Criminal Law Forum (2012) 23:161–191
DOI 10.1007/s10609-012-9177-1 © Springer 2012

PATRICIA PINTO SOARES*

TANGLING HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW: THE PRACTICE OF INTERNATIONAL TRIBUNALS AND THE CALL FOR RATIONALIZED LEGAL PLURALISM

ABSTRACT. International criminal tribunals have often resorted to human rights law in order to ground their rulings. Acknowledging that international criminal law results from the combination of human rights law, international humanitarian law and national criminal laws, this article reviews selected case-law and argues that an emotionally driven application of human rights law has been deployed in respect of domains exclusively pertaining to criminal law. While a comprehensive approach to law is to be praised, it is submitted that international criminal law has undergone controversial developments due to resorting to human rights law in a somewhat erratic manner which overlooks the differences, and sometimes the opposition, between the *telos* of both legal areas, often imperilling the principles of legality and individual culpability as unique foundational rationales of international criminal law. Challenging the methodology adopted by international tribunals and its consequences on substantive international criminal law, the article attempts to set forth the theoretical framework that should underpin the appeal to human rights law in international criminal judgments. It further proposes "analogy" and "complementarity" as analytical devices able to guide an interaction between international criminal law and human rights law that assists international criminal law in moving towards rationalized hybridity as opposed to "wild" fragmentation, political manipulation, selectivity and the discreditation of international criminal justice. Concluding, the practice of the International Criminal Court (ICC) will be briefly assessed through the lens of the theoretical framework proposed.

* PhD, European University Institute (EUI), Florence, Italy. Lecturer in Introduction to Human Rights at Univrsité Jean Moulin Lyon 3, Lyon, France.

A sincere acknowledgment is due to the Grotius Centre for International Legal Studies for the support given to this work, and very particularly to Larissa van den Herik and Carsten Stahn for the valuable comments to this article.

I INTRODUCTION

The genesis of international criminal law is usually traced back to the Nuremberg Trials and Control Council Law No. 10. For the last 67 years there has been a continuing effort towards the consolidation of international criminal law as an effective system of law, requiring it to be developed and applied in accordance with determined principles which ensure its coherence, legitimacy and credibility. The values and "goods" protected under the umbrella of international criminal law are pursued likewise by other areas of international law – especially international humanitarian law and human rights law – as well as by domestic criminal laws. Thus, international criminal law emerges as the combination of these branches: (i) human rights law, in respect of the rights of the accused and standards of due process; (ii) international humanitarian law, from which the definition of many crimes and the parameters for the assessment of offences committed during armed conflicts are drawn, and; (iii) national criminal laws, from which international criminal law imports fundamental legal principles such as the principles of legality and individual culpability. For its intrinsic hybridity concerning sources, principles, institutions and actors, international criminal law is arguably the most profuse laboratory for the debate on legal pluralism. However, the combination of elements originating from different legal areas, social and cultural backgrounds does not always lead to consistent and constructive plurality. Rather, the unsystematic merging of different elements detached from rational criteria can lead to the fragmentation of international criminal law in a way that drastically strikes those that are perceived and advocated as the very legitimizing and identifying yardsticks of international criminal justice.

Acknowledging that legal pluralism is an all encompassing concept, this article stresses the need to distinguish its different conceptualizations in order for it to be effectively resorted to, permitting that legal areas framed as the confluence of different domains may be permeated by relevant diverse elements in an optimal manner. It will be highlighted how international tribunals[1] have resorted to human rights law in a somewhat erratic manner which neglects the differences and sometimes opposition between the principles and *telos* of

[1] The article primordially relies on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). In some instances, reference to the case law of other international(ized) tribunals will be made.

both legal areas.[2] While recognizing the merits of a dialectical management of the law, it is argued that human rights law should be relied upon as a teleological guideline of interpretation. Instead, it is possible to observe a direct application of human rights law rationales which has driven international judges to overstretch legal interpretation – usually equated to "progressive interpretation" – culminating in defining crimes and fixing individual criminal responsibility by directly applying treaty or customary international human rights law. This line of action has led to a noteworthy increase in victims' protection but it overlooks the fact that human rights law is not sensitive to the rigid calculations at play when determining the guilt of individuals in criminal proceedings. This article demonstrates how the "wild" usage of human rights law as frequently observable in the jurisprudence of international tribunals defies the rights of the accused and uncontested benchmarks of criminal law, in particular the principles of legality and culpability.

The article proposes an analytical framework that should ground a more direct or indirect influence of human rights law in the realm of international criminal law. On the basis of Teubner and Moore's studies, the merits of legal pluralism are advocated, with the unconditional exemption of the "legal proprium" of each area, which will permit safeguarding diversity and, at the same time, to benefit from the interactivity between linked legal domains. Using Luhmann's terminology, attention is drawn to the necessity of applying the binary-code "criminal/non-criminal" when pondering calling upon human rights law with regard to international criminal judgments. It is theoretically and factually demonstrated how, and under which standards, "analogy" and "complementarity" are the analytical tools permitting a rationally driven entwinement of human rights law and international criminal law.

In conclusion, the article briefly assesses the case-law of the ICC against the framework drawn. It will be critically appraised whether the permanent court has been engaging in "wild" teleological interpretation based on human rights law or if instead it has been shielding the core singularity of international criminal law against undue intrusions.

---

[2] The article will primarily address the relationship between international criminal law and human rights law. References to international humanitarian law will be made as far as relevant to the analysis proposed.

II THE CONTROVERSIAL JURISPRUDENCE OF THE *AD HOC* TRIBUNALS

International criminal justice is aimed at two fundamental objectives which may in practice appear to be conflicting: ending impunity for perpetrators of core crimes and respecting the rights of the accused.

2.1 *Selected Case-Law*

The principle of legality, posited in several instruments of international law,[3] requires the definition of crimes not to be applied retrospectively. It further entails the rule of lenity, demanding that definitions be drawn narrowly so as to benefit the accused in case of doubt thus preventing the abusive exercise of power and providing individuals with the necessary certainty that permits them to live their lives and plan their future aware of the norms to be respected and the consequences of their infringement.[4] The *nullum crimen sine lege* maxim is at the very core of both domestic and international criminal law, without which "no criminalization process can be accomplished and recognised".[5]

Already in its early jurisprudence, the ICTY embraced the principle of legality as a fundamental feature of international criminal law. In *Delalić et al.* the Trial Chamber stated that "the rule of strict construction requires that the language of a particular provision shall be construed such that no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment".[6] Yet, in later decisions, the Tribunal took a different stance. Judges seem to have resorted to human rights law as a direct ground of criminalization, and "frequently pointed at human rights law to demonstrate that a particular behavior was indeed illegal and that the punishment of an individual violating that prohibition did not infringe upon the principle of

[3] See, for example, Rome Statute, Article 22; European Convention on Human Rights, Article 7; International Covenant on Civil and Political Rights, Article 15.

[4] See for example Rome Statute, Article 22. See also B. Broomhall, 'Nullum Crimen Sine Lege', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München, Baden-Baden Nomos, 1999), 450.

[5] *Prosecutor v. Delalić et al.* (Trial Judgment), IT-96-21-T (16 November 1998), para. 424.

