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**Convergences and Divergences Between International Human Rights,  
International Humanitarian and International Criminal Law**  
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## FOREWORD

‘Human rights’ is an exceptionally strong brand name. In comparison with this giant, international criminal law and international humanitarian law are little-known dwarves. In everyday discourse, as well as in writings by scholars from outside the law, human rights often seems to absorb international criminal law and/or international humanitarian law. For example, in contemporary critiques of the human rights project, criticism of the International Criminal Court holds a central place, regardless of the fact that it is not, as such, a human rights body. In other situations, the lines between human rights law and its next-door neighbours are blurred or contested. A prominent example is found in discussions of the ‘war on terror’.

Hence, when human rights lawyers explore the reality of fragmentation and the desirability of integration within the context of human rights law, it is meaningful to include in the scope of the analysis those parts of the broader human rights project that are, technically speaking, hosted by other legal disciplines. There is such a thing as human rights law ‘in the broad sense’.

This is why a research project on ‘The Global Challenge of Human Rights Integration’, sponsored by the Belgian Federal Science Policy (BELSPO, 2012–17), included a work package that focused on ‘the fuzzy borders of human rights law’. At the project’s flagship conference in Ghent in December 2015, this resulted in a track on ‘Convergence and Divergence between International Human Rights Law and Other Branches of International Law’. A selection of the papers that were presented in that conference track has now been assembled in this volume.

In promoting scholarship that adopts a holistic perspective of the (broad) human rights project, the ‘Human Rights Integration’ project is not pursuing an agenda of unification. Its aim is much more modest and nuanced. An integrated human rights protection system is a human rights system in which the different actors, operating at different levels of jurisdiction, and with different mandates and specialisations, nevertheless share an awareness of being part of that bigger project, and reflect upon their role in it and their relationship to other nodes in the same network. Human rights integration is, in the first place, a matter of mindset and, in the second place, a dynamic. It is about making room for a global conversation on human rights, across sub-disciplines, fora and jurisdictions.

Despite being a young discipline, human rights law is experiencing fast specialisation at the level of scholarship. Only two decades ago, it would have

been self-evident that expertise in international human rights law, international criminal law and international humanitarian law was in the hands of the same scholars. Today, in most law schools, these are likely to be spread over two or three different chairs. What is more, most human rights scholars specialise within human rights law – for example, in a single forum (such as the European Convention on Human Rights) or in a specific set of rights (such as economic and social rights, or minority rights). While this is a sign of the maturing of the discipline, and an indicator of increasing depth and nuance in scholarship, it also carries the risk of the trees obscuring the forest (i.e. the bigger picture of the human rights project disappearing from sight). Against that background, the present volume offers an important contribution to the holistic or integrated analysis of human rights law in the broad sense.

Eva Brems  
Human Rights Centre, Ghent University

## PREFACE

As already noted by Professor Brems in the foreword, this volume compiles a selection of papers initially presented in a track of the ‘The Global Challenge of Human Rights Integration’ flagship conference, which took place in Ghent in December 2015. More specifically, the track was entitled ‘Convergence and Divergence between International Human Rights Law and Other Branches of International Law’. The call for papers required applicants to address the following questions: how does international human rights law (IHRL) relate to and interact with other bodies of international law? How does IHRL have a guiding, gap-filling, expanding or narrowing effect on such other bodies of law? In return, is IHRL undergoing similar effects from other branches of international law? The selected papers explored convergences and divergences between IHRL and the various sub-branches of international law such as international criminal law (ICL), international humanitarian law (IHL), international refugee law, international responsibility law, international economic law and international environmental law. In order to give the volume a focused theme, the editors chose to select only those papers dealing with convergences and divergences between IHRL, IHL and ICL.

IHRL, IHL and ICL are rooted in a similar ideal: respect for the autonomy and integrity of individuals and protecting individuals from misused State authority.<sup>1</sup> They have been represented as circles or rings, each of which overlaps with the other two. Indeed, human rights treaties, such as the Torture Convention,<sup>2</sup> and humanitarian law conventions, such as the four Geneva Conventions,<sup>3</sup> contain provisions regulating individual criminal responsibility.<sup>4</sup> Conversely, ICL instruments, such as the Rome Statute of the International Criminal Court (ICC),

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<sup>1</sup> D. ROBINSON, ‘The Two Liberalisms of International Criminal Law’ in C. STAHN and L. VAN DEN HERIK (eds), *Future Perspectives on International Criminal Justice*, TMC Asser Press, The Hague 2010, p. 117.

<sup>2</sup> See Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>3</sup> The criminal provisions under the four Geneva Conventions are commonly known as the ‘grave breaches’: see, for instance, Art. 50 of the first Geneva Convention; Art. 51 of the second Geneva Convention; Art. 130 of the third Geneva Convention; and Art. 147 of the fourth Geneva Convention.

<sup>4</sup> S.R. RATNER, J.S. ABRAMS and J.L. BISCHOFF (eds), *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3rd ed., Oxford University Press, Oxford 2009, p. 13.

contain provisions that draw upon both IHL<sup>5</sup> and IHRL.<sup>6</sup> Notwithstanding these significant overlaps and synergies, there is a far from perfect congruence between IHRL, IHL and ICL. What is more, their relationship and interaction have been marked by friction and have, at times, resulted in collisions and impairments of the respective normativity and rationale underlying the three bodies of law. For instance, as described by Darryl Robinson in his piece ‘The Identity Crisis of International Criminal Law’, interpretive, substantive, structural and ideological assumptions of IHRL and IHL have seeped into ICL jurisprudence and scholarship. According to Robinson, this has distorted the methods of reasoning of ICL and undermined compliance with the fundamental principles of ICL.<sup>7</sup> In a similar vein, the pieces selected for this volume explore frictions, collisions and impairments that arise because of the fact that IHRL, IHL and ICL interact and overlap, but diverge at the same time. However, in addition, the various chapters identify, conceptualise and formulate multiple ways in which IHRL, IHL and ICL can converge – for instance, by complementing, guiding or gap-filling one another.

