

Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda

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In memory of my Father

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INTRODUCTION

‘So are the people of Bosnia some kind of anthropological experiment to you?’

- Question asked to ICTY Spokesperson by unidentified Bosnian woman

‘Once more, completeness of the law is proved to be an idle dream’

- Maarten Bos *A Methodology of International Law* (1984) 300.

Henry Abraham describes the nature and attendant problems relating to judicial legislating as an ‘endemic can of worms’.¹ These problems include questions relating to the relationship between law and morality, law and politics, where law derives its authority and legitimacy from and the role of judges. The traditional positivist view is that judges should declare the law and not make the law. This view is embodied in the principle *judicis est ius dicere sed non dare*. Judges should be passive agents *through which* the law speaks. According to Blackstone the role of the judiciary is that of ‘living oracles’ of the law.² That this view, represented by philosophers such as Blackstone and Montesquieu,³ is pervasive enough to be taken seriously is proved by the fact that judges and academics are quick to criticise it in strong terms. Legal literature yields a wealth of examples of judges reminding us that they are only human and that applying the law is not a mechanical, mathematical exercise. There are those who describe the notion that a judge should not make law as a model of straw or as fantastic as a fairy tale.⁴ But many who reject this notion insist that the lawmaking function of judges is at most ‘interstitial’⁵ and not ‘dynamic’.⁶

¹ H J Abraham *The Judicial Process* (1998) 430.

² Blackstone also describes judges as the ‘depositories of the law’. See W Blackstone *The Commentaries on the Laws of England*, Vol 1 (1876) 47.

³ See Montesquieu *The Spirit of the Law* Vol 1 (1949) 152, quoted by M Shahabuddeen *Precedent in the World Court* (2001) 234.

⁴ In the words of Lord Reid: ‘Those with a taste for fairy tales seem to have thought that in some Alladin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words ‘Open Sesame’. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore.’ Lord Reid, *The Judge as Law Maker* (1972) 12 *JSP TL* 22. See also the statement by Van der Heever JA in *Sachs v Donges* NO 1950 (2) SA 265 (A) 312.

⁵ Holmes wrote: ‘I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.’ See Holmes J in *Southern Pacific Co v Jensen* 244 US 205, 221 (1916).

⁶ P Devlin *The Judge* (1979) 9 ff.

Lawmaking in the context of international criminal law and at the *ad hoc* Tribunals, the subject of this thesis, comes with its own special set of problems. It could be argued that because of the severity of the sanctions imposed by traditional criminal law, which includes the possibility of depriving people of their most fundamental freedoms, judges have to be especially careful when making international criminal law. Lawmaking in this field could lead to infringement upon the fundamental principle of *nullum crimen sine lege*. International criminal lawyers also have the difficult task of harmonising the approaches of international lawyers and criminal lawyers, and of civil lawyers and common law lawyers. There are the special concerns pertaining to *ad hoc* Tribunals such as the International Criminal Tribunal for the former Yugoslavia (the ‘Tribunal’ or ICTY)⁷ and the International Criminal Tribunal for Rwanda (ICTR)⁸ regarding the impartiality and independence of an international judicial body established for the purpose of trying the alleged perpetrators of particularly serious crimes.⁹ It is because of the potential risks of injustice and abuse that judges, taking into account their greater responsibility in this regard, be especially careful when making international criminal law.

Much has been made of the establishment of the ICTY as the first war crimes tribunal to be established since Nuremberg. The symbolic and historical value of the establishment of the *ad hoc* Tribunals cannot be overestimated. Alvarez has described the *Tadic* judgment as ‘political’, ‘epic’ and ‘foundational’.¹⁰ In early academic and journalistic commentary the Tribunals were often described as *sui generis* and Tribunal judges have often appealed to the new, rudimentary nature of the Tribunals to justify unusual or controversial decisions or features of the ICTY and ICTR.¹¹ The birth or

⁷The full denomination of the ICTY is the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991, established by the Security Council through Resolution 827 (1993) of 25 May 1993 and functioning under a Statute originally published as an Annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) S/25704, 3 May 1993.

⁸ The full name of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1995.

⁹ V Morris & M P Scharf *An Insider’s Guide to the International Criminal Tribunal for the former Yugoslavia* Vol 1 (1995) 38, 39.

¹⁰ J Alvarez ‘Nuremberg Revisited: The *Tadic* case’ (1996) 17 *EJIL* 1.

¹¹ See for example, Address of Antonio Cassese, President of the ICTY to the General Assembly of the United Nations, 4 November 1997.

establishment of the Tribunal was accompanied by much fanfare and (at least initially) it could do no wrong. With time academic commentators have become more critical of the work of the judges. In light of the importance of the work done by the judges at the Tribunals and the influence of Tribunal jurisprudence on the jurisprudence of both national courts and new international courts and Tribunals, criticism is vital. The fact that the Tribunals can be described as self-contained systems with no supervisory body with the competence to review their decisions also calls for strict scrutiny and might militate against judicial lawmaking.¹²

The lack of academic criticism of the work of the Tribunals could also be ascribed to the laudable purpose of the Tribunals: the prosecution of those who committed the most serious international crimes. How can one question or challenge the actions or decisions of judges tasked with the noble pursuit of prosecuting those accused of the most serious international crimes? The question of to what extent Tribunal judges have relied on the grave nature of the crimes in question as a justification for adventurous lawmaking will be addressed. The preamble of the International Criminal Court (ICC) Statute states that it is the task of the ICC to 'prosecute unimaginable atrocities that deeply shock the conscience of mankind'. The serious nature of international crimes was vividly described in the *Eichmann* case:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations.¹³

Some claim that international criminal courts have inherent bias against defendants. They express the concern that there is political pressure at the Tribunals to deliver guilty verdicts and that many cases are 'prejudged' for political reasons and because of the gravity of the offences concerned.¹⁴ It has even been argued that the Tribunals might have an institutional bias against defendants because their continued existence depends on 'producing convictions'.¹⁵ Although pressure to convict might have existed in the early

¹² In the *Tadic Jurisdictional Decision* the ICTY Appeals Chamber referred to the centralised structure of international law and stated that: 'every tribunal is a self-contained system'. See *Prosecutor v Tadic* IT-94-771-AR72, 2 October 1995, para 11.

¹³ *Attorney General of Israel v Eichmann*, Israel Supreme Court (1968) 36 ILR 304.

¹⁴ See the views of Martin Bell as discussed in J K Cogan 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 133.

¹⁵ *Ibid.* Hammond makes the interesting point that the official name of the ICTY, 'The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

years of the 'Tribunals' existence both Tribunals have acquitted accused on the basis of lack of evidence.¹⁶ Pressure to convict tends to increase the lawmaking activities of the judges since the existence of such pressure makes it highly unlikely that judges will find a *non liquet*.¹⁷

It is not the object of this thesis to establish whether judicial lawmaking should or should not be permitted. The object is rather to consider the peculiarities of international criminal law as well as the particular context of the *ad hoc* Tribunals and ask: What are the arguments in favour of and against judicial lawmaking at the Tribunals?

When discussing the concept of lawmaking it is important to consider what is understood by 'law'.¹⁸ The definition of 'law' is a much debated jurisprudential question. Because of its abstract and multifaceted nature the concept is difficult to define. Legal philosophers such as Hart, Raz and Dworkin have all grappled with the question 'what is law?'¹⁹ The definition of law will depend to great extent, on one's jurisprudential allegiance.²⁰ Although the definition of law remains problematic and to some extent

Yugoslavia since 1991' (my emphasis) does not show sensitivity to the presumption of innocence or of the possibility that those appearing before the Tribunal might not be 'responsible for serious violations'. Testimony of Larry A. Hammond before the House International Relations Committee, 28 February 2002, 7. See www.house.gov/international_relations/107/hamm0228.htm

¹⁶ A vivid example of pressure to convict at the Rwanda Tribunal is the Rwandan government's reaction to *Barayagwiza v The Prosecutor* ICTR-97-AR72, 3 November 1999. See the discussion in Chapter 7.

¹⁷ However, Sayers points out that in the ten year history of the ICTY, only two accused have been acquitted on all charges at the trial chamber level. Delalic was acquitted on all twelve charges of grave breaches of the Geneva Conventions as well as charges of violations against the laws or customs of war. *Prosecutor v Delalic* IT-96-21-T, 16 November 1998. In the *Kupreskic* case the ICTY Appeals Chamber acquitted the three Kupreskic brothers as a result of a defective indictment and erroneous finding of fact by the Trial Chamber. *Prosecutor v Kupreskic* IT-95-16-A, 23 October 2001 See the article by S M Sayers 'Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia' (2003) 16 *Leiden Journal of International Law* 751. The ICTR acquitted Ignace Bagilishema on 7 June 2001. The accused Bernard Ntuyahaga has also been acquitted by the ICTR.

¹⁸ Lord Simon of Glaisdale has stated: 'It is idle to debate whether... the courts are making law... it depends on what you mean by 'make' and 'law' in this context.' *Stock v Franck Jones (Tipton) Ltd* [1978] ICR 347, 353 Quoted by A T H Smith 'Judicial Lawmaking in the Criminal Law' (1984) 100 *Law Quarterly Review* 46.

¹⁹ See HLA Hart *Essays in Jurisprudence and Philosophy* (1983) 1-3; R Dworkin *Law's Empire* (1998) 1-49.

²⁰ Realists for example believe that law is only a matter of what legal institutions, like legislatures and courts, have decided in the past. Dworkin *ibid* 7. There is an important disagreement between natural lawyers and positivists about the role of morality in the law.

elusive, the abstract term ‘the law’ represents the idea that certain rules of conduct are obligatory.²¹ Other important features of law are that law is institutionalized and has a normative character.²² Law is a system of binding norms. Cassese defines international criminal law as the body of international rules designed to both proscribe international crimes and to impose upon States the obligation to prosecute and punish those crimes.²³ In this thesis the term ‘law’ will be broadly interpreted to include both substantive law and procedural law. The concept of lawmaking will be analysed in chapter 2.

The idea that international law should have a humanitarian function might serve as an acceptable justification for adventurous lawmaking. Theodor Meron has argued that principles of humanity as reflected in the Martens Clause provide authority for interpreting international humanitarian law consistently with the principles of humanity and the ‘dictates of public conscience’.²⁴ Some, such as Sassoli and Olson have argued that lawmaking could be an extension of the protection of humanitarian law to those not previously protected.²⁵ The Appeals Chamber in *Tadic* relied on Article 4 of the Fourth Geneva Convention, directed at protecting civilians to the maximum extent possible, to extend the protection of humanitarian law.²⁶

The way in which progressive development of international humanitarian law occurs is important. International lawyers recognise that the growth and interpretation of international criminal norms must be reconciled with the fair treatment of defendants, including the prohibition of *ex post facto* responsibility.²⁷ According to Alvarez, the tension between the goals of progressive development and adherence to the principle of legality is exacerbated to the extent one relies on the politically expedient measure of creating the *ad hoc* Tribunals by way of Security Council Resolutions.²⁸ The tension is also heightened to the extent that one relies on judicial legislation

²¹WJ Hosten, AB Edwards (et al) *Introduction to South African Law and Legal Theory* (1983) 10.

²² *Ibid* 2.

²³ Cassese *International Criminal Law* (2003) 15.

²⁴ T Meron ‘The Martens Clause, Principles of Humanity and Dictates of Public Conscience’ (2000) 94 *AJIL* 87, 88.

²⁵ M Sassoli & L M Olson ‘The judgment of the ICTY Appeals Chamber on the merits in the *Tadic* case’ (2000) 82 *International Review of the Red Cross* 733.

²⁶ *Prosecutor v Tadic* IT-94-1-A, 15 July 1999 (hereinafter *Tadic Appeals Judgment*) *Tadic* 94-1-A para 168.

²⁷ J E Alvarez ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’ (1999) 24 *Yale Journal of International Law* 433.

²⁸ *Ibid*.

in the course of criminal trials to nudge the law in new directions or to fill gaps. The tension is recognised explicitly in Article 22 of the Rome Statute which instructs ICC states that ‘the definition of a crime shall be strictly construed and shall not be extended by analogy: in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.

Since the subject of this thesis is Judges and Lawmaking at the ICTY and ICTR, attention will be paid to the institutional culture of the Chambers of the Tribunals. The question of judicial independence forms an important part of this institutional culture and will therefore receive significant attention. This thesis will be strongly concerned with the legitimacy and accountability of the ICTY and ICTR. Judicial independence plays an important role in maintaining the credibility and legitimacy of international tribunals.²⁹ Thomas Franck defines legitimacy as ‘a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively’.³⁰ Because of the severity of the sanctions imposed by criminal law, including life imprisonment in the case of the Tribunals, it is important that the institutions imposing the sanctions have legitimacy.

The ICTY, in exercising its judicial functions, has to contribute to the settlement of wider issues of accountability, reconciliation and establishing the truth of the events in the former Yugoslavia.³¹ The aims of the *ad hoc* Tribunals, those of serving peace³², deterring future crimes and advancing reconciliation can only be achieved if the Tribunals are perceived as legitimate institutions. A public perception of bias and partiality on the part of the judges can only increase existing tensions in the volatile Great Lakes and Balkan regions and be detrimental to efforts to build peace. This is illustrated in the description of the bench of Milosevic judges as ‘NATO judges’.³³ It will be argued that because of the questions surrounding the legitimacy of the establishment of the Tribunals, the judges should exercise particular caution when making new law. The expense of erecting

²⁹ R Mackenzie & P Sands ‘International Courts and Tribunals and the Independence of the International Judge’ (2003) 44 *Harvard International Law Journal* 271.