[6] *Ibid.*, para. 410.

legality".[7] Probably the best-known example of such an understanding was given in the *Furundžija* case where the ICTY largely relied on the definition of torture contained in the Convention Against Torture (CAT)[8] considering that it expressed the customary definition of the crime under international law. In line with this view, the Tribunal ruled that the crime of torture required at least one of the persons involved in the torture process to be a public official or to act at any rate in a non-private capacity, for example as a *de facto* organ of a state or any other entity wielding authority.[9] In *Kunarac*, the Tribunal revisited its understanding of the impact of human rights law on international criminal law by emphasizing the different position of the state *vis-à-vis* the two legal systems. Human rights law aims at protecting the individual against abuses of the state. In international criminal law, as with international humanitarian law, that is not the case. The position of the state is thus irrelevant for the definition of torture under international criminal law. As a consequence, the Tribunal denied the official position of the perpetrator as a constitutive element of the crime of torture.[10]

In the *Kupreškić* case, when constructing the definition of other inhumane acts (a sub-category of crimes against humanity), the ICTY considered that the interpretative standard was to be found in human rights instruments such as the Universal Declaration on Human Rights (UDHR) and the 1966 Covenants. The Tribunal held that it was possible "to identify a set of basic rights appertaining to

---

[7] G. Mettraux, 'Using Human Rights Law for the Purpose of Defining International Criminal Offences – The Practice of the International Criminal Tribunal for the Former Yugoslavia', in M. Henzelin and R. Roth (eds.), *Le Droit Penal a l'epreuve de l'internationalisation* (Brussels, Geneva, Paris, Le droit pénal à l'épreuve de l'internationalisation, 2002), 183 at 193.

[8] It should be noted that the Tribunal also resorted to international humanitarian law in order to construe the definition of torture in this ruling.

[9] *Prosecutor v. Furundžija* (Trial Judgment), IT-95-17-I (10 December 1998).

[10] *Prosecutor v. Kunarac* (Trial Judgment), IT-96-23/1 (22 February 2001), para. 470. "[T]he role and position of the State as an actor is completely different in both regimes. HRL is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organized or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of hostilities. In the field of IHL, and in particular in the context of international prosecutions, and conversely, its participation in the commission of the offence is no defence to the perpetrator. Moreover, IHL purports to apply equally to and expressly binds all parties to the armed conflict whereas, in contrast, human rights law generally applies only to one party, namely the state involved, and its agents".

human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity".[11]

The principle of legality brings certainty to the accused and is fundamentally linked to its procedural rights. By contrast, the human rights law approach led the Trial Chamber to declare in *Hadžihazanović* that "it must be foreseeable and accessible to a possible perpetrator that his conduct was punishable at the time of commission"[12] and that it did not matter whether the conduct was punishable criminally, through disciplinary rules or other sanctions. The Appeals Chamber has clarified the crucial difference between criminal acts and illegal acts. It further underlined that the object and purpose of international humanitarian law could not ground criminalization. Nor could it replace an assessment of international law sources to that effect. By doing so, the Appeals Chamber drew an important limit which human rights law should be seen to observe.[13]

The principle of individual culpability rests at the heart of (domestic and international) criminal law. It establishes the modern conception of criminal law as a law of facts as opposed to a law of agents. It attaches criminal responsibility to individuals' own misconduct and assures that people will not be arbitrarily punished by acts they did not practice or somehow furthered. Accordingly, in the *Tadić* case, the ICTY held that "the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)".[14] This notwithstanding, the practical difficulties in bringing perpetrators to trial led the ICTY to take a line of action whose compliance with the principle of individual culpability is highly questionable.

---

[11] *Prosecutor v. Kuprežkić* (Trial Judgment), IT-95-16-T (14 January 2000), para. 566.

[12] *Ibid.*, paras. 63 and 165.

[13] *Prosecutor v. Hadžihazanović* (Interlocutory Decision on the Joint Challenge to Jurisdiction), IT-01-47-PT (27 November 2002), para. 25: "The protection of humanity and preservation of world order as the overriding aims of IHL cannot serve as basis to criminalise behaviour beyond the existing law. There would be no limit on the scope of IHL if the only guiding criterion was whether the prosecution was broadly in the interests of the spirit of IHL. Where the rights of the accused in a criminal trial are concerned, utmost respect for legality, for certainty and foreseeability of the law are required".

[14] *Prosecutor v. Tadić* (Appeals Chamber), IT-94-1-A (15 July 1999), para. 186.

Since its early years the Tribunal was faced with two major problems. First, the collective nature of most crimes under its jurisdiction. Second, proving the responsibility of individuals for acts they had not directly committed. Genocide and crimes against humanity in particular presuppose a joint plan. Yet, the Tribunal is to indict and convict individuals as opposed to groups or states. In order to handle such obstacles, the ICTY soon formulated theories of individual liability which depart from the principle of culpability; this is particularly the case with respect to joint criminal enterprise (JCE).[15] In light of irrefutable evidence, the judges of both the Trial and Appeals Chamber admitted that Mr. Tadić had not physically participated in the assassination of five individuals in the town of Jakici. The Appeals Chamber further acknowledged that Article 7(1) of the ICTY Statute determined the parameters of criminal responsibility the Tribunal was bound to respect in its judgments.[16] However, the Appeals Chamber concluded that:

> [A]n interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to all those "responsible for serious violations of international humanitarian law" committed in the Former Yugoslavia' (…) Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, perpetration or execution. The Statute does not stop there.[17]

It is inevitable to note the syllogistic reasoning underpinning this decision: because the ultimate purpose of international criminal law and the establishment of the ICTY is to end impunity for the most

[15] JCE is well-known and accepted as a mode of criminal liability. It establishes individual responsibility for crimes not directly committed by the person in question. There are three versions of JCE, which Professor Cassese refers to as (1) "liability for a common intentional purpose"; (2) "liability for participation in an institutionalized common criminal plan"; (3) "incidental criminal liability based on foresight and voluntary assumption of risk". See A. Cassese, 'The Proper Limits of Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 109, at 111–114.

[16] Article 7(1), ICTY Statute reads as follows: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2–5 of the present Statute, shall be individually responsible for the crime".

[17] *Prosecutor v. Tadić* (Appeals Judgment), IT-94-1-A (15 July 1999), paras. 189–190.

serious international crimes, the normative power of the Tribunal is unlimited inasmuch as it contributes to the achievement of such a goal. Yet, this analysis obviously quashes the principle of personal guilt.

Consistent with the *Tadić* ruling, in *Brđanin* the Appeals Chamber reversed the decision of the Trial Chamber and considered that a person could be charged with genocide under the third form of JCE.[18] This model of JCE concerns individuals who agreed to a common criminal plan (for example, the forcible deportation of an ethnical group) but were unaware of the intent of other members of the common plan to commit other crimes (for example raping women during the deportation) incidental to the agreed criminal goal. The third form of JCE triggers criminal proceedings against participants to the common plan for the incidental crimes practised by other individuals. Importantly, for as controversial as it is, the third form of JCE should, in any instance, be resorted to only if the participant not sharing the intent to commit the incidental crime could foresee its perpetration and willingly took the risk of it being committed.[19] It is easy to perceive the problems of applying this version of JCE to genocide: the difference between the *mens rea* (simple foreseeability) and the specific intent required by the crime of genocide is so considerable that essential categories of criminal law such as causation and personal culpability are, in the words of Professor Cassese, "torn to shreds".[20]

2.2 *The Human Rights Law Approach to International Criminal Law Emerging from the Jurisprudence Reviewed*

The case-law examined in the previous section highlighted how the principles of legality and individual culpability, both with important repercussions for the rights of the accused, were undermined. It further exposed the different means and methods by which judges called upon human rights law: (i) the direct application of human rights law rationales; and (ii) a human rights law based teleological interpretation of international criminal law.[21]

[18] *Prosecutor v. Brđanin* (Decision on Interlocutory Appeal), IT-99-36 (19 March 2004), in particular para. 10.

