

# **International Criminal Justice Series**

Volume 5

## **Series editors**

Gerhard Werle, Berlin, Germany

Lovell Fernandez, Bellville, South Africa

Moritz Vormbaum, Berlin, Germany

## **Series Information**

The *International Criminal Justice* Series aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

## **Editorial Office**

Prof. Dr. Gerhard Werle  
Humboldt-Universität zu Berlin  
Faculty of Law  
Unter den Linden 6,  
10099 Berlin, Germany  
gerhard.werle@rewi.hu-berlin.de  
moritz.vormbaum@rewi.hu-berlin.de

More information about this series at <http://www.springer.com/series/13470>

Krit Zeegers

# International Criminal Tribunals and Human Rights Law

Adherence and Contextualization



ASSER PRESS



Springer

Krit Zeegers  
Allen & Overy LLP  
Amsterdam  
The Netherlands

ISSN 2352-6718 ISSN 2352-6726 (electronic)  
International Criminal Justice Series  
ISBN 978-94-6265-101-2 ISBN 978-94-6265-102-9 (eBook)  
DOI 10.1007/978-94-6265-102-9

Library of Congress Control Number: 2015956374

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2016

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This Springer imprint is published by SpringerNature  
The registered company is Springer Science+Business Media B.V. Dordrecht

# Acknowledgements

Numerous people have been instrumental in supporting me during the writing of this book. The academic guidance of Profs. Göran Sluiter and Yvonne Donders deserves to be mentioned first, as well as that of Sergey Vasiliev. This book would not have been finished without their support. I also want to thank all my other colleagues and friends at the criminal law and international law departments of the Law Faculty at the University of Amsterdam for providing an academically stimulating environment. My friends have been more than instrumental in providing distraction and keeping me sane in the sometimes challenging periods. Special thanks to my parents for their infinite love and support. Above all, Gaetano, thank you so much.

# Contents

<b>1 Introduction</b> . . . . .	1
References . . . . .	6
 <b>Part I Applicability of International Human Rights Law to the International Criminal Tribunals</b>	
<b>2 Human Rights Obligations of the ICTs under International Law</b> . . . . .	9
2.1 Introduction . . . . .	9
2.2 International Legal Personality of the ICTs . . . . .	10
2.3 Are International Organizations Bound by International Law? . . . . .	12
2.3.1 Transfer Thesis . . . . .	13
2.3.2 Subject Thesis . . . . .	20
2.4 The Meaning of ‘Being Bound’ by General IHRL . . . . .	26
2.4.1 Indeterminacy of ‘General International Law’ . . . . .	26
2.4.2 Inherent Flexibility of Human Rights Standards . . . . .	31
2.4.3 Permissibility of <i>Lex Specialis</i> . . . . .	38
2.5 Conclusion . . . . .	41
References . . . . .	42
<b>3 Human Rights Obligations of the ICTs Based on their Internal Law and Practice</b> . . . . .	47
3.1 Introduction . . . . .	47
3.2 The <i>ad hoc</i> Tribunals . . . . .	48
3.2.1 Internal Law and Practice . . . . .	48
3.2.2 Case Law . . . . .	59
3.3 The ICC . . . . .	64
3.3.1 Article 21(1): Applicable Law . . . . .	64
3.3.2 Article 21(3): Consistency with Internationally Recognized Human Rights . . . . .	73
3.4 Methodological Complications: Defining the Scope of ‘Internationally Recognized Human Rights’ . . . . .	91

3.5	Contextualization: Adapting Human Rights to the ICTs' Context . . .	97
3.6	Conclusion . . . . .	104
	References . . . . .	105
<b>Part II The Interpretation and Application of Human Rights Norms by the International Criminal Tribunals</b>		
<b>4</b>	<b>The Right to Privacy and Investigative Measures . . . . .</b>	<b>113</b>
4.1	Introduction . . . . .	113
4.2	IHRL Framework . . . . .	115
4.2.1	The Right to Privacy in the Context of Domestic Criminal Investigations. . . . .	116
4.2.2	The Right to Privacy in the Context of Inter-State Cooperation in Criminal Matters . . . . .	126
4.3	Privacy and Direct Coercive Action by the ICTs . . . . .	139
4.3.1	The ad hoc Tribunals . . . . .	139
4.3.2	The International Criminal Court . . . . .	146
4.4	Privacy and Coercive Measures Executed in Cooperation with States . . . . .	149
4.4.1	The ad hoc Tribunals . . . . .	151
4.4.2	The International Criminal Court . . . . .	166
4.5	Comparison and the ICTs' Use of IHRL . . . . .	179
4.5.1	Comparing the ICTs' Approach to the Right to Privacy to IHRL . . . . .	179
4.5.2	The ICTs' Use of IHRL on the Right to Privacy . . . . .	182
4.6	Conclusion . . . . .	184
	References . . . . .	186
<b>5</b>	<b>The Right to Liberty and Provisional Release . . . . .</b>	<b>189</b>
5.1	Introduction . . . . .	189
5.2	IHRL Framework . . . . .	190
5.2.1	General Requirements . . . . .	191
5.2.2	Reasonable Suspicion. . . . .	196
5.2.3	Relevant and Sufficient Reasons for Detention . . . . .	196
5.2.4	Conclusion . . . . .	201
5.3	Provisional Release Before the ad hoc Tribunals . . . . .	201
5.3.1	The Original Requirement of 'Exceptional Circumstances' Justifying Release . . . . .	204
5.3.2	Requirements for Release. . . . .	210
5.3.3	Burden and Standard of Proof . . . . .	237
5.3.4	Comparison and the ad hoc Tribunals' Use of IHRL . . . . .	241
5.4	Interim Release Before the ICC . . . . .	249
5.4.1	Persistence of a Reasonable Suspicion. . . . .	255
5.4.2	Reasons Necessitating Arrest and Detention . . . . .	255
5.4.3	Conditional Release . . . . .	271
5.4.4	Review of the Length of Detention: Article 60(4) . . . . .	273