³⁰ T Franck *The Power of Legitimacy Among Nations* (1990) 16.

³¹ *Prosecutor v Erdemovic* IT-96-22, 29 November 1996, Sentencing Judgment, para. 58.

³² Gabrielle Kirk McDonald said that it is the principal responsibility of the Tribunals to bring to justice ‘those individuals whose presence impedes the establishment of civil society in the former Yugoslavia.’ See the address by President Gabrielle Kirk McDonald to the General Assembly, 8 November 1999. *ICTY Yearbook* (1999) 199.

³³ See the discussion in Chapter 4.

international tribunals also increases the need for judicial accountability. Alvarez writes that acquittals might result if international judges, *cognizant of their forum's tenuous legitimacy*, err on the side of caution.³⁴ The decision by the *Kupreskic* Appeals Chamber to acquit the accused because of insufficient evidence has been praised by commentators.³⁵ According to Judge Wald (presiding in the *Kupreskic* Appeals Chamber case) one needs 'credible evidence to establish incredible events'.³⁶ The real possibility of acquittal can only increase the public perception of the fairness of the Tribunals. Nollkaemper has gone as far as to suggest that, instead of artificially relying on customary international law to fill gaps, the Tribunal could simply recognise that the international community has not yet been able to adopt all the necessary rules criminalising such acts.³⁷

If one accepts that it is inevitable that Tribunal judges will make new law it is important that this lawmaking should be subject to constraints, the most important of which is the principle of legality. In the Report of the Secretary General on the establishment of the ICTY the importance of the Tribunal's adherence to the requirements of the principle of legality is emphasised. The Report states: 'the international tribunal should apply rules of international humanitarian law which are *beyond doubt* part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.'³⁸ The Secretary General explained that 'in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would [thus] not be creating or purporting to 'legislate' that law. The Tribunals would rather have the task of applying existing international humanitarian law.'³⁹ The law applied by the Tribunals must come from existing international criminal law or the national law of the *situs* of the

³⁴ Alvarez (note 27) 429.

³⁵ *Prosecutor v Kupreskic* IT-95-16, 23 October 2001.

³⁶ P Wald 'To 'establish incredible events by credible evidence': the use of affidavit evidence in Yugoslavia war Crimes Tribunal proceedings' (2001) 42 *Harvard Journal of International Law* 552.

³⁷ A Nollkaemper 'The Legitimacy of International law in the case law of the International Criminal Tribunal for the former Yugoslavia' in T A J A Vandamme. & J-H Reestman (eds) *Ambiguity in the Rule of Law, The Interface between National and International Legal Systems* (2001) 13-23.

³⁸ *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) (presented 3 May 1993) (S/25704) para 34.

³⁹ *Ibid* para 29.

conduct alleged to be criminal.⁴⁰ The judges in *Delalic* stated that '[t]he Statute does not create substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law'.⁴¹ But the cases produced by the Tribunals are beginning to form and shape a new body of *Tribunal* law, within the branch of law called international criminal law. It can be said that this law, including the definitions of many of the crimes contained in the respective Statutes, has developed and *evolved*.

This thesis will be concerned with both substantive and procedural lawmaking by the judges. Substantive lawmaking is more problematic and more difficult to define than procedural lawmaking. Substantive law defines legal rights, duties and remedies.⁴² Procedural law is concerned with the proof and enforcement of rights, duties and remedies and involves questions such as in which court the case should proceed, what forms the proceedings should take, and how the proceedings should be conducted in court.⁴³

Substantive lawmaking involves the development of the law relating to subject matter jurisdiction of the Tribunals (crimes contained in the Statutes of the Tribunals). Substantive lawmaking also includes defining the elements of crimes and criminal responsibility. Procedural lawmaking involves the drafting and amending of the Rules of Procedure and Evidence. The distinction between substance and procedure is not always clear. Procedural changes can affect the substantive rights of the accused. Because the Tribunals are international *criminal* tribunals judges should be careful not to create substantive rights. This is one more reason why the judges' power to make rules needs to be carefully scrutinised.

The Tribunals have also engaged in indirect lawmaking. Judge Cassese's Dissenting Opinion in the *Erdemovic* case on the place of national case law in

⁴⁰ M C Bassiouni & P Manikas *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 266.

⁴¹ *Prosecutor v Delalic et al*, IT-96-21, 6 December 1996. Final Judgment, 16 November 1998, para 417 and discussion at paras 414-417. See also the statement of the Appeals Chamber in *Prosecutor v Delalic, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)* IT-96-21: 'the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law' para 26.

⁴² L de Villiers & AC Cilliers *The Civil Practice of the Supreme Court of South Africa* (1997) 1.

⁴³ *Ibid*.

international criminal law is a good example.⁴⁴ Indirect lawmaking takes place when the judges pronounce on matters not central to the legal question before them. Such lawmaking occurs incidentally as part of an *obiter* statement.

One of the most interesting features of the *ad hoc* Tribunals lies in the composition and combination of the body of judges. When the ICC judges were inaugurated at the Dutch Parliament on 12 March 2003, the Secretary General of the UN referred to them as ‘...the embodiment of our collective conscience...’ and asked them to be wise, honest and efficient and to ‘shine with moral and legal clarity’ in order to bring clarity to the provisions of the Rome Statute.⁴⁵ The same is expected of ICTY and ICTR judges.

Tribunal judges hail from both common and civil law backgrounds and, although the law and procedures of the ICTY and ICTR are predominantly adversarial, many civil law influences have found their way into Tribunal jurisprudence. The civil versus common law distinction is almost decisive when it comes to judges’ attitudes and public acceptance of lawmaking. In common law systems it is accepted that superior courts, within certain limits, do not merely apply the law but also make law. The implications of this for the sphere of criminal law specifically will be examined. The distinction between civil law and common law has also been described as the distinction between statutory law and judge-made law or between codified written law and unwritten law based on custom and tradition. The question of how the civil or common law backgrounds of the judges influence attitudes towards lawmaking will be addressed.

Some believe that the domain for creativity in international law may be smaller for international tribunals than for domestic courts. In contrast to the environment in which domestic law is made and practised, international law lacks the common culture and traditions that help instill confidence in international judges. As a result the legitimacy of international tribunals depends on the extent to which their decisions give effect to *existing norms* accepted by states.

Judges who are not afraid of or apologetic about making law could be described as activist. In the context of the Tribunals one finds support for

⁴⁴ *Prosecutor v Drazen Erdemovic, Separate and Dissenting Opinion of Judge Cassese*, IT-96-22-A, 7 October 1997.

⁴⁵ See ‘Judges Inaugurated to the International Criminal Court’, United Nations Chronicle, at http://www0.un.org/Pubs/chronicle/2003/webArticles/031703_icc.html

judicial caution as well as for judicial activism. It could be argued that the fragile nature of the Tribunals, its new and *sui generis* character as well as the rudimentary nature of international criminal law in general calls for judicial caution.⁴⁶ But those in favour of judicial activism have also relied on the newness and fragility of the Tribunals to support their arguments for activism. Adventurous lawmaking by the judges has often been justified by the claim that the Tribunals, being new and *sui generis*, need a certain flexibility, a certain scope for correcting errors, for trial and error.⁴⁷ In this regard the practice and views of judges of the International Court of Justice (ICJ) will be discussed. In spite of the strong tradition of judicial restraint at the ICJ there have been important examples of judicial activism. The pronouncements of ICJ judges on the question of judicial restraint will be examined.

In addition to the above reason for judicial caution the institutional competence of international tribunals to create law has also been questioned. An important reason why international judges should be hesitant to create new rules is that, in contrast to the domestic sphere, there is no possibility to correct a judicially created rule through legislative action if the rule proves unsatisfactory.⁴⁸ Those who argue that international law is not law have traditionally relied upon the absence of an international legislature and enforcement organ in international law.⁴⁹ This means that the doctrine of separation of powers does not apply, at least not as originally formulated. The absence of a central legislature or similar 'supervisory' body in the emerging system of international criminal law places the judges in the position of ultimate lawmakers – a position calling for restraint. Another argument for restraint is the 'democratic deficit' inherent in the international criminal justice system. It is argued that the international criminal justice system suffers from a lack of legitimacy because of a lack of democratic

⁴⁶In this regard, see the views of M Koskenniemi *From Apology to Utopia* (1989) 227 and T Franck *Judging the World Court* (1986) 10.

⁴⁷ See the views of Cassese on the amendments to the Rules of Procedure and Evidence, Address of Antonio Cassese, President of the ICTY to the General Assembly of the United Nations, 4 November 1997.

⁴⁸D Bodansky 'Non Liquet and the Incompleteness of International Law' in L Boisson de Chazournes & P Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (1999) 169. See the views of J Stone 'Non Liquet and the Function of Law in the International Community' (1959) 35 *BYIL* 152.

⁴⁹ Austin categorized international law as 'law improperly so called'. See J Austin *Lectures in Jurisprudence* 5 ed (1977) 86 et seq.

accountability.⁵⁰ For this reason, the Tribunals have been described as controversial and ambitious.⁵¹

International criminal law is a rudimentary system of law. Lauterpacht, a strong proponent of the completeness of international law and the inadmissibility of *non liquet*, has argued that the 'defective' nature of international law calls for judicial restraint or even the declaration of a *non liquet*. He observed that, in certain circumstances, the apparent indecision [of the International Court of Justice], which leaves room for discretion on the part of the organ which requested the Opinion, may both *as a matter of development of the law and as a guide to action* be preferable to a deceptive clarity which fails to give an indication of the inherent complexities of the issue. In so far as the decisions of the Court are an expression of existing international law (whether customary or conventional) they cannot but reflect the occasional obscurity or inconclusiveness of a defective legal system.⁵²

Throughout this study, references and comparisons will be made to the jurisprudence and judicial and institutional character of the International Court of Justice. There are many reasons why the ICJ is an appropriate forum with which to compare the work of the Tribunals. Similar to the Tribunals, the ICJ is a judicial body and organ of the United Nations. Another similarity is that the Tribunals are courts of both first and last resort. A court of first resort must weigh evidence, hear witnesses and establish a probable factual scenario whereas a court of last resort weighs and refines legal principles that may develop the law and seeks consistency by connecting the past, present and future.⁵³ Importantly, both the ICJ and the *ad hoc* Tribunals have the responsibility of developing international law. Some judges, such as Judge Shahabuddeen, Judge Abi Saab and Judge van den Wyngaert, have served as both ICJ judges and Tribunal judges. The important difference between the work of the ICJ and that of the *ad hoc* Tribunals is that the ICJ decides disputes between states whereas the Tribunals prosecute individuals. It is also important that Tribunal judgments

⁵⁰ AM Danner, & JS Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75-96. The authors point out that, unlike most domestic criminal systems, international criminal law is not 'embedded in a mature political or legal system' lending legitimacy to its criminal process.

⁵¹ *Ibid* 97.

⁵² H Lauterpacht *The Development of International Law by the International Court* (1982) 152 (emphasis added).

⁵³ T Franck *Fairness in International Law and Institutions* (1995) 335.

are enforced whereas the decisions of the ICJ are not easily enforced. Neither the ICJ nor the *ad hoc* Tribunals are bound by precedent nor are they bound by each other's decisions.⁵⁴ A prominent example of an ICTY Appeals Chamber referring to (and rejecting) ICJ jurisprudence is the *Tadic* Appeals Chamber's decision not to follow the jurisprudence of the ICJ in the *Nicaragua* case.⁵⁵ The decision in *Tadic* regarding the criminality under international law of the violations of international laws of war in the context of internal armed conflict will be discussed in Chapter 6.

In the *Celibici* case the relationship between the ICJ and ICTY was considered:

However this Tribunal is an autonomous international judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.⁵⁶

Some believe that the fact that the ICJ hears disputes between states means that the ICJ is more political than the *ad hoc* Tribunals.⁵⁷ At the Tribunals it likewise appears as if considerations such as the nature of the appointment process and international politics influence appointments. It has been said that politics influences the nomination and election process of the ICTY and that judges are not selected simply on the basis of their suitability for the job.⁵⁸

In discussing the phenomenon of lawmaking at the Tribunals, this study will look both to the future and to the past. Comparisons will be made with the lawmaking and procedures of the Nuremberg and Tokyo Tribunals.⁵⁹ The legal framework and jurisprudence of the *ad hoc* Tribunals are generally regarded as improvements upon the Nuremberg Tribunal. The fact that, unlike the Nuremberg Tribunal, the ICTY and ICTR provide for the right to appeal, is one of the most significant improvements. The fact that the Rules of Procedure and Evidence of the ICTY and ICTR are more detailed

⁵⁴ See *Prosecutor v Zlatko Aleksovski* IT-95-14/1-A, 24 March 2000, para 89 *et seq.*

⁵⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits Judgment, *ICJ Reports* 1986, 114.

⁵⁶ *Prosecutor v Delalic* IT-96-21-A, 20 February 2001 ('*Celibici*') Appeals Judgment para 24.