[19] See Cassese (n. 15), 112–113.

[20] *Ibid.*, at 122.

[21] A. Guellali, 'The Dialectic Between Unity and Fragmentation of International Criminal Justice: Overlap, Clash or Complementarity between International Humanitarian Law, Human Rights Law and International Criminal Law?', Paper presented at the Conference on "*Unity or Fragmentation of International: The Role of International and National Tribunals*", Oslo, 14–15 May 2009.

In the first case, judges applied the principles and normative developments of human rights law to immediately ground their rulings, for example with the definition of torture in the *Furundžija* case[22] or the construction of other inhumane acts as a residual category of crimes against humanity in *Kupreškić*.[23] In the second, the Chambers adopted the legal philosophy of human rights law and engaged in a teleological interpretation of the Statute on the basis of human rights law equations without theorizing sufficiently on the differences between the two areas of law. This is illustrated by the *Brđanin* ruling.[24]

As far as the direct application of human rights law rationales is concerned, there is sometimes the tendency to underestimate its problematic results. As stressed by several authors, in principle crimes under international law are criminalized by customary law and general principles of law. In addition, they are crimes under national law so no derogation from the principle of legality could subsist as perpetrators would be in the position to anticipate the consequence of their actions.[25] This is generally the case in respect of core crimes but there are hybrid scenarios which are not so clear-cut,[26] particularly

[22] See text at notes 9 and 10. It is interesting to note that, as explained *infra*, a human rights law approach to international criminal law is usually motivated by a desire to increase victims' rights and reparation. Paradoxically, the human rights law approach as materialized in the *Furundžija* case, amounts to a decrease in the victims' right of access to justice.

[23] See text at n. 11 and 12.

[24] See text at n. 18.

[25] See, for example, T. Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *American Journal of International Law* 817 at 821: "After all, customary humanitarian law for the most part prohibits acts that everyone would assume to be criminal anyway: rape, murder, torture, deportations, pillage, attacking civilians, and so forth. Thus, in my view, customary law can provide a safe basis for conviction (…)". Meron clarifies that in order for it to be so it is essential to take "genuine care (…) to determine that the legal principle was firmly established as custom at the time of the offence so that the offender could have identified the rule he was expected to obey".

[26] Referring to scholars who support the merging between international humanitarian law and human rights law on grounds that core crimes are also criminalized under domestic law, Amna Guellali argues that, "although such a statement is undeniable when it comes to crimes which are prohibited in every system and which are criminalized in national as well as in international law, the problem stems from the extension of the same reasoning to areas which are not so obviously criminalized, thereby breaching some principles of international criminal law which are fundamental for substantial guarantees of fair trial (…) [T]eleological interpretation which

when open concepts such as other inhumane acts are the object of interpretation. Importantly, it is one thing to charge an individual for a domestic crime and a very different one to indict him or her for a crime under international law.[27] While the divergence in penalties between national and international systems may not be considerable, there is a significant qualitative variance which will weigh drastically upon the individual. There are, in addition, important technicalities which will most likely operate concerning international crimes but not domestic crimes, for example the absence of an instrument resembling a statute of limitation. Furthermore, with respect to human rights law, customary law and general principles recognized by civilised nations are very reliable because states are simultaneously the holders of the normative power and the addressees of normativity.

In international criminal law the situation is different and that difference is fundamental inasmuch as it drastically affects the accessibility of custom and general principles to the individual. Specifically concerning the *Kupreškić* case, it is important to take into account that other inhumane acts is already a rather open criminal category. By directly referring the interpretation to human rights law and to the object and purpose of human rights treaties, the scope of interpretation becomes much broader. It means that when balancing conflicting values and "goods" traditionally at the hub of international criminal law, judges will give prevalence to human rights rationales; consequently, the interpretative result will be the one satisfying the largest number of victims. While both international criminal law and human rights law intend to provide the maximum protection to beneficiaries, human rights law is not given to the complex normative operations that are at stake when determining individual guilt.

With regard to "wild" human rights law-based teleological interpretations of international criminal law, caution should be applied. The human rights law project traditionally aimed at protecting individuals against states' abuse thus limiting the state power. Instead, criminal law was developed to ensure the reach of the state over

Footnote 26 continued
is assumed to be progressive interpretation further guaranteeing human rights can be in contradiction with some fundamental human rights of the accused". See A. Guellali (n. 21).

[27] In general, it is reasonable to argue that individuals have the right to "*fair or precise labeling*", that is the right to be indicted and convicted for the crime they indeed committed and not similar or close criminal figures.

individuals so as to guaranty order and security.[28] With the emergence of international criminal law, the distinction between human rights and criminal law became blurred. The international criminal law project was intended to criminalize the most heinous violations of fundamental human rights while at the same time activating the individual responsibility of perpetrators. International criminal law was therefore seen as a device for the protection and enforcement of human rights as opposed to a tool at the disposal of an arbitrary power to be used against individuals. International criminal law was perceived as being detached from criminal law as such and intertwined instead with human rights law. Undoubtedly, international criminal law is built upon the respect for guarantees of due process and fair trial. This friendly bridging is thus understandable. However, this proximity in goals between international criminal law and human rights law furthers a tendency to ignore that both areas maintain their distinguished reserved realms, and that the prevalence of human rights philosophy in international criminal law neglects ''anti-human rights tendencies inside the system''.[29] This is frequently the case precisely because the interests or rights to be balanced are no longer those of the individual vis-à-vis the state machinery but rather those of the accused vis-à-vis the international community, where victims play a fundamental role. The human rights law approach will necessarily tend to overlook the rights of the accused as the numbers of individuals deserving reparation is considerable. Against this backdrop, by grounding a teleological interpretation of international criminal law in human rights law rationales, judges will choose, among the available interpretative results, the one that ensures satisfaction to a larger number of human beings. In other words, there is the propensity under the human rights paradigm to equate the conviction of the accused with respect for

[28] In the words of William Schabas: ''Until relatively recently, human rights law and human rights activists have been concerned principally with the rights of the accused and the rights of the detained, and not seeking that they are convicted and put in prison. Traditionally, human rights lawyers acted for the defense, not the prosecution. Human rights literature was characterized by appeals for clemency and amnesty, not calls for accountability and appropriate punishment'. W. A. Schabas, 'Criminal Responsibility for Violations of Human Rights', in J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement* (Aldershot, Ashgate Publishing Limited, 2003), 281 at 297. It is relevant to stress that important human rights law instruments, such as the UDHR and the ICCPR, include a number of procedural guarantees aimed at constraining the power of the state in order to shield individuals from arbitrary prosecutions. See for example, Article 14 ICCPR.

[29] See A. Guellali (n. 21).

victims' rights. It was in line with this view that the Appeals Chamber reached the flawed decision in *Brđanin* according to which an individual could be charged with genocide on the basis of the third form of JCE. One thus arrives at the following paradox: human rights law, called upon by the ICTY in order to further human rights, led instead to the contravention of the fundamental rights of the accused.

