg, Mayeul Hiéramente, Julia Kasselt, Nandor Knust, Mandana Knust Rassekh Afshar, Björn Länsisyrjä, Sally Longworth, Polina Levina Mahnad, Sigrid Mehring, Ulysses Moreira Formiga, Carse Ramos, Isabel Röcker, Jennifer Schuetze-Reymann, Christina Sell, Inga Švarca, Helena Sunnegårdh, Alice Thomas, Diana Trimiño and Johann-Christoph Woltag.

In particular, eternal gratitude to Berit, Diana, Jules, Johannes, Kristina, Sally and Ulysses. Your love, friendship and support have many times saved my sanity and made my days and will surely continue to do so in the future. Thank you.

To my parents, Angelika and Heinz Gebhard, and to Felix, I am grateful for all the love and encouragement, for always being there in any moment of need, for having my back and for putting things into perspective, not only, but also, during the course of this project.

Finally, to Csaba, thank you for your love, your unwavering and enthusiastic support, for cheering me on and for believing and living in an equal partnership. And to Levi, for being with us, himself and a part of us.

Table of Contents

Introduction	17
I. Approach and Conceptual Framework	17
1. Overview of the Research Topic	17
2. Approach and Demand for Research	21
II. Scope and Methodology	22
Part One: The Relationship between International Criminal Law and Human Rights	29
Chapter One: Introduction	29
Chapter Two: Human Rights Law and Procedural International Criminal Law	33
I. Ad Hoc Tribunals	35
II. ICC	39
1. Art. 21 (3) ICC	39
2. What are ‘internationally recognized human rights’?	42
Chapter Three: Human Rights Law and Substantive International Criminal Law	46
I. Relationship ICL – Substantive HR:	46
1. Hierarchy vs Horizontal Completion	50
2. Structural Differences vs Universality	55
II. Legal Basis for the Application of Extra-Statutory Substantive Law	60
1. Ad Hoc Tribunals	61
2. ICC	62
a. Art. 21 (3) Rome Statute	63
b. Art. 21 (1) (b) Rome Statute	64
c. Guidance and Interpretational Aid	68
III. Application of Substantive Extra-Statutory Human Rights Law and the Principle of Nullum Crimen Sine Lege	69
1. The concept of nullum crimen sine lege?	69
2. Nullum Crimen Sine Lege in International Criminal Law	70

3. How is this area of conflict solved in international criminal jurisprudence?	76
Chapter Four: Concluding Remarks	81
Part Two: How are Different Areas of Human Rights Law Referred to in International Criminal Jurisprudence?	83
Chapter One: Prohibition of Torture and ‘Other Inhumane Acts’	84
I. Where was the Prohibition of Torture Referred to at Ad Hoc Tribunals?	84
1. The Specific Elements in the Definition of Torture as a Crime against Humanity	84
a. Akayesu	85
b. Delalić and others (Čelebići)	86
c. Furundžija	90
d. Kvočka	94
e. Krnojelac	97
f. Kunarac and others	97
g. Brđanin	104
2. The Definition of ‘Other Inhumane Acts’	105
II. Where Could the Prohibition of Torture Have Been Referred to?	107
1. State Obligations Regarding the Prohibition of Torture under Human Rights Law	108
a) CAT	108
b) Universal Declaration of Human Rights	109
c) International Covenant on Civil and Political Rights	110
d) Other Instruments Prohibiting Torture	111
2. The Prohibition of Torture under International Criminal Law	112
a) Genocide	112
(1) Causing serious bodily or mental harm (Art. 6 (b) Rome Statute)	112
(2) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Art. 6 (c) Rome Statute)	114

(3) Imposing measures intended to prevent births within the group (Art. 6 (d) Rome Statute)	115
This modality of committing genocide covers acts such as '[forced] sterilization, compulsory abortion, segregation of the sexes and obstacles to marriage'.	115
b) Crimes against Humanity	116
(1) Torture (Art. 7 (1) (f) Rome Statute)	116
(2) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (Art. 7 (1) (g) Rome Statute)	118
(3) Enforced disappearance of persons (Art. 7 (1) (i) Rome Statute)	118
(5) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Art. 7 (1) (k) Rome Statute)	121
c) War Crimes	122
(1) Grave breaches of the Geneva Conventions	122
(2) Other serious violations of the laws and customs applicable in international armed conflict	122
(3) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions	123
(4) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law	123
IV. Concluding Remarks	123
Chapter Two: Minority Rights Law	124
I. What is a Minority in the Context of Crimes under International Law?	124
II. Where Has Minority Rights Law Been Referred to?	127