⁵⁷ Franck (note 46) 6.

⁵⁸ For more on the political nature of the electoral process see Chapter 3.

⁵⁹ The Tokyo Tribunal will also be referred to as the International Military Tribunal for the Far East (IMTFE).

than the Nuremberg Rules can also be regarded as a procedural improvement.

The ICTR and ICTY have been described as ‘models’ or as providing a blueprint for the ICC.⁶⁰ Since the drafting of the Statute and Rules of the Rome Statute has not been a judicial enterprise one cannot make a direct comparison between judicial lawmaking at the ad hoc Tribunals and at the ICC. To compare lawmaking at the Tribunals with lawmaking at the ICC one will have to wait for a body of case law to develop at the ICC. Comparisons between the institutional culture at the ICC and at the ad hoc Tribunals can however be made.⁶¹

Structure of the Study

In Chapter 1 the establishment and organisation of the ad hoc Tribunals will be discussed. The history of the efforts to establish an international criminal Tribunal will be traced from its early tentative roots to the establishment of the ICTY, ICTR and ICC. It is important that the Tribunals are perceived to have been established legitimately. It will be argued that as the legality of the establishment of the Tribunals has been challenged the Tribunal’s legitimacy rests on a tenuous foundation and judges should therefore be particularly careful when making new law. The challenges to the legality of the establishment of the Tribunals will therefore be discussed.

In Chapter 2 the concept and theory of lawmaking will be described, the influence of the rudimentary nature of international criminal law on the lawmaking of Tribunal judges will be discussed and the difference between judicial legislation and development of international law will be highlighted. The meaning of a ‘gap’ or *lacuna* in the law will be examined. The question of whether a finding of *non liquet* could be seen as an alternative to lawmaking will be canvassed. Because judges are reluctant to admit to lawmaking, it is difficult to analyse what they do. Judge Cassese seems to be the only judge who has been unapologetic and open about his lawmaking at the ICTY.⁶² Since the ICTY and ICTR Statutes contain no ‘choice of law’ or sources provisions similar to Article 38 of the ICJ Statute, the sources the judges can draw from in making international criminal law will be examined. Special attention will be paid to the use of custom and general principles as lawmaking tools. Tribunal judges have looked to customary law to

⁶⁰ S R Ratner & J S Abrahams *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy* (2001) 220, 221.

⁶¹ See for example the discussion of the appointment on ICC judges in Chapter 3.

⁶² Interview Judge Cassese, 6 June 2003, Florence.

determine the elements of the offences set forth in the Statutes. Cassese argues that *usus* and *opinio juris*, as elements of customary law, play a different role in humanitarian law than in international law generally because of the influence of the Martens clause.⁶³ The judges at the Tribunals have also often resorted to general principles as a lawmaking tool. It has been argued that relying on general principles, in so far as it is used to fill gaps in the application of existing law, may beg the question of legality since ‘general principles’ are more likely to result in generality rather than specificity.⁶⁴

Chapter 3 concerns the lawmakers: the judges as a body of individuals. Franck writes that every bench creates its own ‘cultural environment’.⁶⁵ Different aspects of the cultural environment at the ICTY and ICTR will receive attention. Questions such as the drafting process and the importance of dissenting opinions will be discussed. The argument made by legal realists has been that because judges are not automatons, it is inevitable that they will be influenced by their personal and professional backgrounds. Much is expected of judges. Kennedy writes that judges are supposed to ‘rise above’ and ‘transcend’ their personal interest, their instinctive and intuitive sympathies, their partisan affiliations, and their ideological commitments and are supposed to submit to something ‘higher’ than themselves.⁶⁶

The question of judicial independence at the Tribunals forms part of the discussion of institutional culture. Judicial independence is the topic of Chapter 4. This chapter discusses questions which affect the independence of ICTY and ICTR judges such as their election. The question of whether Judges Odio Benito, Florence Mumba and Richard May should have recused themselves in particular cases because of alleged bias will receive attention.

Chapter 5 focuses on the importance of the principle of legality in the context of international criminal law generally, and specifically in the context of the Tribunals. It will be argued that in the context of international criminal law the principle of legality constitutes the most important constraint on judicial lawmaking by the judges. Because German law has the oldest tradition of recognising and applying the principle of

⁶³ For more on the Martens Clause see A Cassese ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11 *EJIL* 187. See also Chapter 6.

⁶⁴ M C Bassiouni *Crimes Against Humanity in International Criminal Law* (1999) 121-122.

⁶⁵ Franck (note 46) 320.

⁶⁶ D Kennedy *A Critique of Adjudication (fin-de-siecle)* (1997) 3.

legality, the way the principle has been interpreted in German law will receive extensive attention. The status of the principle of legality in common law jurisdictions such as the United States will also be discussed. There seems to be general consensus that the context of international criminal law calls for a more lenient and flexible approach to the application of this principle than would be the case in municipal systems.

In Chapter 6 instances of lawmaking in the case law of the ICTY and ICTR will be discussed. Lawmaking should be understood as development of the law and extending the law to new areas. Different methods of lawmaking will be considered. The cases selected show *inter alia* how the tribunals formulated and expanded definitions, applied purposive interpretation and filled gaps in the Statutes. The chapter will consider how the Tribunals developed the concept of an internal as opposed to an international conflict and how they expanded and developed the concepts of common purpose, reprisals and protected persons. Attention will also be paid to the indirect or *obiter* lawmaking by Judge Cassese in *Erdemovic*.⁶⁷ The judges have also defined and redefined crimes such as torture and rape. These instances of lawmaking have triggered a considerable amount of academic debate. The chapter explores the question of whether a particular instance of lawmaking constitutes legitimate or illegitimate lawmaking.

Tribunal judges have amended and made new rules on several occasions. The rulemaking activity of the judges will be discussed in Chapter 7. Procedural lawmaking by the Tribunals has taken the form of making and amending the Rules of Procedure and Evidence. Judges are not authorised to create new substantive law or to impose new obligations on states under the guise of procedural rules.⁶⁸ Knoops writes that adherence to procedure assists in promoting the fundamental goals of certainty of the law and fairness in criminal proceedings.⁶⁹ It can be argued that the frequent amendments made to the rules violate the principle of legality and threaten legal certainty. Alternative solutions to the making of amendments will be suggested.

⁶⁷ *Erdemovic* (note 44).

⁶⁸ V Morris & M Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (1995) 179.

⁶⁹ G J A Knoops *Theory and Practice of International and Internationalised Criminal Proceedings* (2005) VII.

A Short Note on Method and Terminology

Information about the personal philosophies and theoretical affiliations of individual judges is not easy to obtain. It is always difficult to pierce the judicial veil. Many judges see it as incompatible with their role as judges to speak of their personal philosophies. Few judges speak freely. The principle of confidentiality of deliberations in chambers is taken seriously. This principle entails that the ideas underlying the judgment and the controversies that may have been debated are kept secret.⁷⁰ It is therefore difficult to capture the ‘full flavour’ of a judgment.⁷¹ The information obtained about the individual Tribunal judges has been obtained in a few personal interviews, in their curricula vitae, in articles written by the judges themselves and in interviews with Legal Officers at the ICTY.

In this thesis the ICTY and ICTR will sometimes be referred to as the *ad hoc* Tribunals or ‘the Tribunals’. The term ‘Tribunals’ will therefore refer exclusively to the ICTY and ICTR. The term ‘Tribunal judges’ will refer to ICTY and ICTR judges. The ICTY will sometimes be referred to as the ‘Yugoslav or Yugoslavia Tribunal’ and the ICTR will sometimes be called the ‘Rwanda Tribunal’.

Frequent reference will be made to the *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*.⁷² This Report will be abbreviated as the ‘Secretary General’s Report’.

For technical reasons the accents on Slavic surnames have not been included. The state of the law at the Tribunals and developments at the Tribunals will reflect the position as at December 2005.

⁷⁰ T ten Kate ‘Dissenting Opinion, A background sketch’ in S K Martens, M I Veldt, G J M Corstens, W E Haak *Martens Dissenting: The Separate Opinions of a European Human Rights Judge* (2000) 12.

⁷¹ Ibid.

⁷² The foundational document of the ICTY was a 35 page report submitted to the Security Council by the Secretary General. The report was prepared at the request of the Security Council and unanimously adopted by it. See D McGoldrick ‘Criminal Trials before International Tribunals: Legality and Legitimacy’ in D McGoldrick, P Rowe & E Donnelly (eds) *The Permanent International Criminal Court* (2004) 22.

CHAPTER ONE

SETTING THE STAGE: THE ESTABLISHMENT AND ORGANISATION OF THE TRIBUNALS

1. Introduction

It has become customary to begin studies on the *ad hoc* Tribunals with the history of the establishment of the Tribunals and the work of the International Law Commission to create a permanent international criminal court. This chapter will not do so merely as a matter of convention. To understand the lawmaking activity of the judges one has to understand the context within which that law is made. It has been stressed and overstressed that the *ad hoc* Tribunals are *sui generis* in terms of their method of establishment, character and function. This chapter will not address the question of whether the specific nature of the Tribunals calls for more flexibility or elasticity in applying or making the law. This question will be addressed in Chapter 2. The present chapter will be of a more descriptive nature. The method of establishment of the ICTY and ICTR, the structure and different organs of the Tribunals will be described. The important question of why the Rwandan and Yugoslav conflicts were singled out for special and expensive attention by the Security Council will be addressed briefly.

The judges in the first case before the ICTY, *Prosecutor v Tadic*, acknowledged that criminal law is only effective if the body that determines the criminality is viewed as legitimate.¹ According to Max Weber ‘a sovereign’s command...acquires the additional legitimacy necessary to promote habitual obedience without encountering serious resistance *only* when the rule’s subject is aware that the rule, and the ruler, both have a democratic legitimacy’.² In the context of international criminal law and the Tribunals this means that the rules and institutions of international criminal law will only be respected if they are seen as legitimate. The challenges to the legality of the establishment of the Tribunals will therefore be discussed.

This chapter will start by tracing the history of the Tribunals - from the early abortive efforts of the international community to create an international criminal court to the creation of the Nuremberg, Tokyo and eventually the *ad hoc* Tribunals and the International Criminal Court.

¹ *Prosecutor v Dusko Tadic*, IT-94-1-T, 10 August 1995, para 6.

² M Weber *Economy and Society: An Outline of Interpretative Sociology* (1968) 17.

2. Historical Precedents

(i) The *Interbellum*

The idea of creating an international criminal court to bring those responsible for war crimes to justice was seriously considered for the first time in the aftermath of the First World War. The ‘Commission on the Responsibility of the Authors of the War and Enforcement of Penalties’ proposed the establishment of a ‘high’ tribunal composed of judges drawn from many nations.³ The Treaty of Versailles eventually included a provision, Article 227, which provided for the establishment of a tribunal, composed of five judges (appointed by the United States, Great Britain, France, Italy and Japan) to try the former Kaiser of Germany, Wilhelm II. Since the Netherlands refused to hand over the accused this tribunal was never established.⁴

Another failed attempt was made in 1920 when the ‘Advisory Committee of Jurists’ was summoned to prepare the project for the establishment of the Permanent Court of International Justice. The Committee proposed that the ‘High Court of International Justice’ should also be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or the Council of the League of Nations.⁵ This proposal was however rejected by the Assembly of League of Nations as being ‘premature’.⁶ This was followed by the Convention for the Creation of an ICC of 16 November 1937⁷ but the Convention was only ratified by India and never came into effect.⁸

Subsequently, draft statutes of an international criminal court were adopted by non-governmental organisations and by scholarly bodies.⁹ Since the efforts

³ See however the dissenting opinion of the two United States delegates (R Lansing and J Brown Scott) in the ‘Report of the Commission’ (1920) 14 *AJIL* 121-3, 129, 139 ff.

⁴ As a political formality, the Allies merely requested that the Netherlands ‘make the Kaiser available for trial’. The Netherlands inferred that the Allies would not attempt to seize the Kaiser and denied the request arguing that the charges against him appeared to be of a political and not a criminal nature. T Taylor *The Anatomy of the Nuremberg Trials* (1992) 16. On the non-implementation of Article 227, see amongst others, A Merignhac and E Lemonon *Le Droit des gens et la guerre de 1914-1918* (1921) 80 ff.

⁵ See the text of the Second Resolution adopted by the Advisory Committee in Lord Phillimore ‘An International Criminal Court and the Resolutions of the Committee of Jurists’ (1922-23) 3 *BYIL* 80.

⁶ *Ibid* 84.

⁷ See Part I (2) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations Official No C 548 M 385 1937 V.

⁸ M C Bassiouni *International Criminal Law* Vol 1 2ed (1999) 7.

⁹ An example of a non-governmental organisation would be the Inter-Parliamentary Union in 1925. The International Law Association discussed the creation of a permanent international court at meetings in Buenos Aires (1922), in Stockholm (1924) and in Vienna (1926). See the Chapter by G Tanja ‘International Adjudication of War Crimes’ in E Denters & N Schrijver (eds) *Reflections on International Law from the Low Countries: in Honour of Paul de Waart* (1998) 218, 219.

undertaken in academic circles were not followed by appropriate diplomatic action, none of these drafts led to anything concrete.