It is important to stress that the importance of teleological interpretation is not to be underestimated. Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) determines that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Teleological interpretation is an analytical process fully acknowledged in international law,[30] recognizing in law the necessary flexibility that allows judges to determine the normativity in respect of actual cases in a fair manner. When interpreting international criminal law, judges will clearly be deferential to human rights protection, which is a principal component of the international criminal justice system. Yet, this is entirely different from deferring the interpretative result to the scope and *telos* of human rights law. As previously highlighted, international criminal law and human rights law do not share identical philosophical foundations. Nor do they aim at protecting the exact same "goods". Nor are they framed by the same indistinguishable legal principles and norms. While there is in both legal areas a common substrate, it is only partial. It does not amount to a perfect juxtaposition of the overall realms of international criminal law and human rights law. Teleological interpretation of international criminal law is to be referred to the scope and *telos* of international criminal law itself, where human rights play a primary role. In this context, human rights are already

[30] See ECtHR, *Case of Soering v. UK*, Judgment, 7 July 1989, para 87, stating that, "[i]n interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (…) Thus, the object and purpose of the Convention for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the 'general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' ". For case-law of international criminal tribunals promoting teleological interpretation see, for example, *Prosecutor v. Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-I-AR72 (10 August 1995); *Prosecutor v. Kunarac et al.* (Appeals Judgment), IT-96-23&23/1 (12 June 2002).

incorporated in international criminal law: directly, in norms regulating the rights of the accused to a fair trial; indirectly, by being crystallized in critical principles of substantive law.

The previous analysis has shed some light on the need to apply standards able to guide a "rationalized" and consistent reliance on human rights law by international criminal tribunals which respects archetypal features of international criminal law, specifically the principles of legality and individual culpability. The next section aims to grasp how international criminal law judges should resort to human rights law.

III CLARIFYING THE ROLE OF HUMAN RIGHTS LAW IN THE INTERPRETATION AND APPLICATION OF INTERNATIONAL CRIMINAL LAW

The critical outcome of interpreting and applying international criminal law by means of an often "wild" appeal to human rights law is sharply illustrated by Darryl Robinson:

> The official narrative, and widespread understanding, is that ICL adheres to fundamental principles of criminal law, and that it does so in an exemplary manner. These fundamental principles distinguish a liberal system of criminal justice from an authoritarian system. An authoritarian system may deal with individuals in any manner in order to pursue its aims, whereas a liberal system embraces restraints on its pursuit of societal aims out of respect for the autonomy of the individuals who may be subject to the system. Thus while the purpose of the criminal law system as a whole may be to protect society, some further deontological, or desert-based, justification is still required for a just application of punishment to a particular individual. Treating individuals as subjects rather than objects for an object lesson, or as 'ends' rather than solely as 'means', imposes principle restraints on the infliction of punishment.[31]

In view of the evidence provided earlier when analysing the jurisprudence of the ICTY, one could argue that international criminal law does not adhere to the same strict principles that ground criminal law. However, such an argument is to be rejected. On the one hand, scholars and international judges do not challenge the fundamental nature of the principles of legality and individual culpability as founding pillars of international criminal justice.[32] On the other, the

[31] D. Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, at 926.

[32] *Ibid.*, 927: "(…) one might be tempted to conclude that ICL is indifferent to liberal principles and is simply more harsh and punitive than national criminal law.

jurisprudence of international tribunals, though departing from the above-mentioned principles, does not reject their binding nature. Rather, international judges recognize their compulsory character by explaining how human rights law (directly or through a human rights law-based teleological interpretation of international criminal law) assures respect for the principles in question.[33] In other words, the principles of legality and personal guilt have never been refuted by international tribunals; judges have attempted to sort out explanations to demonstrate full compliance with normative standards the binding force of which is never contested. The explanations provided are often contradictory: while aimed at reaffirming the principles of legality and personal culpability, they lead to charges and convictions which, it is fair to argue, the accused could not have foreseen and for crimes he or she did not intend, plan, commit or even have knowledge of.

More often than not human rights law has an influence on the enforcement of international criminal law, and as excessive as this influence may be, it is justified on account of the plurality of the international legal order and the confluence of different normative realms which regulate the same factual scenarios. That is, such influences have been accepted and justified by reference to the merits of legal pluralism. Again, this seems a desperate justification for resorting to an interpretation of the law that contradicts the very foundations of

Footnote 32 continued
However, such an explanation misses the curious complexity of the phenomenon. Mainstream ICL does not reject fundamental principles, but rather sees itself as fully compliant, which suggests that more subtle distortions are at work''.

[33] In this regard, see J. Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication' (2006) 44 *Columbia Journal of Transnational Law* 377 at 449, where it is possible to identify an institutional explanation for what this article refers to as a ''wild'' human rights law approach to the interpretation and application of international criminal law. While one can trace back international criminal law to the Nuremberg Trials, it met an outstanding growth in the early 90s with the establishment of the *ad hoc* Tribunals. It was then necessary to gather qualified personnel to work in the newly created criminal institutions. As very few specialists in international criminal law existed the gap was filled with human rights lawyers and experts in international humanitarian, who due to their background approached international criminal law on the basis of the methodological and philosophical foundations of their respective fields of expertise without taking into account the most basic differences between human rights law and international humanitarian law, on the one hand, and international criminal law, on the other. See also M. Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455, especially at 495.

the system but has permitted to trigger criminal proceedings. Legal pluralism is not to be equated with a disarrayed merging of legal orders. To the contrary, it recognizes the existence of multiple legal systems interacting and sometimes overlapping with each other.[34] Often, this interaction is fruitful, opening the way for constructive conflict and innovative adaptation. But this rule knows exceptions. Historically, the concept of legal pluralism appeared associated with colonialism. In that context, it was undeniable the confluence and overlapping of two legal systems: the system of the metropolis and the legal or quasi-legal indigenous system. Legal pluralists tried then to draw attention to the fact that law, perceived as such, did not derive exclusively from the central power of the sovereign state. Legal pluralism understood in this manner cannot be automatically transposed to all socio-legal realities it came later in time to embrace. The idea of legal pluralism in reference to colonized societies does not capture the reality and dynamics of, for example, the rapport between international criminal law and human rights law. It is one thing to apply the pluralist project to the social reality of colonialism, for instance, and argue that there were no reserved domains of a single power. It is quite different to affirm the same in respect of legal areas thought to serve specific needs or to protect determinate "goods" under certain deontological and philosophical boundaries. There is no homogeneous concept of legal pluralism with immutable contours. There is an archetypal project of legal pluralism the specific features of which vary according to the context it is to be applied to. It is submitted that international criminal law has a nuclear normative space where there is no room for a legal pluralism debate as no conflict exists with other areas (in this case with human rights law) as human rights law does not overlap with international criminal law in that regard.[35]

[34] See S. Roberts, 'Against Legal Pluralism – Some Reflections on the Contemporary Enlargement of the Legal Domain' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 95 at 101: "'Legal pluralism' presupposes a certain way of thinking about social space – as divided into a number of co-existing, more or less discrete compartments. Once we adopt this compartmentalization, the question is immediately posed: how can we best conceptualize the relationship between these different orders/fields/discourses, etc?"

[35] As noted earlier, this does not mean that human rights are not part of international criminal law's reserved domain. International criminal law aims at protecting fundamental human rights and therefore they are a corner-stone of international criminal justice. Yet, deference to human rights within international criminal law is different from deference to human rights law.

