

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

¹ M. Ch. Bassiouni, *Introduction to International Criminal Law* (2003), pp. 134–135.

² C. de Than, E. Shorts, *International Criminal Law and Human Rights* (2003), p. 12.

³ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, (3rd ed., 2014), p. 13.

⁴ See e.g. E. Friesenhahn, “Menschenrechte”, in H.-J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, Zweiter Band (1961), pp. 503f.

⁵ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), pp. 9–10.

⁶ See e.g. C. Kreß, “International Criminal Law”, MPEPIL, §1. Cf. the early views denying the emergence of the discipline: G. Schwarzenberger, “The Problem of an International Criminal Law”, in G.O.W. Mueller and E.M. Wise (eds.), *International Criminal Law* (1965), pp. 3ff.

interrelated with the international protection of human rights.⁷ 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.⁸

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.⁹ 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.¹⁰ Furthermore, it is now widely established that a failure to address human rights abuses would also constitute a violation of human rights.¹¹ 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.¹²

7 C. Stahn, S.-R. Eiffler, „Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom“, 82 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1999), pp. 255ff.

8 See Ch. Tomuschat, „Die Arbeit der ILC im Bereich des Materiellen Völkerstrafrechts“, in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen: zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (1995), pp. 282f.

9 See F. Pocar, „The Rome Statute of the International Criminal Court and Human Rights“, in M. Politi and G. Nesi (Eds.), *The Rome Statute of the International Criminal Court: A challenge to impunity* (2001), p. 72.

10 After the (1) enunciative stage, (2) the declarative stage, (3) the prescriptive stage and (4) the enforcement stage – see M. Ch. Bassiouni, „The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights“, in T. Vogler (ed.), *Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag* (1985), p. 1455ff.

11 D. Orentlicher, „Settling Accounts: The Duty to Prosecute Human Rights Violations of a Former Regime“, 100 *Yale Law Journal* (1991), p. 2537.

12 S. Nimaga, „The International Criminal Law Regime and International Human Rights Law: Theoretical and Empirical Explorations“, in K. Hoffmann-Holland (ed.), *Ethics and Human Rights in a Globalized World: an Interdisciplinary and International Approach* (2009), p. 121.