(ii) Nuremberg and Tokyo

During World War II, the Allies again took up the idea of establishing an 'international tribunal'. The four major Allies collectively provided for the establishment of the International Military Tribunal at Nuremberg (IMT) in the London Agreement to which nineteen other states acceded.¹⁰ In Tokyo the Supreme Commander for the Allied Powers, General Douglas MacArthur, unilaterally established the International Military Tribunal for the Far East (IMTFE) through a general military order.¹¹ In this instance there was no treaty and no participation in the institution-creating process by the defeated party.¹²

In 1948, the United Nations General Assembly invited the International Law Commission (ILC) to study the desirability and possibility of establishing a criminal judicial body, in particular as a 'Criminal Chamber of the International Court of Justice'.¹³ Neither the early discussions of the Commission, nor the provisions of Article VI of the Genocide Convention on 'an international penal tribunal' were translated into reality.

Since World War II, the international community, represented by the United Nations, has made several efforts to establish a permanent international criminal court. For many years these efforts proved unsuccessful. The debates of the International Law Commission (ILC), the body entrusted with the task of drafting a statute for an international criminal court, became mired and seemed fated never to succeed.¹⁴ One reason for this was that during the Cold War countries were fearful of any interference into their sovereignty. Bennouna emphasised this obstacle of state sovereignty and came to the following pessimistic conclusion: 'The establishment of an international criminal court remains an academic exercise, which can even become dangerous if it is perverted by sovereignties to justify *fait accompli* or to salve the conscience of those in power.'¹⁵ At the end of the Cold War, in 1989, the General Assembly requested the ILC 'to address the

¹⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 1945, 59 Stat 154482, UNTS 279 (hereinafter London Agreement). The charter of the IMT was annexed to this agreement. See Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 August 1945, 59 Stat 1544, 1546, 82, UNTS 279, 284 (hereinafter IMT Charter).

¹¹ Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946, TIAS No1589, 4 Bevans 20: Charter Dated 19 January 1946.

¹² V Morris & M P Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* Vol 1 (1995) 8 fn 42.

¹³ *The Path to The Hague, Selected documents on the origins of the ICTY* (2001) 7.

¹⁴ P Tavernier 'The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda' (1997) 321 *International Review of the Red Cross* 605.

¹⁵ M Bennouna 'La creation d'une juridiction penale internationale et la souverainete des etats' (1990) *Annuaire francais de droit international* 299-306.

question of establishing an international criminal court'.¹⁶ By 1993 the ILC had prepared a draft statute under the direction of James Crawford. In 1994 the Commission submitted the final version of its work to the General Assembly.¹⁷

3. Establishment of the ICTY

The tragic events and gross violations of human rights that followed the disintegration of the former Yugoslavia led the Security Council to agree to establish the ICTY.¹⁸ The establishment of a Tribunal for Yugoslavia was a political decision. Many believe that the decision to create the ICTY and later the ICTR was an attempt by the international community to salve its conscience. The omissions of the UN and international community during the genocide in Yugoslavia and Rwanda are well publicised.¹⁹ This may help to explain the question why a tribunal was established in these and not in many other conflict-ridden areas of the world.

The scope of this chapter does not allow for a full description of the history of the conflict in the former Yugoslavia. It is however instructive to look at the preliminary steps taken by the UN leading up to the formal establishment of the Tribunal.

The first steps taken by the United Nations included the deployment of a UN peacekeeping force, known as the United Nations Protection Force (UNPROFOR) in the areas of conflict inside Croatia and Bosnia. The task of UNPROFOR was to oversee the cease-fire in the former Yugoslavia.²⁰

What made the establishment of the ICTY different from the establishment of the IMT and IMTFE was that this Tribunal was created by a Security Council Resolution pursuant to Chapter VII of the UN Charter. Unlike the cases of the IMT and IMTFE, the ICTY was not established to judge the defeated party's or parties' nationals. The Security Council, acting on behalf of the world community, established the Tribunal to judge all parties to the conflict who committed violations of well-established international criminal law.²¹ The legality of the establishment of the Tribunals will be discussed under the heading 'Challenges to the Jurisdiction of the Tribunal'.

¹⁶ Res 44/339 of 4 December 1989.

¹⁷ J Crawford 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140.

¹⁸ For historical background on the conflict in the Balkans, see Morris & Scharf (note 12) 18 - 22.

¹⁹ It is tragic but true that 'the world had stood around with its hands in its pockets' during the extermination of approximately 800 000 Tutsis in 1994. Comment of the Rwandan General Kagame cited by P Gourevitch *We wish to inform you that tomorrow we will be killed with our families* (1998) 163. See also S Power *A Problem from Hell, America and the Age of Genocide* (2002) 364 - 5.

²⁰ See SC Res 743 (1992) 21 February 1992.

²¹ See C Tomuschat 'International Criminal Prosecution: The Precedent of Nuremberg Confirmed' (1994) 5 *Criminal Law Forum* 237.

On 6 October 1992 the Security Council adopted Resolution 780 which established a Commission of Experts to investigate breaches of the Geneva Conventions and other serious violations of international humanitarian law committed during the conflict in Yugoslavia.²² The Commission heard reports of ethnic cleansing, forced expulsion, and widespread and systematic detention and rape of women.²³ The Commission of Experts interpreted its mandate as requiring the collection of all relevant information and evidence concerning violations of international humanitarian law it could secure. The Commission's efforts resulted in 65 000 pages of documents, a database cataloguing the information in these documents, over 300 hours of videotape, and 3 300 pages of analysis.²⁴ All this information was handed over to the Prosecutor of the ICTY between April and December 1994.

The Commission of Experts proposed the idea of establishing an international tribunal²⁵ on 26 January 1993.²⁶ Various draft proposals for an *ad hoc* Tribunal were submitted by a number of states and international bodies to the United Nations Secretary General. This assisted him in the drafting of the Statute of the ICTY after the Security Council, at the proposal of France, adopted Resolution 808 on 22 February 1993. Resolution 808 was the resolution by which it was *decided* to establish a Tribunal.²⁷ The use of the term 'tribunal' rather than 'court' was chosen partly because of the Nuremberg and Tokyo precedents and partly to distinguish the ICTY, an *ad hoc* Tribunal, from the efforts to establish a permanent international court.²⁸

On 25 May 1993 the Security Council unanimously approved Resolution 827 which established the ICTY and approved the Secretary General's draft of the Statute without change. The ICTY came into legal existence on the same day. The

²² SC Res 780 SCOR, 47th Sess, 2, UN Doc S/RES/780 (6 October 1992) (hereinafter Resolution 780).

²³ See SC Res 798 (1992) 18 December 1992. See also the Report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia, S/25240, Annex 1 (1993).

²⁴ These documents and analysis comprise the Annexures to the Final Report of the Commission of Experts. The analytical reports were prepared under the direction of the Chairman of the Commission of Experts, M C Bassiouni. See *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992), UN SCOR Annex UN Doc S/1994/674 (27 May 1994) (hereinafter Final Report).

²⁵ 'The Commission was led to consider idea of the establishment of an *ad hoc* international tribunal. In its opinion, it would be for the Security Council or another organ of the United Nations to establish such a tribunal in relation to events in the territory of the former Yugoslavia. The Commission observes that such a decision would be consistent with the direction of its work.' UN Doc S/25274 Annex I para 74.

²⁶ The International Conference on the former Yugoslavia also proposed the establishment of a tribunal on 30 January 1993, See UN Doc S/25221 Annex I para 9.

²⁷ M C Bassiouni *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 205.

²⁸ V Morris & M P Scharf *The International Criminal Tribunal for Rwanda* (1998) 138.

Judges were elected on 15 September 1993²⁹ and the Prosecutor took office on 15 August 1994. The Commission of Experts submitted its Final Report on 24 May 1994.³⁰

4. Principal Organs of the ICTY

The ICTY consists of three principal organs. The first organ is the Chambers, which is entrusted with the performance of judicial functions. The second organ is the Office of the Prosecutor, responsible for the investigation and prosecution of alleged criminals. These two independent organs are served by a third administrative organ, the Registry.³¹

The Security Council initially decided that the Prosecutor of the ICTY should also serve as the Prosecutor for the ICTR. In spite of this institutional link, the Office of the Prosecutor of the ICTY and that of the ICTR remained two separate, independent organs. On 28 August 2003 the UN Security Council amended the statute of the ICTR to provide the ICTR with its own prosecutor as of 15 September 2003. On 6 April Jassan Jallow was appointed to this position.

This thesis is strongly concerned with the role of the judges. The Chambers will not be discussed here but in two chapters devoted exclusively to Tribunal judges. The election and independence of the judges forms the subject matter of Chapter 3. The institutional culture of Chambers is discussed in Chapter 4.

It is however important to note that the two Tribunals share a common Appeals Chamber. The Security Council believed that a common Appeals Chamber would allow the two tribunals 'to function more economically and harmoniously'.³² In addition the use of a common Appeals Chamber was meant to ensure the consistent interpretation of humanitarian law.³³

An important reason for the sharing of organs was that neither Tribunal should hand down decisions inconsistent with those of the other.³⁴ It is generally considered desirable for international courts (although not *bound* by precedent) to

²⁹ The Security Council unanimously accepted the Secretary General's list of twenty-three nominations for the position of Judge. In terms of Article 13 of the Statute the General Assembly was to elect eleven of the nominees to a four year term. SC Res 857 UN SCOR 48th Sess 3265th mtg, UN Doc S/Res/857 (20 August 1993).

³⁰ The Annexes to the Report were submitted on 28 December 1994. These annexes were published by the UN for public dissemination in August 1995 as UN Doc S/1994/674/Add 2 (Vol 1) (31 May 1995) (Vols II -V) (28 December 1994) (hereinafter Annexes).

³¹ Morris & Scharf (note 12) 137.

³² See Article 12 (2) of the ICTR Statute.

³³ L D Johnson 'The International Tribunal for Rwanda' (1996) 211 *International Review of Penal Law* 18.

³⁴ C Aptel 'The International Criminal Tribunal for Rwanda' (1997) 321 *International Review of the Red Cross* 2. The decision reportedly reflects a compromise reached during the negotiations that preceded the adoption of Resolution 955.

follow their own precedent as ‘internal consistency’ could be said to be more important than international courts following the precedent of *other* international courts.³⁵ The composition of the Appeals Chamber is discussed further in Chapter 4.

5. Jurisdiction of the ICTY

(i) Concurrent Jurisdiction

Article 9 of the ICTY Statute provides that the ICTY has concurrent jurisdiction with and primacy over national courts. The concurrent jurisdiction of the Tribunals is based on the principle of universality. Whereas as a general rule states apply their criminal laws only in their own territories, certain crimes, universally dangerous to states and their subjects, require the jurisdiction of all community members wherever they may occur, even in the absence of a link between the state and the parties in question.³⁶ From a practical point of view it was considered almost impossible for the ICTY to prosecute all the perpetrators of atrocities in the former Yugoslavia. The idea was that states should be encouraged to search for, to prosecute and to punish any persons responsible for war crimes in the territory as demanded by the Geneva Conventions.³⁷ Shortly after its establishment the ICTY urged countries that had arrested suspected war criminals from Yugoslavia to initiate domestic prosecutions. The ICTY reserved the option to assert its primacy of jurisdiction in these cases when it became fully operational.³⁸

(ii) Subject-matter Jurisdiction

The Statute of the ICTY grants the Tribunal subject-matter jurisdiction over the following crimes: 1) grave breaches of the Geneva Conventions; 2) violations of

³⁵ On the question of precedent at the ICTY, see *Prosecutor v Zlatko Aleksovski* IT-95-14/1-A, 24 March 2000, para 89. In the case of the *ad hoc* Tribunals one can distinguish between consistency between different decisions of the same tribunal, consistency between the decisions of the two *ad hoc* Tribunals and consistency between the *ad hoc* Tribunals and the decisions of other international courts such as the ICJ. As will be illustrated in the chapters on the principle of legality (Chapter 5) and lawmaking through the case law (Chapter 6) the Tribunals do not always decide consistently. The crime of rape, for example, has been defined differently by the ICTY and the ICTR. Different ICTY Trial Chambers have even defined rape differently. See the discussion in Chapter 6.

³⁶ Universal jurisdiction has traditionally been asserted over the crime of piracy on the high seas because any nation that apprehended and punished a pirate acted in community interest. After World War II, strong arguments were advanced, based largely on the principles of the Nuremberg Trials and various United Nations Resolutions, that perpetrators of genocide and crimes against humanity were also subject to universal jurisdiction. T Buergenthal & HG Maier *Public International Law in a Nutshell* 2 ed (1990) 172-3, K Randall ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785 (1988), Morris & Scharf (note 12) 122.

³⁷ Articles 49, 50, 129 and 146 of Geneva Conventions I, II, III and IV respectively.

³⁸ Morris & Scharf (note 12) 312.

the laws or customs of war; 3) genocide; and 4) crimes against humanity.³⁹ The scope of this chapter does not allow for a full analysis of each of these crimes.⁴⁰

How does the ICTY Statute define crimes against humanity? Article 5 defines crimes against humanity as being the following crimes: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. Article 5 requires the above crimes to be committed in armed conflict, whether international or internal in character, and directed against any civilian population.