This notwithstanding, the point has been made according to which international criminal law required oversight outside itself; otherwise one would face unavoidable circularity, largely due to the broad goals assigned to international criminal law. For Professor Mégret, human rights law constitutes the "constitutional" framework of reference that prevents international criminal law from derailing into an illiberal system.[36] As noted before, it is the aspiration to satisfy a range of different goals that has led judges to overstretch international criminal law. However, this does not mean that international criminal law needs a "constitutional" referent outside its realm, but rather that one is demanding far too much from this system of law. While the goals of international criminal justice are far beyond the scope of this work, it is submitted that international criminal law is only a sub-system of international law with a very specific purpose: to punish, through the imputation of criminal penalties, those bearing the greatest responsibility for the perpetration of the most serious crimes of international concern. It does not aim at ensuring international peace and security, national reconciliation or satisfying victims. These might amount to indirect effects of the activity of international courts but do not constitute the core of their mandate.[37]

---

[36] This view was sustained by Professor Frédéric Mégret in the contribution 'Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by the ICC', *Workshop on Public Law and Human Rights, Faculty of Law, Hebrew University of Jerusalem* (26 May 2010), (forthcoming article). Specifically, Professor Mégret maintained that human rights law should be the criterion to assess the legitimacy and "fairness" of international criminal law, with "fairness" focusing on whether the administration of justice in actual cases is being made at the expense of the parties (in particular the accused). However, as "justice" is an open concept susceptible to different materializations, so is fairness. Within the scope of this article the term "fairness" does not seem to be necessary. A comprehensive analysis of the subject of this work lies more on how to construe (that is, against what "constitutional" referents) the concepts of "fairness" or, as preferred here, "validity" of international criminal law rather than in the concept of fairness as such. Considering that international criminal law does not need a referent outside itself see S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, Oxford University Press, 2005), 13: "(…) every international legal system of adjudication is a sort of 'self-contained system' that cannot be subjected to the supervision of organs belonging to a different system. Among international judicial bodies there cannot be such vertical relationships".

[37] For a comprehensive analysis of the goals of international criminal law see M. Damaska, 'What is the Point of International Criminal Justice' (2008) 83 *Chicago-Kent Law Review* 329 at 331–335, 342–343. Damaska proposes that the principal objective of international criminal justice (as performed by international tribunals and courts) is pedagogical and didactical: "In the meantime, it seems more appropriate for

Again, it is not contended here that international criminal law constitutes an isolated system immune to dialectical influences. It is permeated by influences from other branches of law that share some of its axiological tenets. Still, the fundamental canons of international criminal law are determined by the international criminal justice system itself. Primarily, they arise from the "will of the international community" understood as a legal fiction that represents the consensus of the members of the international community concerning certain values and principles that are so fundamental for the understanding of humanity in a certain historical period that they have matured sufficiently so as to be expressed through legal imperatives. Then, in view of the layered or multi-level organization of international law, the different legal systems materialize with different nuanced understandings of those same axiological tenets. Accordingly, the source of ultimate validity of international criminal law is beyond the set of norms and legal principles it applies. However, the essence of international criminal normativity is the product of the context and teleological mandate of this branch of law. The values and principles that work as constitutional parameters to scrutinize international criminal law can only be resorted to as such after realizing what is the function of international criminal law and how it is intended to protect and enforce fundamental values whose source lies beyond international criminal law, that is, in the will of the international community as a whole. As mentioned earlier, international criminal law, human rights law and international humanitarian law share, to a significant extent, the same goals. Yet, they serve them in different manners, by emphasizing different levels, versions or features of the common goal. Only when the different "spheres of protection" (or "spheres of enforcement") are safeguarded has the value or principle in question been duly protected or ensured. In sum, the material source of the legitimacy and validity of international criminal law is not derived from the system of international criminal law itself. However, the legitimacy and validity of the exercise of the international judicial power of a criminal nature

Footnote 37 continued
international criminal courts to place greater emphasis on suasion (…) they should aim (…) at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity. This exposure is apt to contribute to the recognition of basic humanity. (…) But (…) there is a necessary condition for [the success of international tribunals] in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures" (footnotes omitted), at 345.

requires an assessment based upon criteria that respect the functions and philosophical pillars of international criminal justice.

3.1 *Delineating the Analytical Framework*

As early as 1973, Moore realized the dangers of merging ‘‘all together’’, without any criteria guiding the operation. She pointed out that when ‘‘recognizing the existence and common character of binding rules at all levels, it may be of importance to distinguish the sources of the rules and the sources of effective inducement and coercion’’.[38] Merry emphasized the problem of boundaries which legal pluralism discourse necessarily implicates:

> Why is it so difficult to find a word for nonstate law? Is it clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? It is useful to call these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds analysis. The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.[39]

While Merry had in mind colonialism and similar realities, her concerns are entirely pertinent in respect of the dialectic between human rights law and international criminal law. The lack of boundaries and of any effort to define them jeopardizes the integrity of international criminal law. It creates confusion among enforcers and addressees. The latter become immersed in social and legal disarray and the public message is passed of disarray within that legal branch which is called upon to regulate irrationally and chaos derived from the most serious attacks on human beings. Just because human rights law is a ‘‘form of ordering’’ with the status of law and serving, to a certain extent, the same goal as international criminal law it cannot be treated and relied upon as if it were true criminal law.

Strongly committed to the pluralist project but shedding light on the importance of being meticulous in defining the ‘‘legal proprium’’, Teubner argued that:

[38] S. F. Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 *Law and Society Review* 719 at 745.

[39] S. E. Merry, ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869, at 878–879.

> (…) this is the line which the discursive practice of law draws between itself and its environment. If we are interested in a theory of law as a self-organising social practice, then it is not up to the arbitrary research interests to define the boundaries of law. Boundaries of law are one among many structures that law itself produces under the pressure of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices.[40]

The boundaries of international criminal law, as well as those of its ‘‘legal proprium’’, cannot be defined *a priori* in categorical terms for reality is much more creative than law. However, there are unchallengeable parameters to be respected by international criminal law, which still permit the necessary flexibility that allows a fair and equitable enforcement of international criminal law. Adapting Teubner's reasoning, it is submitted that it is not up to judges to *freely* determine the boundaries of the law. It is their imperative task to acknowledge the self-imposed boundaries of international criminal law, as a response to the social and human demands of the international community. It is only after defining the ‘‘legal proprium’’ of international criminal law that the latter can be permeated by human rights law in an optimal manner, that is accepting and integrating what is compatible with its teleological and philosophical foundations and rejecting what does not comply with such parameters. The ‘‘legal proprium’’ comprises the axiological set and the deontological principles that identify and singularize international criminal law. As previously explained, the principles of legality and individual culpability are the corner-stones of international criminal law. Where these standards are not respected it is not possible to speak of international criminal law. Supporting this conclusion is the practice of national and international criminal tribunals since the Nuremberg Trials as well as national legislation, treaty law and customary norms of international criminal law.

The analytical framework for any attempt, always on a case-by-case basis, to construe the ‘‘legal proprium’’ of international criminal law should focus on Luhmann's theoretical scheme of binary codes. The relevant binary code is not ‘‘legal/illegal’’ but rather ‘‘criminal/non-criminal’’. Facts falling under the term ‘‘criminal’’ cannot be submitted to the direct lens of human rights law, which in this instance can only adopt the role of interpretative aid. Facts that are

[40] G. Teubner, ‘The Two Faces of Legal Pluralism’ (1992) 13 *Cardozo Law Review* 1442 at 1452.

"non-criminal" but are illegal can be submitted to the more direct influence of human rights law.