- 5.4.5 Burden and Standard of Proof . . . . . 276
- 5.4.6 Comparison and the ICC’s Use of IHRL . . . . . 278
- 5.5 Conclusion . . . . . 284
- References . . . . . 286
- 6 The Right to Be Tried Without Undue Delay . . . . . 289**
  - 6.1 Introduction . . . . . 289
  - 6.2 IHRL Framework . . . . . 290
    - 6.2.1 Scope of the Right to Be Tried Without Undue Delay . . . . . 292
    - 6.2.2 Relevant Parameters to Determine a Violation. . . . . 293
    - 6.2.3 Interim Conclusion. . . . . 301
  - 6.3 Trial Without Undue Delay Before the ad hoc Tribunals. . . . . 302
    - 6.3.1 Scope of the Right to Be Tried Without Undue Delay . . . . . 303
    - 6.3.2 Relevant Parameters to Determine a Violation. . . . . 305
    - 6.3.3 Comparison and the Tribunals’ Use of IHRL. . . . . 332
  - 6.4 Trial Without Undue Delay Before the ICC. . . . . 338
    - 6.4.1 The Right to Be Tried Without Undue Delay  
in the Case Law of the ICC . . . . . 339
    - 6.4.2 Analysis: Comparison and the ICC’s Use of IHRL . . . . . 345
  - 6.5 Conclusion . . . . . 348
  - References . . . . . 350

**Part III Synthesis, Conclusion & Recommendations**

- 7 Adherence and Contextualization: Towards a Methodological Framework for the Interpretation and Application of Human Rights Norms . . . . . 355**
  - 7.1 Introduction . . . . . 355
  - 7.2 Adherence to IHRL . . . . . 356
    - 7.2.1 Legislative Influence. . . . . 356
    - 7.2.2 Consistent Interpretation . . . . . 358
  - 7.3 Contextualization . . . . . 361
    - 7.3.1 The Specific Context of International Criminal Justice . . . . . 362
    - 7.3.2 Modalities of Contextualization . . . . . 371
  - 7.4 Proper Contextualization of Human Rights Norms:  
A Methodology . . . . . 380
    - 7.4.1 Determining the Applicable Human Rights Norm. . . . . 380
    - 7.4.2 Determining the Nature, Scope, and Content  
of the Applicable Right . . . . . 384
    - 7.4.3 Analyzing the Context in Which the Right  
Must Be Applied. . . . . 386
    - 7.4.4 Interpreting and Applying the Right in the ICT Context . . . . . 387
    - 7.4.5 The Methodological Framework in Practice . . . . . 388
  - 7.5 Conclusion . . . . . 392
  - References . . . . . 394



<b>8 Summary and Conclusion</b> . . . . .	397
8.1 Part I: Applicability of IHRL to the ICTs. . . . .	398
8.2 Part II: Interpretation and Application of Human Rights by the ICTs. . . . .	400
8.3 Part III: Towards a Methodological Framework. . . . .	402
References. . . . .	406
<b>Annexes</b> . . . . .	407
<b>Bibliography</b> . . . . .	417
<b>Index.</b> . . . . .	433

# Abbreviations

ACHPR	African Convention on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACnHPR	African Commission on Human and Peoples' Rights
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECnHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACnHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTs	International Criminal Courts and Tribunals
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
MLAT	Mutual Legal Assistance Treaty
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes
STL	Special Tribunal for Lebanon
UN	United Nations
UN Model Treaty	UN Model Treaty on Mutual Legal Assistance in Criminal Matters
UNC	United Nations Charter

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
VCLT	Vienna Convention on the Law of Treaties