(iii) Personal Jurisdiction

Article 6 of the ICTY Statute limits the personal jurisdiction of the ICTY to natural persons. This is consistent with the personal jurisdiction of the Nuremberg Tribunal, which was given the ‘power to try and punish persons’.⁴¹

The personal jurisdiction of the ICTY may be exercised over natural persons charged with individual criminal responsibility for having planned, instigated, ordered, committed or otherwise aided and abetted in a crime, or persons with superior criminal responsibility, or persons who had authority and control over subordinates and who knew or had reason to know subordinates were committing or persons about to commit a crime who failed to take necessary and reasonable measures to prevent, halt or punish the crimes.⁴² In contrast to the Nuremberg Tribunal that was only empowered to try ‘persons acting in the interest of the Axis countries’,⁴³ the personal jurisdiction of the ICTY extends to any person alleged to have committed crimes referred to in the Statute in the territory of the former Yugoslavia after 1991 *regardless of nationality*.

(iv) Territorial Jurisdiction

Security Council Resolution 808 provides that the territorial jurisdiction of the Tribunal is limited to the territory of the former Yugoslavia,⁴⁴ including its land

³⁹ M-C Roberge ‘Jurisdiction of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide’ (1997) 321 *International Review of the Red Cross* 651.

⁴⁰ See M Boot *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2001); G Werle *Principles of International Criminal Law* (2005); G Mettraux *International Crimes and the Ad Hoc Tribunals* (2005) for a thorough analysis of these crimes.

⁴¹ Article 6 of the Nuremberg Charter. The IMT did however certain organizations as criminal (in accordance with article 9 of the IMT Statute), such as the SS, the Gestapo, the Leadership Corps of the Nazi Party and the SD. A Cassese *International Criminal Law* (2003) 138.

⁴² Article 7(1) ICTY Statute.

⁴³ Article 6 Nuremberg Charter.

⁴⁴ This limitation on the competence of the ICTY is the result of the Security Council mandate rather than international law. International law recognises jurisdiction on the part of all States to try persons suspected of crimes under international law without regard to where the crime is committed. Morris & Scharf (note 12) 117.

surface, airspace and territorial waters.⁴⁵ Every element of a crime need not have occurred in the former Yugoslavia but the fact that a significant element of the crime occurred therein may be sufficient.⁴⁶

(v) Temporal Jurisdiction

The temporal jurisdiction extends to any crime committed after 1 January 1991.⁴⁷ The temporal jurisdiction of the Yugoslavia Tribunal was defined in its Statute only in terms of the starting point since atrocities were still being committed in the former Yugoslavia when the statute was adopted and there was no indication of when violations of humanitarian law would cease.⁴⁸ The possibility of extending the jurisdiction was recognised by the Security Council in Resolution 827 establishing the Yugoslavia Tribunal which refers to the prosecution of persons responsible for serious violations of international humanitarian law committed during the period 'between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace'.⁴⁹

6. The Establishment of the ICTR

Within a year of the establishment of the Yugoslavia Tribunal, the Security Council was confronted with the genocide in Rwanda. The Security Council was accused of Eurocentrism which was an important reason why the Council was compelled to establish the Rwanda Tribunal.⁵⁰

The Arusha Peace Agreement was concluded in August 1993. The most serious acts of genocide however, occurred after this date. Talks for the initiation of a cease-fire in Rwanda started in 1994.⁵¹ As in the case of the former Yugoslavia, the Security Council requested the establishment of a Commission of Experts to investigate specific violations of international humanitarian law in Rwanda.⁵² The Commission found serious breaches of international humanitarian law on both sides of the conflict.⁵³ The members of the Security Council believed that the prosecution of those responsible for the violations by a neutral international body would deter further atrocities, break the cycle of violence and retribution, and

⁴⁵ See *Report of the Secretary General pursuant to para 2 of SC Resolution 808 (1993) S/25704*, 3 May 1993 (hereinafter 'Secretary General's Report') para 16.

⁴⁶ A significant link between the crime and the territory of Yugoslavia is required but this would not necessarily exclude crimes involving a transnational element. Morris & Scharf (note 12) 118.

⁴⁷ This means that the recent Kosovo conflict also falls within the jurisdiction of the Tribunal.

⁴⁸ Morris & Scharf (note 12) 119.

⁴⁹ SC Res 827, UN SCOR 48th Sess at 29 UN Doc S/INF/49 (1994), reprinted in Morris & Scharf (note 11) 177.

⁵⁰ M Scharf 'The Politics of Establishing an International Criminal Court' (1995-1996) 6 *Duke Journal of Comparative and International Law* 168.

⁵¹ This took place after the adoption of Security Council Resolution 918 (1994).

⁵² Security Council Resolution 935 (1994) established the Commission of Experts.

⁵³ G Erasmus & N Fourie 'The International Criminal Tribunal for Rwanda: Are all issues addressed?' (1997) 321 *International Review of the Red Cross* 706.

encourage the return of refugees.⁵⁴ A decision was made to set up an international criminal tribunal and the ICTR was established on 8 November 1994.

The Preamble of the ICTR Statute states that the ICTR was established by the Security Council acting under Chapter VII of the UN Charter. In a similar way to the Preamble of the ICTY Statute⁵⁵, the Preamble further establishes the general principle that the Rwanda Tribunal must function in accordance with the provisions of the Statute.

Unlike the ICTY which the Security Council established on its own initiative to help restore and maintain peace in that territory, the International Criminal Tribunal for Rwanda was created in response to an official request by the Rwandan government.⁵⁶ In spite of having initially called for the setting up of the Tribunal, the Rwandan government subsequently voted against the adoption of Resolution 955 in the Security Council.⁵⁷ Ambassador Bakuramutsa, the Rwandan Representative to the United Nations, expressed his government's dissatisfaction with the Rwanda Tribunal as constituted. He argued that the temporal jurisdiction which enables the Tribunal to prosecute persons responsible for violations between 1 January and 31 December 1994, was too limited and would not cover the lengthy period during which preparations were made for the genocide.⁵⁸ Secondly, he argued that the composition of the Tribunal, consisting of only two Trial Chambers,⁵⁹ would prevent it from functioning properly in view of the large number of prosecutions to be brought.⁶⁰

The Secretary General was not requested to prepare a report to assist the Security Council in the establishment of an International Tribunal for Rwanda since the

⁵⁴ New Zealand, the principle sponsor of Resolution 955 (1994), the resolution establishing the ICTR, stated: 'We believe the guarantee of a fair and impartial trial would go some way to encouraging the millions of Rwandese now in refugee camps in neighbouring countries to return to their homeland.' UN SCOR 49th Sess, mtg at 2, UN Doc S/PV 3453 (1994) 5.

⁵⁵ The Preamble of the ICTY Statute states that the Tribunal 'shall function in accordance with the provisions of the present Statute'.

⁵⁶ Letter of 28 September 1994 addressed by Rwanda's Permanent Representative to the United Nations to the President of the Security Council, Doc S/1994/115.

⁵⁷ Summary Record of the 3453rd meeting of the Security Council (8 November 1994), Doc S/PV 3453.

⁵⁸ C Aptel (note 34) 2.

⁵⁹ Initially the ICTR had only two Trial Chambers. On 30 April 1998 the Security Council adopted Resolution 1165 (1998) which established a third Trial Chamber of three additional judges in order to try without delay the large number of accused awaiting trial before the ICTR.

⁶⁰ Ambassador Bakuramutsa made five more arguments: (i) the scope of the subject-matter jurisdiction conferred on the Tribunal could result in a scattering of its resources, whereas its priority should be to try persons presumed to be responsible for genocide; (ii) countries said to have been involved in the events of 1994 should refrain from putting forward their own nationals as candidates for judges; (iii) the problem of terms of imprisonment served outside Rwanda; (iv) the fact that those tried and found guilty by the Tribunal would escape capital punishment; and (v) the need for the Tribunal to be based on Rwandan territory to enable it to take part in the struggle against impunity. Aptel (note 34) fn 9.

Secretary General's Report on the former Yugoslavia was thought to provide a sufficient analysis of the relevant legal issues relating to the establishment of the Tribunal. In addition the ICTY Statute was believed to provide an acceptable blueprint for the ICTR Statute.⁶¹

7. Principal Organs of the ICTR

The Security Council decided to provide the ICTR with structures similar to that of the ICTY. Similar to the ICTY, the ICTR consists of three organs: the Chambers, the Office of the Prosecutor and a Registry. In addition to the three Trial Chambers there is an Appeals Chamber common to the two Tribunals. The Chambers are composed of eleven independent judges, with three serving in each of the Trial Chambers and five judges serving in the Appeals Chamber.

8. Jurisdiction of the ICTR

The Rwanda Tribunal is a court established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. Article 1 of the Statute confers this limited jurisdiction on the Rwanda Tribunal. Similarly to the ICTY, the ICTR has subject-matter jurisdiction, personal jurisdiction, territorial jurisdiction and temporal jurisdiction in accordance with the limited mandate conferred by the Security Council.⁶²

(i) Concurrent Jurisdiction

According to Article 8 of the ICTR Statute, the ICTR shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law. The Article also states that the ICTR shall have primacy over the national courts of all States. The question of whether a Tribunal should be vested with exclusive or concurrent jurisdiction depends on factors such as the purpose for which the Tribunal is established, the role envisaged by the Tribunal in relation to national courts and the nature and extent of the crimes which the tribunal is intended to address.⁶³ In the context of Rwanda, these three factors weighed in favour of establishing a Tribunal with concurrent jurisdiction. Rwanda requested the establishment of an international tribunal to supplement rather than supersede the jurisdiction of its national courts.⁶⁴ In establishing the Rwanda Tribunal the Security Council recognised that the national courts of Rwanda would need to hear a large number of cases in addition to the cases heard by the ICTR. It would be virtually impossible for the ICTR to prosecute all the individuals responsible for crimes during the Rwandan genocide. Because of the fact that simultaneous or consecutive trials could violate the principle of *ne bis in idem* the ICTR was awarded primacy of jurisdiction. This means that the ICTR is

⁶¹ Morris & Scharf (note 28) 101.

⁶² ICTR Statute Articles 2 to 5 and 7.

⁶³ Morris & Scharf (note 28) 309.

⁶⁴ *Ibid.*

authorised to exercise its jurisdiction to the exclusion of national court of any state.⁶⁵

(ii) Subject-matter Jurisdiction

First and foremost, the Rwanda Tribunal has jurisdiction over the crime of genocide. It has been said that the *focus* of the jurisdiction of the ICTR is not on war crimes, but on genocide as Rwanda had requested.⁶⁶ Perhaps the most important reason for Rwanda's objection to the Rwanda Tribunal was the failure to restrict its jurisdiction to genocide.⁶⁷ Rwanda was afraid that genocide, the crime that brought about the Tribunal's existence, could be relegated to a secondary level.⁶⁸ The Security Council agreed to place genocide first on the list of crimes in Article 2 of the ICTR Statute but decided against limiting the list only to that crime. The Security Council thought that prosecuting the Hutu-dominated former government for genocide and excluding 'crimes against humanity' and other crimes committed by the Tutsi group would have conveyed the wrong legal and political message.⁶⁹ According to Morris and Scharf prosecuting only one of the parties to the conflict would not have achieved the aims of the Security Council which included promoting national reconciliation by ensuring independent and impartial justice and alleviating the threat to international peace.⁷⁰ Article 3 of the ICTR Statute therefore states that the Tribunal has jurisdiction over Crimes against Humanity. In addition Article 4 states that the Tribunal shall have the power to prosecute Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

⁶⁵ In the Rwanda Tribunal Statute the phrase 'national courts' was replaced with 'courts of any State' to avoid a restrictive interpretation of the primacy of the Tribunal. Uganda has however challenged the primacy of the ICTR over its national courts with respect to crimes committed in neighbouring states such as Uganda. See *Letter Dated 31 October 1994 From the Charge d'Affaires a.i of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council* UN Doc S/1994/1230 (1994), reprinted in Morris & Scharf (note 28) Vol II, 362.

⁶⁶ The reason for this can be found in the statement of New Zealand, UN SCOR, 49th Sess, 345 remtg at 5, UN Doc S/PV 3453 (1994).

⁶⁷ Morris & Scharf (note 28) 164.

⁶⁸ Mr Bakuramutsa stated on behalf of Rwanda: '...my delegation was surprised to see in the draft Statute that the International Tribunal, instead of devoting its meagre resources, and probably equally meagre financial ones, to trying the crime of crimes, genocide, intends to disperse its energy by prosecuting crimes that come under the jurisdiction of internal tribunals. Furthermore nothing in the draft resolution and statute indicates the order of priority for crimes considered by the Tribunal. In these conditions, nothing could prevent the Tribunal from devoting its resources on a priority basis to prosecuting crimes of plunder, corporal punishment or the intention to commit such crimes, while relegating to a secondary level the genocide that brought about its establishment'. *Provisional Verbatim Record of the Security Council*, Forty Ninth Year, 3453rd Meeting, UN SCOR, 49th Sess, UN Doc S/PV 3453, 8 November 1994, reprinted in Morris & Scharf (note 28) Vol II, 308.

⁶⁹ D Shraga & R Zacklin 'The International Criminal Tribunal for Rwanda' (1996) 7 *EJIL* 501, 508.

