chapter 8
Human Rights and International Criminal Law

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1 Introductory Remarks on the Troubled Interrelationship

There are a variety of interrelationships between human rights and international criminal law. According to the picturesque vision of one author, where the former is the shield, the latter is the sword.¹ Both may be seen as two different perspectives of the same problem.² Indeed, the development of the two branches of international law bears many similarities. Both share a common base, both seek to provide a minimum standard of humane treatment and, in contrast to other branches of international law, both have a direct impact on individuals.³ In fact, it is due to those parallel developments that individuals may now be considered subjects of international law.

It is beyond the limits of the present study to examine in detail different understandings of human rights. In a traditional sense, they protect individuals against mistreatment by the state.⁴ But the real issue under investigation here is the extent and modality of transposing (or elevating) such a concept onto the international level.

In this study we define international criminal law as “the body of international law imposing criminal responsibility directly upon the individual, without the necessary interposition of national legal systems”.⁵ This is of course but one of the many definitions of the concept suffering from great ambiguity and at the same time offering a plethora of potential understandings.⁶ Within this approach, the existence of the respective international judiciary is indispensable. The creation of international criminal justice is, therefore, closely

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interrelated with the international protection of human rights. Of course, international criminal courts and tribunals are not human rights courts; nor do they monitor the protection of human rights. One may, however, consider international criminal justice as an element of the human rights protection system, both from a substantive and procedural perspective.

The subject-matter jurisdiction of international criminal courts and tribunals includes some gross human rights violations. However, the scope of international criminal law is much narrower, as not every infraction is deemed to be at the level of an international crime, thereby a distinction between different categories of human rights is introduced, which in itself results in the departure from the principle of indivisibility of human rights. Still, even if it is only to a limited extent, criminal proscription becomes the ultima ratio modality of international protection of human rights. Using the model elaborated by M. Cherif Bassiouni, one may refer to such criminalization, i.e. the development of international penal proscriptions, as the fifth and final stage in the pattern of human rights emergence and development. Furthermore, it is now widely established that a failure to address human rights abuses would also constitute a violation of human rights. There is thus a peculiar interplay between human rights and international criminal responsibility. The elevated value of certain human rights leads to the criminalization of their violation and, as a result of such proscription, the very value protected is consolidated.

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