Legal pluralism does not represent a panoply of different legal norms and principles merged together because they address the same reality. It is instead "a multiplicity of diverse communicative processes that observe social action under the binary code" criminal/ non-criminal.[41] This is not to support the normative closure of international criminal law.[42] There is an undeniable mutual influence between human rights law and international criminal law. Yet what they import from each other needs to undergo a maturation process – which will likely implicate adaptation in order to comply with fundamental principles of the legal area in question – that might eventually lead in time to the integration of norms and principles of human rights law into international criminal law thus becoming international criminal law themselves.[43] It is because there was no maturation processes or evidence of social demand in the import of human rights law ideology into international criminal law, as it was pursued in the case-law previously reviewed, that it is herein referred to as a "wild", as opposed to a "rationalized" appeal to human rights law.

3.2 *Delimitating Analytical Criteria*

Once the necessity of preserving the "legal proprium" of international criminal law is acknowledged, the question remains which analytical criteria shall be deployed to decide whether and to what extent human rights law can be called upon to enforce international criminal law. The concepts of "analogy" and "complementarity" are here proposed to act as such criteria.

International criminal judges operate in the realm of three different normative fields: (i) definition of crimes; (ii) individual liability,

[41] See *ibid.*, 1451. Referring to the relationship between different authoritative sets of normativity, Teubner concluded that: "legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/ illegal".

[42] See Moore (n. 38), who, referring to the social field, argues that "it can generate rules and customs internally, but (…) is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded".

[43] See Roberts (n. 34) at 102: "While messages are inevitably transformed in their transition from one discourse to the other, 'something' passes across the boundary, if in garbled form".

and; (iii) guarantees of due process. Arguably, one could add area (iv): the protection of victims' rights.

Analogy is not a common analytical tool in criminal law as it may imperil legal certainty. Prohibition of analogy in criminal law is thus a corollary of the principle of legality. However, here it is advocated not to undermine but to shield the core of the principle of legality from interferences which would amount to criminalizing behaviours for which individuals could not have foreseen personal punishment.

In the *Furundžija* and *Kupreškić* cases,[44] the ICTY directly resorted to human rights instruments to define crimes. In doing so, judges presupposed some type of analogy between human rights law and international criminal law. However, such analogy is nonexistent. Analogy is a methodological process by which a given norm or set of norms extends its application to facts or fields not directly comprised in its scope and with which it shares a specific relationship. This *specific* relationship lies on the values or "goods" protected by the norm the application of which is extended, on the one hand, and the values and "goods" that would be struck if the norm's scope were not to be extended, on the other. The values and "goods" are the same in both situations. The *specific* relationship corresponds to that axiological identity. In national systems, analogy is called upon usually in respect of different norms of a similar legal area which therefore share the same underpinning philosophy. When in question is the analogy between two different legal areas – human rights law and international criminal law – the *specific relationship* cannot be assessed only by reference to facts, values or "goods" protected but predominantly by reference to the scope and *telos* of the normative tenets of the systems at stake. In other words, importing a human rights norm in to international criminal law requires an assessment of whether such norm shares the same concerns, serves the same aims and is grounded on legal principles which are corner-stones of international criminal law. Because human rights instruments ultimately aim at protecting the individual against the abuse of state power, the definition of crimes under human rights law cannot be automatically transposed on international criminal law where the relationship is private in the sense that the individual is opposed to other individuals. In addition, there are fluid areas where the knowledge of the state concerning the criminal nature of the act is unquestionable – the same not being the case with regard to individuals. It is easy to understand how the principle of individual

[44] See text to n. 9–10 and 11–12, respectively.

culpability gathers different nuances in human rights law and international criminal law. If it is not possible to foresee the criminal nature of an act and the punishment attached to it, it is clearly impossible to maintain that the individual had the knowledge and intent necessary to determine personal guilt. While the principle of legality is primordially linked to the definition of crimes, the principle of individual culpability is inevitably intertwined with the modes of criminal liability.

Accordingly, in respect of the definition of crimes and determination of individual criminal responsibility, as a rule, there should be no space for directly resorting to human rights law in international criminal law or for a human rights law-based teleological interpretation of international criminal law. Still, one could feel tempted to immediately apply human rights law in respect of some cases where the influence of human rights discourse is well-known, for example with respect to forced marriage as a crime against humanity. The Special Court for Sierra Leone (SCSL) in *Brima, Kamara and Kanu* ruled for the first time that forced marriages may amount to crimes against humanity under the category of other inhumane acts (Article 2 (i) SCSL Statute).[45] Important human rights law instruments consider forced marriage a gross violation of individual rights.[46] However, the realm of forced marriage as a violation of human rights includes but is much broader than forced marriage as a crime against humanity. From the viewpoint of human rights law, one might consider marriages according to traditional law (whereby members of the same religious or ethnic group are to wed other members of the group) derogations of internationally recognized standards of equality.[47] As

---

[45] *Prosecutor v. Brima, Kamara and Kanu* (Appeals Chamber), SCS-04-16-T (22 February 2008). It has been discussed in legal doctrine and by the Appeals Chamber of the SCSL, whether forced marriage should be prosecuted as a separate crime or within broader categories such as ''sexual violence'' and other gender-related criminal acts. This issue is beyond the scope of this article. For a comprehensive analysis see N. Jain, 'Forced Marriage as a Crime against Humanity – Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice* 1013; M. Frulli, 'Advancing International Criminal Law – The Special Court for Sierra Leone Recognises Forced Marriage as a 'New' Crime Against Humanity' (2008) 6 *Journal of International Criminal Justice* 1033.

[46] See for example Articles 16 UDHR and 23(3) ICCPR.

[47] See B. Oppermann, 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa and the United States' (2006) 17 *Hastings Women's Law Journal* 65. However, it is important to note the risk of human rights law colliding with peoples' right to self-determination by dismissing

of today, it is unthinkable that international criminal law – as *ultima ratio* normativity – might adopt such an expansive notion. Instead, it needs to construe this criminal conduct by reference to the international criminal law framework. In the sphere of international criminal law, forced marriage refers exclusively to a specific form of gender-based violence (which is already criminalized under different modalities). It shares the constitutive elements of other crimes against humanity such as sexual slavery or forced pregnancy.[48] Further, in order to constitute an international crime, forced marriage needs to achieve the threshold of gravity of other crimes against humanity, or more specifically, of other inhumane acts. The judge should assess this comparable gravity through the *eiusdem generis* maxim.[49] It is only within the limits established by the constitutional principles of international criminal law that the definition and the regime of individual responsibility of the crime of forced marriage may be refined through the influence of human rights law. That is to say, human rights law might be very important to verify the principles of accessibility and foreseeability of the alleged perpetrator. It will hardly make a direct contribution to the substantive elements of the crime. As already mentioned, the crime of forced marriage shares some of the constitutive traits of other sexual and gender-based crimes. The teleological interpretation that might take place in order to specify this criminal conduct will be based on these other criminal categories rather than on human rights law violations as such.

The situation is different with regard to the third area mentioned above: guarantees of due process. Ensuring fair trials in which the accused will not be submitted to the arbitrary dicta of a central power appertains to the domain *par excellence* of human rights law. Originally, the central power was equated to the sovereign state and exercised through courts as states' organs. Nowadays, with the proliferation of international and supranational judicial and quasi-judicial bodies the understanding of the central power has been enlarged coinciding with the power of the authoritative body enforcing

---

Footnote 47 continued
religious or ethnic communities' distinctiveness that is essential for their self-understanding.

[48] For example, in *Kvocka et al.* the ICTY considered forced marriage a form of sexual violence. See *Prosecutor v. Kvocka et al.* (Trial Chamber), IT-98-0/1-T (2 November 2001), para. 180, n. 343.