⁷⁰ Morris & Scharf (note 28) 164, 165. See also LJ van de Herik *The Contribution of the Rwanda Tribunal to the Development of International Law* (2005).

(iii) Personal Jurisdiction

Article 5 of the ICTR Statute limits the personal jurisdiction of the Tribunal to natural persons. Article 5 reproduces *mutatis mutandis* Article 6 of the ICTY Statute. It is important to note that the personal jurisdiction of the ICTR is limited with respect to the nationality of the persons responsible for crimes committed in the neighbouring states of Rwanda. The territorial jurisdiction of the ICTR extends beyond the territory of Rwanda so as to encompass serious violations of international humanitarian law committed in neighbouring states. However the extended territorial jurisdiction of the Tribunal only applies to Rwandan nationals. The reason for this was to ensure that the crimes committed outside of Rwanda were nonetheless related to the situation in Rwanda.⁷¹

(iv) Territorial jurisdiction

The territorial jurisdiction is limited to crimes committed in the territory of Rwanda or in neighbouring states by Rwandan citizens under Article 7 of the Statute. The Nuremberg Tribunal was not subject to any limitation on its territorial jurisdiction. According to the Charter the Nuremberg Tribunal was established for the purpose of trying the major Nazi war criminals whose offences had no particular geographic location.⁷²

The territorial jurisdiction of the ICTR first extends to crimes committed within the borders of Rwanda. Rwandan territory also includes a portion of Lake Kivu which is located between Zaire and Rwanda.⁷³

(v) Temporal Jurisdiction

Article 7 of the ICTR Statute provides that the temporal jurisdiction of the Rwanda Tribunal encompasses the crimes covered by the Statute if committed during the period beginning on 1 January 1994 and ending on 31 December 1994. The reason why the first day of January 1994 was selected as the starting point for the temporal jurisdiction was to include the planning and preparation of the

⁷¹ This limited personal jurisdiction avoids unnecessarily encroaching on the territorial jurisdiction of states by conferring jurisdiction on the ICTR for unrelated crimes committed in neighbouring states that should be dealt with by the competent national authorities of those states. Morris & Scharf (note 28) 291.

⁷² Nuremberg Charter, 8 August 1945, 82 UNTS 279, Article 1.

⁷³ There are two situations in which crimes described in the Statute may have been committed by Rwandan citizens outside the territory of Rwanda but that will nevertheless be considered sufficiently connected to the situation in Rwanda to fall within the territorial jurisdiction of the ICTR. First, crimes may have been committed by Rwandan citizens who stepped across the border. It was believed that these people should not be considered from the jurisdiction of an international tribunal established simply because they stepped across the border. The second situation covers crimes which were committed in Rwandan refugee camps located in neighbouring states. As in the case of the ICTY the territorial jurisdiction does not require that every element of a crime should have occurred in Rwanda or a neighbouring state. The fact that a significant element of the crime occurred in one of those states may be sufficient. Morris & Scharf (note 28) 296, 297.

massive and systematic criminal acts that started in early April.⁷⁴ The last day of December 1994 was selected as the end point even though this date came several months after the cease-fire unilaterally declared by the Rwandese Patriotic Front on 18 July 1994, the date when the internal armed conflict effectively ended. On 19 July 1994 a Government of National Unity was formed.⁷⁵ Morris and Scharf believe that the finite nature of the temporal jurisdiction, in contrast with the open-ended temporal jurisdiction of the ICTY, limits the deterrent value of the ICTR with respect to crimes committed after 1994. Dissatisfaction with the the temporal jurisdiction of the Tribunal was one of the seven reasons given by Rwanda for voting against its establishment ⁷⁶.

9. The Cost of Justice: Funding and its Implications for Independence

(i) The Funding of the ICTY and ICTR

Tribunals are expensive. The cost of Tribunals has led many to object to this form of implementation of international criminal law.⁷⁷ The tremendous costs involved make it difficult for the UN to establish Tribunals in parts of the world where it may be equally necessary.⁷⁸ The gap in resources between the ICTR and the national courts in Rwanda has led some to ask whether there has been a similar disparity between the quality of justice dispensed by the national courts and the Tribunal.

According to Megret the question of money is ‘no less the lifeblood of justice as it is of war’.⁷⁹ He writes that the dilemma concerning whether the Tribunal should be funded by the regular UN budget or through voluntary contributions illustrates what could be described as an ‘insoluble quandary’: on the one hand the risk of a

⁷⁴ ‘Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994 in order to capture the planning stage of the crimes.’ *Report of the Secretary General Pursuant to paragraph 5 of Security Council Resolution 955* (1994) at para 14 UN Doc S/1995/134 (1995).
⁷⁵ Morris & Scharf (note 28) 299.

⁷⁶ Rwanda explained its dissatisfaction with Article 7 as follows: ‘First my delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda from 1 January 1994 to 31 December 1994 as inadequate. In fact, the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination was successfully tested. For example, there were the extermination of a sub-group of Tutsis, the Bahimas, in Mutara in October 1990, the extermination of another Batutsi sub-group, the Bagogwes, in the region of Gisenyi and Ruhengeri, in January and February of 1991; the massacre of over 300 Bahutsi in Bugesera in March 1992; and the massacre of more than 400 other Bahutsi in Gisenyi, in January 1993.’ UN SCOR, 49th Sess, 3453 mtg. at 14-15, UN Doc S/PV 3453 (1994).

⁷⁷ See also R Zacklin ‘The Failings of Ad Hoc International Criminal Tribunals’ (2004) 2 *JCIJ* 543.

⁷⁸ See SC doc S/2004/616, 23 August 2004 (‘Zacklin Report’) which states that ‘the tribunals have been expensive and have contributed little to sustainable national capacities for justice administration.’

⁷⁹ F Megret ‘The Politics of International Criminal Justice’ (2002) *EJIL* 13, 5.

tribunal that cannot function because of lack of money, on the other hand a Tribunal that risks being controlled by it.⁸⁰

Arsanjani writes that the question of financing for the International Military Tribunals for Nuremberg and the Far East did not appear to have been a significant or problematic issue.⁸¹ Article 30 of the Charter of the IMT stated: 'The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.'⁸² However, despite Article 30 it appears that each of the four participating Allied governments covered at least some, if not all, of the costs of their own staff at the Tribunal. In the case of the IMTFE the issue of financing was not addressed in the Proclamation for its establishment or in the Rules of Procedure and Evidence. It seems as if in the case of the IMTFE the United States ended up paying for most of the Tribunal's expenses. In most cases, the costs of commissions or military tribunals established after World War II have been born by the prosecuting states.⁸³

The word 'independence' in the context of the ICTY and ICTR can refer to at least three forms of independence: The independence of the Prosecutor, the independence of the Judges and the independence of the Tribunals from the Security Council. It can refer to formal or 'structural' independence or real, substantive independence. Questions of judicial and institutional independence will be addressed in Chapter 3. It seems clear that the question of funding has *some* impact on the independence of the Tribunals.⁸⁴

Although the Chambers of the ICTY appear, at least formally, to be completely independent, the Tribunal, as a subsidiary organ of the Security Council, is administratively serviced by the UN Office of Legal Affairs (OLA). The internal workings of the Tribunal are subject to UN administrative rules and regulations. Ultimately administrative and financial control over all aspects of the Tribunal's

⁸⁰ Ibid.

⁸¹ M H Arsanjani 'Financing' in A Cassese, P Gaeta, J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 315, 316.

⁸² Ibid 316.

⁸³ As a result of the provisions of the Treaty of Peace with Japan, signed at San Francisco on 8 September 1951, most of the expenses of the Tribunal and the occupation was paid by the American dominated occupation authority, America ended up paying 'for most if not all of the expenses of the IMTFE.' Some IMTFE-related costs were however paid by Japan. Ibid 317, fn 7.

⁸⁴ Some believe that the financing of the ICTY could be an obstacle to achieving impartiality and independence According to Trifunovska, the manner of the financing of the Tribunal through private donors and 'intermeshing of NATO governments' indicates the influence which some countries might exercise on ICTY activities and the lack of independent review of the whole system Trifunovska, Snezana, 'Fair Trial and International Justice: The ICTY as an example with special reference to the Milosevic case' *Rechtsgeleerd Magazijn Themis* Jaargang 164, 1 Feb. 2003, 11. See also T Robson *Milosevic Trial: Hague Tribunal shows its Partisan Nature*, 15 October 2001 www.wsws.org/articles/2001/oct2001/milo-o15.shtml

workings is exercised by UN headquarters in New York.⁸⁵ In addition, the budget of the Tribunal is subject to approval by the UN Controller's Office in the first instance, in the second instance by a Review Committee, the Advisory Committee on Administrative and Budgetary Questions (ACABQ), and ultimately by the Fifth Committee of the GA.⁸⁶ It has been argued that the General Assembly, as the most representative organ of the UN, should have played a more substantial role in the establishment of the Tribunal.⁸⁷ The General Assembly has however been granted the power to appoint the judges and to determine the budget. According to Article 32 of the ICTY Statute the expenses of the Tribunal will be borne by the regular budget of the United Nations on the basis of Article 17 of the UN Charter.⁸⁸

Whereas initially both the ICTY and ICTR were understaffed and underfunded the Tribunals now receive generous funding. The Tribunals receive money from two main sources: the UN and trust fund money from various governments. In its Resolution 47/235 of 14 September the General Assembly invited Member States and other parties to make voluntary contributions to the Tribunal both in cash and in the form of services and supplies. As at May 2001, the Voluntary Fund of the Tribunal has received approximately \$32.9 million in contributions from 30 countries.⁸⁹ The UN pays the biggest share. When the ICTY was established it had a starting budget of \$500 000. For the period from 1 January to 31 December 2000 the General Assembly decided to appropriate an amount of \$95, 942, 600 to the Special Account of the Tribunal.⁹⁰ The 2004-2005 ICTY budget estimate was \$327.3 million.⁹¹

The ICTR started of with a budget of \$13, 467, 300 in 1994.⁹² The ICTR received \$86, 154, 900 for 2000. Interestingly, the amount appropriated to the ICTR for

⁸⁵ Bassiouni (note 27) 216.

⁸⁶ Ibid.

⁸⁷ See 'Challenges to the Establishment of the ICTY' below.

⁸⁸ According to the regular procedure, the budget is initially submitted by the Secretary General and reviewed by both the 16-member Advisory Committee on Administrative and Budgetary questions (ACABQ) and by the Fifth Committee of the General Assembly. The budget is finally approved by the General Assembly pursuant to the recommendations of its Fifth Committee.

⁸⁹ For a breakdown of the countries and their contributions see the *Eighth Annual Report of the International Tribunal*, 17 September 2001, A/56/352-S/2001/865, 42, 43.

⁹⁰ At the 98th plenary meeting of the fifty-fifth session on 23 December 2000 the General Assembly having considered the report of the Fifth Committee (A/55/691/Add.1) adopted resolution 55/225 B, in which it appropriated \$4, 899, 400 for the Tribunal for six *ad litem* judges for the period from 1 July to 31 December 2001. Ibid 47.

⁹¹ Press Release GA/AB/3594. The increase in the appropriation for the ICTY was attributed to the weakening of the dollar vis-à-vis the euro. Ibid.

⁹² For the 1994 budget, see UN Document A/49/945, Report of the Fifth Committee on 'Financing the International Criminal Tribunal for the Prosecutions of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994' 3.

2002-2003 is significantly higher- an amount of \$ 177, 739, 400. According to the ICTR the increase in the budget is related to heightened activities in investigations.⁹³ For the period 2004-2005 the amount of \$239.2 million was appropriated to the ICTR. The increase in the cost of the ICTR was attributed to the increase in the number of *ad litem* judges and the appointment of a separate Prosecutor.⁹⁴

The above amounts do not include the trust funds that both Tribunals have for special expenses. It can be argued that the expense of the Tribunal places an additional responsibility on the judges and the Tribunal as a whole to be accountable and responsible in its judgments and general operation.

Apart from the UN contribution, the United States has made the biggest financial contribution to the ICTY. The United States has also made significant voluntary contributions towards different projects.⁹⁵ Pursuant to GA Resolution 47/235 a voluntary trust fund for contributions to the Tribunal has been established. In the Thirteenth Report of the ABACQ it is stated that as of February 1995, a number of states had contributed a total of US\$ 6.08 million to the fund.⁹⁶ Because of the significant role played by voluntary contributions and gratis personnel in setting up the Tribunals the role of voluntary contributions was important in the debates surrounding the funding of the ICC.⁹⁷ Many developing countries opposed the idea of the ICC accepting voluntary contributions on the grounds that in the case of the *ad hoc* Tribunals most of the gratis personnel came from North America and Western European States which led to an imbalance in the geographical competence among the personnel. This was especially problematic because the functions of the gratis personnel included supervisory and policy competences which led developing countries to believe that the Tribunal was losing its international character in favour of becoming an Anglo-European court.⁹⁸

Interestingly, the Special Court for Sierra Leone, being a Tribunal established by treaty and not under Chapter VII of the United Nations, is not funded by the United Nations but relies on voluntary contributions. Over fifty countries have made voluntary contributions. The court has an annual budget of \$15 million - one tenth of that of the ICTY. The Special Court initially experienced serious

⁹³ See *Fifth Annual Report of the ICTR*, 2 October 2000, A55/435-S/2000-927.