III. Where Could Minority Right Law Have Been Referred to?	129
1. The Categorization of Groups Falling under the Ambit of Protected Groups Within the Definition of Genocide	130
2. The Definition of Persecution	132
3. The Definition of a Stigmatised Group within the Crime of Persecution	134
IV. Where is the Link?	135
1. State Obligations regarding the Protection of Minorities from Crimes under International Law	135
a) Charter of the United Nations	137
b) International Covenant on Civil and Political Rights	139
c) United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities	141
d) Responsibility to Protect	144
e) International Convention on the Elimination of All Forms of Racial Discrimination	145
f) Council of Europe Framework Convention for the Protection of National Minorities	146
g) Other Instruments Relevant to the Protection of Minorities from Crimes under International Law	147
2. Protection of Minorities under International Criminal Law	149
a) Genocide (Art. 6 Rome Statute)	149
b) Crimes against Humanity/Persecution	153
(1) Important Developments in Terms of Minority Protection	153
(1.1) Crimes against Humanity and Armed Conflict	154
(1.2) Crimes Against Humanity and Non-State Actors	156
(2) Specific Crimes and Their inherent Minority Element	157
(2.1) Murder/Extermination	157
(2.2) Deportation or Forcible Transfer of Population	158
(2.3) Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation, or any other Form of Sexual Violence of Comparable Gravity	158

(2.4) Persecution as a Crime against Humanity with a Particularly Prominent Minority Element	159
(2.5) Enforced Disappearance of Persons	162
(2.5) The Crime of Apartheid	162
c) ‘Ethnic Cleansing’ in International Criminal Law	163
d) War Crimes (Art. 8 Rome Statute)	166
(1) International Armed Conflicts	168
(1.1) Article 8 (2) (a) Rome Statute: Grave Breaches of the Fourth Geneva Convention Protecting Civilian Persons in Times of War:	168
(1.2) Article 8 (2) (b) Rome Statute: Other serious violations of the Laws and Customs Applicable in International Armed Conflict, within the Established Framework of International Law:	169
(2) Non- International Armed Conflicts	169
(2.1) Article 8 (2) (c) Rome Statute: Serious Violations of Article 3 Common to the four Geneva Conventions of 12 August 1949	169
(2.2) Article 8 (2) (e) Rome Statute : Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character, within the Established Framework of International Law:	170
V. Concluding Remarks	170
Chapter Three: Women’s Rights/The Prohibition of Gender-Based Violence	171
I. Where Were Women’s Human Rights Referred to?	175
1. Sexual Assault as Persecution	175
2. Rape as Torture	177
II. Where Could Women’s Human Rights Have Been Referred to?	183
1. Genocide	183
2. Definition of Rape	185

3. Persecution	192
III. Where is the Link?	196
1. State Obligations regarding Violence against Women	197
a. International Covenant on Civil and Political Rights	199
b. International Covenant on Economic, Social and Cultural Rights	202
c. Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women	206
d. International Convention on the Elimination of all Forms of Racial Discrimination	210
e. UNGA Declaration on the Elimination of Violence against Women	210
f. African Charter on Human and Peoples Rights (Banjul Charter)	211
g. Beijing Declaration and Platform for Action	212
2. Protection of Women against Gender-Based Violence in International Criminal Law	213
a. Genocide	214
b. Crimes against Humanity	216
(1) Sexual Violence	216
(2) Persecution	216
(3) Enslavement/ Sexual Slavery	220
c. War Crimes	221
IV. Concluding Remarks	226
Chapter Four: Conclusions Drawn from Case-Law Analysis	228
Part Three: Perception of the Value of Human Rights Law from the View of Practitioners	233
Chapter One: Perceptions of Human Rights Law in a Diverse Professional Environment	233
I. Safeguarding Professional Diversity on the Bench at the ICC and the ICTY	239
1. General attitude of judges towards the importance of HRL in ICL	243
2. Specific relevance of the recourse to human rights law in substantive international criminal law	245

II. Professional and Personal Factors Contributing to the Attitude towards International Human Rights Law	247
1. Public International Law Experts/(National) Criminal Law Experts	247
2. Common Law/Civil Law	249
3. Academics/Practitioners	250
4. Developing Country/Industrialized Country	250
Chapter Two: Concluding Remarks	252
Conclusion	255
Annex	265
Bibliography	267