[49] See Frulli (n. 45), 1036.

the law to actual cases. Whether such body is a domestic court or an international tribunal makes no determining difference, particularly in light of the well-known critiques of selective justice and political manipulation directed at international tribunals. In line with this view, the statutes of the *ad hoc* Tribunals and the laws of establishment of hybrid tribunals include sections dedicated to the rights of the accused to a fair and impartial trial. These norms were in most cases directly imported from human rights law. Where lacunae subsist in the statutes of international(ized) tribunals and the remaining sources of international criminal law are not sufficient to integrate legal gaps, the analogy persisting between the scope of this normative area and human rights law is so evident that it may justify direct application of human rights law rationales in the realm of international criminal judgements. Interestingly, even though this would be the most uncontroversial field to call upon human rights law, international tribunals have been rightly cautious in appealing to human rights law, underlining the specificity of international criminal law.[50]

Finally, area (iv): protection of victims' rights. As earlier noted, the mission of international criminal law is not to directly satisfy the legitimate pretensions or interests of victims. This is not to argue that victims' rights play no role within the mandate of international courts. However, it is more accurate to conceive their protection as a reflex effect of criminal justice which immediately intends to punish the gravest and most censurable social behaviours through the most restrictive sanctions on personal freedom. This is all more so given the limited capabilities of the international judicature, which prevents it from intervening in all cases demanding a transnational judicial response.[51] Nonetheless, it is relevant to note that the Rome Statute

[50] See for example, *Prosecutor v. Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses), IT-94-1-T (10 August 1995), para. 28: "The fact that the International Tribunal must interpret its provisions within its own legal context and not rely on its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR [right to a fair trial] by the European Court of Human Rights are meant to apply to ordinary criminal (…) adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction". See also ICTR, *Jean-Bosco Barayagwiza v Prosecutor* (Decision), ICTR-97-19-AR72 (3 November 1999), para. 40, where the Tribunal considered that while the decisions of the European Court of Human rights and the Inter-American Court of Human Rights were not directly applicable to cases under its jurisdiction, they were authoritative evidence of international custom.

[51] See Damaska (n. 37).

presents some exceptions to this framework. According to the principle of complementarity, the ICC is bound to step in when competent states are inactive, unwilling or unable to genuinely investigate and prosecute (Article 17) and the threshold of gravity is met (Article 53(1)(c)). The ICC is competent to intervene on the basis of a delegation of *jus puniendi* made by states. This means that the right of victims to access the court and the right to an effective remedy are partially enforceable before the ICC: that is, when it is competent to adjudicate. Importantly, the limited resources of the Court are likely to lead to selectivity. Therefore, while the victim's right is a fundamental one vis-à-vis the state, the same does not happen in respect of the international judicature. The ICC is not obligated to administer justice but it is required to decide whether or not to do so, in accordance with the Rome Statute. Against this background, it is submitted that direct application of human rights law or human rights law-based teleological interpretation of international criminal law in the realm of protection of victims' rights is admitted only in tangential cases where the rights of victims before international tribunals are very much similar to those before the state. For example, with regard to the right of victims to participate in international criminal proceedings – a novelty of the Rome Statute – it appears that human rights law may have a more direct influence, always within the scope of the criminal law provisions at stake. Yet, while the balance between the rights of victims and those of the accused may be similar in human rights law and international criminal law, the fact remains that the very specific features of criminal guilt, causation and liability are not shared by human rights law in the same terms in which they exist in international criminal law. This is a field where judges might be particularly tempted not to examine the repercussions of resorting to human rights law and the methodology to do so as thoroughly as advisable.

Rejecting the direct application of human rights law and human rights law-based interpretation of international criminal law in respect of the definition of crimes and modes of criminal liability does not amount to denying any influence of human rights law in the interpretation and enforcement of those sets of criminal norms. There is space for dialogue between the two legal systems beyond direct applicability and human rights law-based interpretation. The analytical tool framing that interaction should be "complementarity" as opposed to subsidiarity.

Complementarity is well-known as a procedural principle characterizing the relationship between domestic criminal jurisdictions and the jurisdiction of the ICC. The proposal of complementarity in the context of this work departs from the terms of the Statute.[52] The New Oxford Dictionary of English defines complementarity as "a relationship or situation in which two or more different things enhance or emphasize each other's qualities or form a balanced whole".[53] According to the Oxford American Dictionary and Thesaurus, "complementary" is an adjective referring to two or more parts that combined form "a whole or (...) improve each other".[54] The New Oxford Thesaurus of English clarifies that in order for something to complement another it needs to "*add*" something to it in a way that "*completes it*"[55] and makes it "*perfect*".[56] It is proposed that "complementarity" be taken as an analytical device to standardize the relationship between different sets of substantive norms which regulate the same fractions of social reality. When there is uncertainty concerning the definition of crimes and imputation of individual responsibility, the law enforcer can and should resort to human rights law and import therefrom the facts and normativity that enhance international criminal law and contribute to form a "*balanced whole*". Surely, the import needs to conform to the foundational pillars of international criminal law otherwise the "*whole*" would not be "*balanced*" and "*perfect*". In practice, this means that when facing gaps in the definition of crimes international judges cannot automatically apply the notion of the crime in force in human rights law. They are required to analyse human rights law, international humanitarian law, domestic criminal laws and assess whether

---

[52] For a comprehensive reading of "complementarity" in general international law, see P. M. Dupuy, 'Principe de Complémentarité et Droit International Général', in M. Politi and F. Gioia (eds.), *The International Criminal Court and National Jurisdictions* (Aldershot, Ashgate Publishing Limited, 2008), 18.

[53] *The New Oxford Dictionary of English* (Oxford, Oxford University Press, 1999), 375.

[54] *The Oxford American Dictionary & Thesaurus* (Oxford, Oxford University Press, 2009), 250.

[55] *The New Oxford Thesaurus of English* (Oxford, Oxford University Press, 2000), 170.

[56] *Webster's Third New International Dictionary of the English Language Unabridged* (Springfield, MA, Merriam-Webster, 1993), 464.

the developments in these areas have crystallized as general principles of, or customary, criminal law. Complementarity, as opposed to subsidiarity, is not equated to a hierarchical relationship culminating in the direct and immediate application of other laws vis-à-vis the insufficiency of the primarily competent law.[57] For example, there could be space for international judges to *complementarily* resort to human rights law in respect of the definition of genocide, which by definition is hardly committed without the support of the state apparatus or conceivable independent of its assistance.

Complementarity as here proposed should also be the analytical tool guiding appeals to human rights law when international criminal law is incomplete rather than silent in respect of a specific matter. For instance, if international tribunals realise vis-à-vis an actual case that a determined norm aimed at guaranteeing the rights of the accused is flawed or incomplete, this does not mean that judges should immediately apply human rights normativity. In view of the specificity of international criminal law, judges should *complement* rather than substitute (formally or substantively) the criminal norm.