⁹⁴ Press Release (note 91).

⁹⁵ The United States has also provided significant intelligence information to the ICTY to support its investigations. In addition they have provided 'political support'.

⁹⁶ Thirteenth Report of ABACQ, Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/49/7/add. 12 March 1995, 11.

⁹⁷ Arsanjani (note 81) 326.

⁹⁸ As a result of this the General Assembly passed a series of resolutions strictly limiting gratis personnel even though it was clear that they were crucial to the work of the two Tribunals. Ibid.

financial pitfalls. It will be interesting and instructive to see whether the budget proves sufficient.⁹⁹

In the context of the ICC it was feared that 'he who pays the piper, calls the tune'. The parties at Rome feared that an imbalance between states' contributions and those by non-states entities could lead to possible influences by non-states entities in the operation of the court.¹⁰⁰ With regard to the ICTY it has been argued that the Tribunal is independent and autonomous because it is not under the direction and control of the Security Council when it comes to exercising its *judicial function*. According to some the UN has been very conscious of the fact that the Tribunal is a judicial organ and has been careful not to interfere.¹⁰¹ It can however be argued that the UN, by withholding funds can exercise control over the Tribunal in an indirect way.

Bassiouni maintains that control over bureaucratic procedures and finances are the means by which the UN exerts political control over the activities over its organs. In 1995 he wrote that although bureaucratic and financial factors have at times slowed the progress of the Tribunal, these factors have not yet placed the independence or the integrity of the Tribunal in danger.¹⁰²

(ii) The Funding of the ICC

According to Schabas, it is one of the 'unpleasant consequences' of the fact that the ICC is not a UN body that it is responsible for its own funding.¹⁰³ Article 117 of the Rome Statute allows the Court to take money based on assessed contributions upon State Parties following the basic scale already in use at the United Nations. In addition, the court may take any funds provided by the United Nations. In the case of Security Council referrals for example, it would seem fitting that the UN must be responsible.¹⁰⁴ Proposals that the court should be financed solely by the UN were resisted - principally by the three biggest contributors to the United Nations budget, the United States, Germany and Japan.¹⁰⁵ In addition Article 116 states that the court is entitled to receive and use any voluntary contributions from governments, international organisations, individual corporations and other entities. The practice of receiving voluntary contributions is already well entrenched in the United Nations and other international organisations.

⁹⁹ The court has a three year budget of \$ 57 million. Lecture by D Crane, Chief Prosecutor of the Special Court for Sierra Leone, The Hague, 4 April 2003.

¹⁰⁰ Arsanjani (note 81) 326.

¹⁰¹ Interview with Judge Cassese, 6 June 2003.

¹⁰² Bassiouni (note 27) 217.

¹⁰³ W Schabas *An Introduction to the ICC* 2ed (2004) 185.

¹⁰⁴ *Ibid.*

¹⁰⁵ F Jarasch 'Establishment, Organization and Financing of the International Criminal Court' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 23.

Some stated that the funding of the ICC should be independent and not drawn from the UN.¹⁰⁶ Some argued that requiring only State Parties or states referring cases to it to bear the expenses of the court could be a disincentive for states to join the court or initiate proceedings. Advocates of the State Parties approach however thought it was important to maintain the independence of the court in all respect. However a later view emerged that envisaged the payment of voluntary contributions as an additional means of financing.¹⁰⁷

10. A Question of Pedigree: The Legality of the Establishment of the Tribunals

Challenges to the Establishment of the ICTY

(i) Arguments Against and in Favour of the Treaty Approach

Was the decision by the Security Council to establish the Tribunals *ultra vires* its powers?

The question of the legality of the establishment of the ICTY has attracted much debate and is important because it affects the authority and credibility of the judges of the Tribunals and of the Tribunal as an institution. Some states preferred the establishment of the ICTY by way of the consensual act of nations or by treaty. Still others believed that the General Assembly, being the most representative organ of the United Nations, would have been the most appropriate organ to establish the ICTY since it would have guaranteed full representation of the international community.¹⁰⁸

According to Morris and Scharf, the advantages of the treaty approach were that it provided States with an opportunity to ‘carefully examine and elaborate provisions on all aspects of the tribunal’¹⁰⁹ and to exercise their sovereign will in the negotiation and conclusion of such treaty. The main argument raised against the treaty approach in the context of the former Yugoslavia was that too much time was required for the negotiation and conclusion of a treaty and for obtaining the necessary ratifications for its entry into force. In light of the sensitive political situation there was no guarantee that the states concerned whose participation would be essential for the effectiveness of the tribunal would have become party to the treaty.¹¹⁰

¹⁰⁶ See discussion of the Sixth Committee on Agenda item 150, Establishment of an International Criminal Court during the fifty-second session of the GA and Report of the Sixth Committee on this item, A/52/651, and GA Resolution 52/160 of 15 December 1997 United Nations GA Official Records, Fifty-second Session, Supplement, No 26 (A 52/56).

¹⁰⁷ Arsanjani (note 81) 326.

¹⁰⁸ Morris & Scharf (note 12) 40.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

Interestingly, Morris and Scharf point out that the ICTY *was* created pursuant to a treaty - the United Nations Charter - and that the Security Council, in creating the Tribunal, acted not on behalf of individual states but on behalf of the whole international community of states ¹¹¹

States such as Mexico, France and Brazil believed that the General Assembly, as the most representative organ of the United Nations, should play a role in respect to the establishment of the Tribunal such as participating in drafting or reviewing its statute.¹¹² It was considered important that the General Assembly be provided with a means by which it could lend its authority and prestige to the Tribunal. The ICTY Statute provided it with such a role in that the General Assembly was given the role of electing the judges, approving the budget and reviewing the Annual Report of the Yugoslavia Tribunal.¹¹³

The objections to the involvement of the General Assembly were similar to the objections to the treaty approach. Commentators again focused on the idea that such a time-consuming approach could not be reconciled with the urgent need to address the continuing violations of international humanitarian law in the former Yugoslavia, as emphasised in Resolutions 780 and 808.¹¹⁴

According to Bassiouni the involvement of the General Assembly in the preparation of a statute would have added a potentially time-consuming phase. He repeats the two advantages of establishment of the Tribunal by the Security Council. First, it provided an expeditious method for establishing the Tribunal because the Security Council could act relatively quickly on the basis of the Secretary General's Report and, secondly, the Security Council's decision to establish the Tribunal under Chapter VII would be effective immediately and would create binding obligations for all states.¹¹⁵

The Report of the Secretary General concluded that a decision of the Security Council would be the most consistent with the Security Council's emphasis on the need to effectively and expeditiously implement its decision to establish the Tribunal. The Report of the Secretary General determined that the recommended action by the Security Council 'would be legally justified, both in terms of the object and purpose of the decision and of past Security Council practice'.¹¹⁶

¹¹¹ Ibid 87.

¹¹² See the submissions of these three countries contained in UN Doc A/47/922-S/25540 (1993), UN Doc S/25266 (1993) and UN Doc S/25417 (1993) respectively. See also *Letter from the Permanent Representative of Egypt, Iran, Malaysia, Pakistan, Saudi-Arabia, Senegal, and Turkey, on behalf of the organisation of the Islamic Conference (OIC), to the Secretary-General* UN Doc S/25512 (1993), reprinted in Morris & Scharf Vol 1 (note 11) 327, 335.

¹¹³ *Secretary General's Report* (note 45) paras 21, 75 and 137.

¹¹⁴ Bassiouni (note 27) 220.

¹¹⁵ Ibid see UN Charter Articles 2(6) and 25.

¹¹⁶ *Secretary General's Report* (note 45) para 7.

Doubts about the method of establishment were, however, already raised during the debate on Security Council Resolution 827. Some delegates referred to ‘the exceptional nature or character’ of establishing the Tribunal and indicated that *for political reasons* they were willing to accept the method of establishment. Interestingly, China stated that the ‘exceptional’ political circumstances ‘should not be construed as our endorsement of the legal approach involved’.¹¹⁷

In spite of the objections of some states, Sluiter points out that the overwhelming majority of states have recognized and expressed their support for the ICTY and ICTR in a variety of ways.¹¹⁸ He argues that the practice of states in this regard should form an important interpretative tool concerning the provisions of the UN Charter which attribute powers to the Security Council and which have been relied on by the Security Council for the establishment of the ICTY and ICTR.¹¹⁹

The first challenge to the legality of the proposed ICTY came shortly after the Secretary General issued his Report and just before the Security Council adopted the draft statute contained therein. The challenge came in the form of a letter from the Federal Republic of Yugoslavia to the Secretary General questioning whether the Security Council could establish the ICTY as a subsidiary organ under Article 29 of the United Nations Charter.¹²⁰

(ii) The *Tadic* Challenge

The most important case in this regard has been the *Tadic Jurisdictional Decision*.¹²¹ In this decision the Appeals Chamber dealt with the various ‘constitutional issues’ put forward by the Appellant. The diverse responses of the Trial Chamber and the Appeals Chamber in *Tadic* show the contested propositions regarding the reviewability of Security Council decisions posed by the creation of the tribunals.

The Trial Chamber in *Tadic* concluded that it did not have jurisdiction to review the action taken by the Security Council.¹²² It held that the competence of the Tribunal is narrowly defined and does not extend beyond the prosecution of

¹¹⁷ Representative of China, UN Doc S/PV 3217. The Chinese representative said that ‘...the international tribunal can only be an *ad hoc* arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent’.

¹¹⁸ G J A Sluiter *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 19.

¹¹⁹ *Ibid.* Sluiter makes particular mention of the General Assembly Resolutions 44/88 (1993); Resolution 49/10 (1994) and Resolution 49/206 (1994) and Resolution 50/200 (1995) in which UN members were favourable about the establishment of the Tribunals, *ibid.*

¹²⁰ The letter expressed the following view: ‘No independent Tribunal, particularly an international tribunal, can be a subsidiary organ of any body, including the Security Council.’ See *Letter Dated 19 May 1993 from the Charge d'affaires, a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary General*, UN Doc A/48/170-S/25801 (1993), reprinted in Morris & Scharf Vol 2 (note 12) 479.

¹²¹ *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 (hereinafter *Tadic Jurisdictional Decision*).

¹²² *Tadic* (note 1) para 8.

persons responsible for serious violations of international humanitarian law.¹²³ The Trial Chamber resorted to the political question doctrine derived from US constitutional law¹²⁴ and considered the Article 39 determination of ‘threat to the peace’ and its choice of means to meet that threat as a non-justiciable policy determination.¹²⁵

It is widely believed that the Trial Chamber judgment was a weak one. Alvarez writes that the Trial Chamber, by describing the matter as a non-reviewable political question, came close to suggesting that the judges should follow the Security Council’s dictates ‘even if this were to violate defendants’ (or victims’) human rights or even if the Council were to mandate selective enforcement of international humanitarian law’.¹²⁶ In essence the Trial Chamber views the Security Council as all-powerful and non-reviewable.

The Appeals Chamber took a very different approach. The majority of the Appeals Chamber¹²⁷ disagreed with the view of the Trial Chamber and held that the principle of *competence de la competence* gave the Tribunal jurisdiction to determine its own jurisdiction.¹²⁸ The Appeals Chamber’s use of the doctrine of *Kompetenz-Kompetenz* is treated as an example of Tribunal lawmaking in Chapter 6.

(iii) Criticising *Tadic*

The reasoning of the Appeals Chamber in *Tadic* has been widely criticised, particularly by Judge Li, and Judge Shahabuddeen. In a dissenting opinion to the Appeals Chamber decision Judge Li disagreed with the view that the Tribunal had the competence to determine its own jurisdiction. He argued that the Tribunal cannot review the legality of the resolutions by the Security Council. According to him such review is *ultra vires* and unlawful. In his comment in a collection of essays in memory of Judge Li Judge Shahabuddeen asks: If jurisdiction entitles the ICTY to say that it has not been validly established, in what capacity is it acting when it makes that determination?¹²⁹ According to Shahabuddeen there are problems with

¹²³ Ibid.

¹²⁴ The seminal case on this doctrine is *Baker v Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S.Ct. 691 (1962). See K Lee Boyd ‘Are Human Rights Political Questions?’ (2001) 53 *Rutgers Law Review* 279. n1. The political question doctrine has been raised by defendants in the following cases: [Abebe-Jira v. Negewo](#), 72 F.3d 844, 848 (11th Cir. 1996); [Kadic v. Karadzic](#), 70 F.3d 232, 249-50 (2d Cir. 1995); [Philippines v. Marcos](#), 862 F.2d 1355, 1360-61 (9th Cir. 1988); 18 U.S.C. 1961 et seq. (1994); [Forti v. Suarez-Mason](#), 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

¹²⁵ The Trial Chamber cited the criteria for ‘political questions’ delineated by the US Supreme Court in *Baker v Carr* 369 US 186, 217 (1962). *Tadic* (note 1) para 24.

¹²⁶ Jose Alvarez ‘The Likely Legacies of *Tadic*’ (1997) 3 *ILSA Journal of International and Comparative Law* 616.

¹²⁷ The Appeals Chamber decision was supported by Judge Cassese, Judge Dechenes, Judge Abi-Saab and Judge Sidhwa.