This volume consists of three main parts. Under the first main part, the contributions by Patrícia Pinto Soares and Gerhard Kreutzer, Damien Scalia and Marina Aksenova explore the convergences and divergences between IHL and/or IHRL on the one hand, and ICL *stricto sensu* on the other hand. ICL *stricto sensu* is to be understood as ‘the totality of international law norms of a penal nature which conjoin typical legal consequences of criminal law with a decisive conduct – namely the international crime – and as such can be applied directly’.<sup>8</sup> The four core international crimes for which international law is said to provide direct individual criminal responsibility are: genocide, crimes against humanity, war crimes and the crime of aggression, as incorporated under Article 6 to Article 8*bis* of the Rome Statute.<sup>9</sup> In their contribution, Pinto Soares and Kreutzer tackle an issue that has been relatively underexplored in scholarship: the impact of ICL on IHRL. More specifically, their contribution scrutinises the (likely and/or evident) short- and long-term effects of ICL on the overall edifice of HRL, by giving, inter alia, an overview of the ICC’s law and practice relating to fair trial rights. Conversely, in his piece, Damien Scalia studies the manifold ways in which international criminal courts and tribunals have (mis)used IHRL in their judicial practices. Marina Aksenova’s chapter explores the relationship

<sup>5</sup> See, most notably, Art. 8 of the ICC Statute on war crimes.

<sup>6</sup> See, for instance, Art. 67 of the ICC Statute on the rights of the accused.

<sup>7</sup> D. ROBINSON, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 961.

<sup>8</sup> K. AMBOS, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, Oxford University Press, Oxford 2013, p. 54.

<sup>9</sup> N. BOISTER, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law* 961–62.



between human rights law and ICL with specific reference to the principle of complementarity. She argues that judicial discretion is essential when assessing the degree of human rights protection at the ICC.

ICL in the broader sense – or ICL *lato sensu* – includes so-called transnational criminal law (TCL). Contrary to ICL *stricto sensu*, TCL is considered indirect, because it suppresses crimes such as drug trafficking, trafficking in human beings and corruption through international treaties providing for domestic enforcement of these crimes.<sup>10</sup> Despite its practical importance, in scholarship, TCL in general is too often overlooked<sup>11</sup> and also its interactions with other bodies of international law are rarely studied. The contributions by Amy Weatherburn, Valentina Milano and Mirja Ciesiolka in Part II of this volume are thus timely in starting to fill this gap in international legal scholarship by enquiring into the convergences and divergences between IHRL and transnational crimes. Amy Weatherburn's contribution considers the role of IHRL in strengthening and facilitating actions to end forced labour in order to achieve the newly adopted International Labour Organization Protocol of 2014 to the 1930 Forced Labour Convention's aim of a modern approach to addressing forced labour. In her piece, Valentina Milano analyses the extent to which IHRL is permeating the TCL response to human trafficking, and vice versa. Milano enquires, inter alia, whether IHRL and TCL are fundamentally distinct, in terms of not only norms but also monitoring mechanisms. Furthermore, she analyses to what extent they are mutually reinforcing and what their main gap-filling and guiding effects are. The last chapter in this part, written by Mirja Ciesiolka, examines the relationship between IHRL and the United Nations Convention against Corruption (UNCAC). Ciesiolka highlights that the UNCAC's aim of containing corruption is an essential element of international peace and security. She posits that the tensions between this aim and ensuring the enjoyment of civil and political rights are also a reflection of structural and general problems that come along with the phenomenon of fragmentation in international law.

The last main part of this volume, which contains contributions by Federica Favuzza, Cedric De Koker, Deborah Casalin and Vito Todeschini, provides the reader with novel and original insights as to how IHRL and IHL converge and diverge. Through the lens of a fictional character, Federica Favuzza ascertains whether the right to personal liberty and security is doomed to succumb in times of emergency. Favuzza considers whether and how the norms of other branches of international law come into play, distinguishing among the case of an international armed conflict, that of a non-international armed conflict,

<sup>10</sup> N. BOISTER, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford 2012, p. 13.

<sup>11</sup> E. VAN SLIEDREGT, 'International Criminal Law: Over-studied and Underachieving?' (2016) 29 *Leiden Journal of International Law* 2.

and that of any other public emergency such as terrorism. Cedric De Koker's contribution analyses how the European Court of Human Rights has engaged with IHL in its case law. He addresses the complex legal issues that arise due to this engagement, such as the multifaceted relationship and interaction of the European Convention on Human Rights with the sometimes contradicting norms of IHL. Deborah Casalin's chapter aims to contribute to the body of analysis of the relationship between specific IHL and IHRL norms by examining the rules in these two bodies of law that prohibit arbitrary displacement, and mapping their interaction in situations in which IHL is applicable (i.e. armed conflict and occupation). The last chapter in this volume, written by Vito Todeschini, enquires into how the effectiveness of States' investigations of war crimes committed by their armed forces is to be evaluated. Todeschini proposes paying attention to the relevant standards developed within human rights law, since IHL does not indicate specific criteria for evaluating the effectiveness of an investigation.

Finally, in a short concluding chapter, the editors aim to present some general conclusions that can be drawn from the various chapters.

The Editors  
Brussels, November 2017

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