IV BRIEF ASSESSMENT OF THE EARLY CASE-LAW OF THE ICC

The Rome Statute is very specific in determining the law judges are bound to respect.[58] Yet, Article 21(3) is a crucial provision which opens

[57] See P. S. Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155 at 1207–1209. Referring to a broader context than the one dealt with in this article, Berman proposes "subsidiarity" as a procedural mechanism to manage hybridity. Assessing manners of coping with conflicts between different levels of authority, he explains how, in many sectors, matters should be dealt with at the local level. When local entities were incapable of satisfying the interests at stake, the higher power (the state) would step in. This thesis presupposes the existence of two sets of normativity regulating the same social fraction. Yet, as explained previously in this article, it is contended that the actions under the jurisdiction of international criminal tribunals are regulated exclusively by international criminal law. There is no conflict with human rights law so no subsidiary or hierarchical relationship should be acknowledged between them. Again, human rights law may influence international criminal law inasmuch as the former contributes to the formation of general principles of international criminal law or customary criminal law.

[58] Article 21 of the Rome Statute determines the law to be applied by the Court: (i) the Statute of Rome, Elements of Crimes, Rules of Procedure and Evidence; (ii) "*where appropriate*" treaties, principles and rules of international law, and; (iii) principles derived from national laws of legal systems of the world.

the way for different uses of human rights law depending on the interpretative approach one adopts.[59] Some authors consider that it should be subject to a minimalistic interpretation, having a functional role mostly limited to procedural guarantees[60]; others argue that it should be the object of a maximalistic reading where human rights law enjoys a higher rank within the law the ICC is to apply, including in respect of the definition of crimes and their constitutive elements.[61]

Even if not explicitly citing Article 21(3), the ICC has referred to different human rights law instruments to ground decisions. In *Prosecutor v. Al-Bashir*, for instance, the Court relied on human rights law to construe the "*reasonable suspicion*" standard in Article 5(1)(c) of the ECHR. This is a case where one sees "analogy" functioning in practice. Human rights law instruments were recalled insofar as they were pertinent to comply with the mission of the ICC, that is to say when they shared the teleological and philosophical tenets of international criminal law. In reality, at stake were mostly the rights of the accused.[62]

Article 21(3) was addressed predominantly with regard to procedural rights aimed at ensuring fair trials.[63] In the *Lubanga* case, the Appeals Chamber had to decide whether the Pre-Trial Chamber had the competence to halt proceedings for abuse of power by national authorities. It concluded that "abuse of process or gross violations of human rights of the suspect or of the accused are not identified as such as grounds for which the Court may refrain from embarking

[59] Article 21(3) concerns the entitlement of the Court to apply principles derived from national laws of legal systems, "provided that those principles are not inconsistent with this Statute and with international law and internationally recognized human rights".

[60] See for example, G. Haffner and C. Binder, 'The Interpretation of Article 21(3) ICC Statute: Opinion Reviewed' (2004) 9 *Austrian Review of International and European Law* 164.

[61] See for example A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), 1079 ss.

[62] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision of the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-OA (3 February 2010), para. 31.

[63] The ICC also construed the definition of "harm" as encompassing physical or psychological pain by reference to human rights law. *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber 1's 31 March Decision Denying Leave to Appeal), ICC-01/04-168 (13 July 2006).

upon the exercise of its jurisdiction".[64] However it acknowledged the legal pertinence of the doctrine of abuse of power and admitted it was intrinsically founded on human rights. Accordingly:

> Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute: every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights; first and foremost in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embarking the judicial process in its entirety. Where fair trial becomes impossible due to breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial (…) If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.[65]

The previous quotation illustrates how "complementarity" as a methodological device operates in practice. While the Statute did not regulate conditions for the detention of suspects by national authorities, a complementary appeal to human rights law permitted a coherent and rationally driven completion of the Rome Statute aimed at *perfecting* it, *completing* international criminal law when it presents gaps but safeguarding, at the same time, the integrity of the system ensuring that it remains or moves towards a "*balanced whole*".

This notwithstanding, it should be pointed out that in other instances, the practice of the Court has been questionable, seeming that it overlooks some of the most well-established principles of due process. One could fairly argue that, after several years, the fact that the ICC Prosecutor has not yet taken a decision on the situation in Colombia runs contrary to the right of victims to access the court.[66]

The approach adopted concerning the dialogue between human rights law and international criminal law may have important consequences for the functioning of the ICC. It is possible to conceive of conflicts of obligations for states: cooperation with the ICC *versus* human rights law obligations.[67] In line with these contradictions, the

[64] *Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2) of the Statute, 3 October 2006), ICC 01/04-01/06 (14 December 2006), para 24.

[65] *Ibid.*, para. 27.

[66] See, for example, Article 2(3) ICCPR.

[67] While the Rome Statute is rich in norms protecting human rights and ensuring fair trials there are some instances where doubts and conflict may arise, though this situation is *prima facie* unlikely.

ICC may be called in the future to decide challenges to the compatibility of specific norms of the Rome Statute with internationally recognized human rights standards. The Court might have to rule out those norms or further integrate and specify them in order to guarantee its validity. Overlooking human rights standards could further impact the principle of complementarity as enshrined in the Rome Statute, particularly as few States Parties to the Statute have adopted implementing laws where national courts are called to fill gaps derived from the functioning of the ICC.[68] One could argue that if violations of human rights standards are at stake the Court somehow fulfils the requirements of unwillingness or inability which could reactivate the jurisdiction of states.

V CONCLUSION

The jurisprudence analysed in Section II reveals how international judges tend to borrow principles and rationales from human rights law without theorizing sufficiently on the methodology to do so. Arguably, this is due to the commitment of judges to put an end to horrific crimes.[69] To that effect, they imported the necessary normative framework from human rights law, the domain *par excellence* of progressive interpretation, where the main objective is to protect and provide satisfaction to the largest number of victims.[70] However, in this adoption of human rights rationales, judges did not take enough consideration of major differences between the axiological foundations, and philosophical tenets of international criminal law and human rights law.

This article acknowledges that human rights law has the potential to act as a guideline to teleological interpretations of international criminal law. However, the article rejects the direct application of human rights law or ''wild'' human rights law-based interpretations of international criminal law, following no methodology or analytical

[68] This is the case, e.g., of Spain, Belgium and Germany. The concept is usually referred to as ''reversed'' complementarity.

[69] Studies reveal that the greater the gravity of crimes, the stronger the pressure to ensure a conviction and the greater the probability of perceiving a person as guilty. See M. Lovaglia, 'Misconduct in the Prosecution of Severe Crimes: Theory and Experimental Test' (2006) 69 *Social Psychology Quarterly* 97.

[70] Robinson (n. 31), 929: ''Human rights focus more simply on broad and liberal construction to maximize protection for beneficiaries, and are not accustomed to the special moral restrains which arise when fixing guilt upon an individual''.

process. If no rationally driven method is followed when assessing the properness of importing human rights law into the realm of international criminal law, the serious risk exists of raising human rights law into the analytical system, giving it wider application than it should or is prepared to have. In this way, international criminal law would find its standard of reference in human rights law. Hence, it would not remain a distinct system of law but would become something else, probably only the enforcement branch, or a sub-area, of human rights law. In this case, the paradigm of international criminal law would need to be rethought as where the principles of legality and individual culpability are neglected one cannot speak of international criminal law as today it is generally affirmed and perceived.[71]

Even if the motivation of international judges when engaging in "wild" reliance on human rights law is to end impunity of international crimes, and for as noteworthy as it might ideologically be, it must be pursued impartially which requires the establishment of an independent analytical framework.[72] Otherwise, the credibility of international criminal justice and the legitimacy of international criminal law will be severely impaired.

[71] See *ibid.*

[72] See Roberts (n. 34) at 105: "Whatever the specific objective, its execution must involve a self-conscious attempt at the impossible – the establishment of a framework of analysis distinct from the 'cultures' compared".