¹²⁸ *Tadic Jurisdictional Decision* (note 121) para 19.

¹²⁹ Mohammed Shahabuddeen ‘The competence of a tribunal to deny its existence’ S Yee & W Teyia (eds.) *International Law in the Post Cold War World, Essays in Memory of Li Haopei* (2001) 474.

the view that persons who accept appointments as judges of a court and who swear to serve such court can, in their capacity as judges, question the validity of the law establishing the court. In what capacity are such persons acting when they make that decision? Are they acting as judges or individuals?¹³⁰ Shahabuddeen points out that if judges say that their court was never lawfully established they are speaking as individuals. He writes:

If they are speaking as a court, they are exercising judicial power and therefore recognising the authority from which that judicial power flows; for the only way they can decide as a court is by affirming the validity of the law by which the court is established. The contradiction will be that they are accepting that they are a court at the same time when they are denying that they are a court.¹³¹

Shahabuddeen continues that the Security Council, acting under Article 96 of the Charter, could have referred the matter to the ICJ for an advisory opinion. In the *Effect of Awards*¹³² case the ICJ decided that the General Assembly was competent to establish the United Nations Administrative Tribunal as a judicial body.¹³³ By a similar procedure the court could have been asked for its advice as to whether the Security Council was competent to establish the ICTY.

Alvarez attacks the Trial Chamber position. He finds it inconsistent that the Trial Chamber judges aver that an issue is non-justiciable and then purport to dismiss this issue, 'perfunctorily on the merits'.¹³⁴ If the judges believe there is 'no law' to apply with regard to certain questions, they should also not pronounce on these questions. Judge Li takes the same absolutist yet logical position. In his Separate Opinion he argues that judicial statements about either the Security Council's Article 39 determination or its chosen means of dealing with a threat to the peace are 'imprudent and worthless in both fact and law'.¹³⁵ Alvarez states that a reason why the majority of the judges in the Trial and Appeals Chambers reject this position might be because they regard it as unacceptable for an international criminal court to admit that a defendant will be subject to the 'capricious whim' of the Security Council instead of the rule of law.¹³⁶

Bassiouni writes that similar challenges to Security Council actions have been unsuccessful in the past. He points out that organs of the UN enjoy a

Judge Shahabuddeen however made these comments not in his capacity as judge but in his personal capacity.

¹³⁰ Ibid 475.

¹³¹ Ibid 476.

¹³² *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, 1954, Advisory Opinion of 13 July 1954 ('Effect of Awards') *ICJ Reports* 1954, 47, 56-58.

¹³³ Shahabuddeen (note 129) 477.

¹³⁴ J E Alvarez 'Nuremberg Revisited: The *Tadic* Case' (1996) 17 *EJIL* 250, 251. See *Tadic* (note 1) para 16. See also Erika de Wet *The Chapter VII Powers of the UN Security Council* (2004) 66.

¹³⁵ [Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction \(note 120\)](#) para 2-4.

¹³⁶ J E Alvarez (note 134) 251.

presumption of legality. Security Council actions only become *ultra vires* once the presumption is rebutted.¹³⁷ To rebut such presumption there would have to be a showing that the establishment of the tribunal is not rationally related to the establishment, maintenance and restoration of peace. Considering the international character and the *ius cogens* nature of the crimes committed in the Balkans it is hard to conceive the possibility that the presumption of validity would be rebutted. The ICJ, despite being described by some as the ‘ultimate guardian of UN legality’¹³⁸ has not yet resolved the question of whether it can legitimately review the legality of Security Council action.

Alvarez states that the legal arguments used by the Trial Chamber and the Appeals Chamber to affirm the legality of Tadic's prosecution by the Tribunal are in themselves not sufficient to legitimize a Tribunal with ‘political, foundational and epic goals’.¹³⁹ According to Alvarez the reviewability of Chapter VII acts remain highly debatable. He writes it would be naïve to believe that the Tribunal, whose ‘questionable pedigree is at stake’ has conclusively settled a question which even the ICJ has avoided.¹⁴⁰ According to Alvarez the Appeals Chamber should have adopted some model of judicial review and of UN constitutional interpretation.¹⁴¹

In the *Tadic Jurisdictional Decision* the Prosecutor stated that the ICTY ‘is not a constitutional court set up to scrutinize the actions of the Security Council’.¹⁴² The Prosecutor emphasised that the ICTY was a criminal tribunal with very limited defined powers and that if it were to confine its adjudication to those limits ‘it will not have authority to investigate the legality of its creation by the Security Council’.¹⁴³

The matter of the legality of the establishment of the Tribunal was raised by Milosevic after he was brought to stand trial before the ICTY.¹⁴⁴ After Milosevic was arrested on 3 August 2001 defense lawyers for Milosevic summoned the Netherlands to release him. This request was ignored by the Netherlands and defense lawyers subsequently instituted interlocutory injunction proceedings against the Netherlands in the District Court of The Hague. The Hague District

¹³⁷ Bassiouni (note 27) 24.

¹³⁸ Ibid 238 fn 4. See T Franck ‘*The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?*’ (1992) 86 *AJIL* 519.

¹³⁹ Alvarez (note 134) 246.

¹⁴⁰ Ibid 250. In the *Legal Consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion of 21 June 1971, *ICJ Reports* 1971, 16, 45 the ICJ dealt specifically with the matter of reviewability, stating that: ‘Unfortunately, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.’ *Tadic* (note 1) para. 10.

¹⁴¹ See Alvarez (note 134) 261.

¹⁴² *Tadic Jurisdictional Decision* (note 121) para 20.

¹⁴³ Ibid.

¹⁴⁴ First Pre-Trial Hearing, 30 August 2001.

Court considered itself incompetent to consider the question.¹⁴⁵ The essence of Milosevic's challenge to the legality of the Tribunal was that the Tribunal should have been established by international convention or at least by a motion adopted by the General Assembly.¹⁴⁶ The President of the District Court addressed the matter and said that the issue of Security Council competence has already been dealt with at length by Trial Chamber II and by the Appeals Chamber of the Tribunal in the *Tadic* decision. On 31 August 2001 the President of the District Court of The Hague pronounced his judgment, finding he had no jurisdiction to decide on Milosevic's application for release.¹⁴⁷

11. Challenges to the Legality of the Establishment of the ICTR

The ICTR's establishment by Security Council Resolution instead of by treaty was equally controversial.¹⁴⁸ The treaty approach in the context of Rwanda, would have had similar disadvantages to those mentioned in the context of Yugoslavia. Ratification of a treaty was believed to be a potentially too time-consuming process, not reconcilable with the need to urgently address the continuing violations of international humanitarian law in Rwanda. A treaty would have had to be speedily ratified not only by Rwanda but also by the neighbouring states of Burundi, Tanzania, Uganda and Zaire and by other states harbouring Rwandan refugees.¹⁴⁹ In light of Rwanda's opposition to Security Council Resolution 955, it is unlikely that a generally acceptable treaty could have been negotiated and concluded with the participation of Rwanda with the necessary speed.¹⁵⁰

In *Ntakirutimana*¹⁵¹ the legitimacy of the ICTR was challenged in a district court in the United States in which the United States, on behalf of the ICTR, requested the extradition of Elizaphan Ntakirutimana. The first request for extradition was denied by a magistrate of the US district court. Ntakirutimana's counsel argued that the UN Security Council exceeded its powers under Chapter VII of the

¹⁴⁵ See the summary of the case 'Judgment in the Interlocutory Injunction Proceedings *Slobodan Milosevic v The Netherlands*' (2001) XLVIII 3 *Netherlands International Law Review* 357- 362, 394.

¹⁴⁶ Ibid 359.

¹⁴⁷ Milosevic, the plaintiff, contended that the 'so-called Tribunal' has no basis in law and possesses no democratic legitimacy. He claimed that the Security Council is not competent to establish an international tribunal since it is not sufficiently representative of the world community. He claimed that not a single rule of law exists which would entitle the Security Council to limit the sovereign rights of states. He contended that the establishment of the so-called Tribunal is a flagrant violation of the principle of the sovereign equality of all UN member states, as enshrined in Article 2 paragraph 1 of the UN Charter. The Security Council has no jurisdiction over the individual citizens of states. That the so-called Tribunal can sit in judgment over its own lawfulness is neither credible nor acceptable. Ibid 359.

¹⁴⁸ The legality of the establishment of the Rwanda Tribunal was challenged by Joseph Kanyabashi, one of the first defendants who came before the ICTR. *Prosecutor v Joseph Kanyabashi* ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997.

¹⁴⁹ Morris & Scharf (note 28) 99.

¹⁵⁰ Ibid 99, 100.

¹⁵¹ *In Re The Surrender of Elizaphan Ntakirutimana*, Misc No L-96-005 (SD Texas, 1997).

United Nations Charter in establishing the Rwanda Tribunal.¹⁵² He explained why the *Tadic* judgment did not settle the question of the legitimacy of establishment by way of Security Council Resolution in the following terms:

The *Tadic* opinion adds nothing to the issue. The Yugoslavia Tribunal is a creature of the very statute that was under challenge. The several views of the judges show they cannot agree on anything except their own legitimacy. But they fail to find a source for their creation in the Charter.¹⁵³

Ntakirutimana unsuccessfully sought to be released on the ground of *habeas corpus* and appealed the decision to the Fifth Circuit Court of Appeals. The Fifth Circuit found that it was outside the scope of the court's *habeas* review to address Ntakirutimana's arguments that the UN Security Council is not authorized to create the ICTR and that the ICTR is incapable of protecting Ntakirutimana's rights under US and international law.¹⁵⁴ The majority of the Fifth Circuit decided that Ntakirutimana could be extradited.¹⁵⁵ It was decided that Ntakirutimana would be surrendered to the ICTR.¹⁵⁶

The first challenge brought before the ICTR was by Joseph Kanyabashi. Like the *Tadic* Trial Chamber, the *Kanyabashi* Trial Chamber (consisting of Presiding Judge Sekule, Judge Khan and Judge Pillay) rejected the defence challenges to the jurisdiction of the Rwanda Tribunal.¹⁵⁷ *Kanyabashi* is however more than merely a copy of *Tadic*. The Trial Chamber continued to consider the defence motion. It stated that even though some of the issues raised by the defence had already been dealt with in the *Tadic* case, 'in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interest of justice...the Defence Counsel's motion deserves a hearing and full consideration'.¹⁵⁸

In considering the merits of the motion, the Trial Chamber rejected the principal objections raised by the defence. First, the defence argued that the establishment of the Rwanda Tribunal violated the sovereignty of States, particularly Rwanda, because it was not established by means of a treaty recommended by the General Assembly. The Trial Chamber stated that the accused could raise the plea of state sovereignty but concluded that the establishment of the ICTR did not

¹⁵² Memorandum in Opposition To Surrender of Pastor Elizaphan Ntakirutimana, *In Re The Surrender of Elizaphan Ntakirutimana*, Misc No L-96-005 (SD Texas), 6 March 1997, para 20-24.

¹⁵³ Second Memorandum In Opposition To Surrender of Pastor Elizabethan Ntakirutimana, *In Re The Surrender of Elizabethan Ntakirutimana*, Misc No. L-96-005 (SD Texas), 5 May 1997, para 5.

¹⁵⁴ *Ntakirutimana v Reno*, 184 F 3d 419, 430 (5th Cir 1999), cert denied, 68 USLW 3479 (US 25 January 2000) (No 99-479).

¹⁵⁵ See the commentary on the case by M Coombs 'In re Surrender of Ntakirutimana' (2000) 94 *AJIL* 171.

¹⁵⁶ *In Re The Surrender of Elizabethan Ntakirutimana* (note 153).

¹⁵⁷ *Kanyabashi* (note 148).

¹⁵⁸ *Ibid* para 6.

violate the sovereignty of Rwanda or the other Members of the United Nations which had accepted certain limitations on their sovereignty by virtue of the United Nations Charter and had agreed to follow and carry out Security Council decisions under Article 25 thereof.¹⁵⁹ The Trial Chamber further stated that (i) there was no merit to the argument raised by the defence that the Rwandan conflict did not pose a threat to international peace and security which is a matter to be determined by the Security Council¹⁶⁰ and (ii) that there was no basis for the 'submission that the Security Council's competence to act rested on a preexisting international conflict'.¹⁶¹ Internal conflicts too have international implications which can justify Security Council action.¹⁶² The court stated that the establishment of an *ad hoc* tribunal clearly falls within the ambit of measures adopted to satisfy the goal of restoring peace notwithstanding the absence of any direct mention of the establishment of judicial bodies in the nonexhaustive list of measures contained in Article 41 of the UN Charter. According to the Trial Chamber the existence of specialised bodies or institutions for the protection of human rights does not preclude the Security Council from taking action against human rights violations.¹⁶³

The defence challenged the supremacy of the Tribunal by arguing that the supremacy violated the principle of *jus de non evocando*.¹⁶⁴ The Trial Chamber concluded that this principle was not violated. In this regard the judges quoted the Appeals Chamber in *Tadic* which stated that this principle is aimed at avoiding the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial. In the opinion of the Trial Chamber the Tribunal is 'far from an institution designed for the purposes of removing, for political reasons, certain offenders from fair and impartial justice and have them prosecuted for political crimes before prejudiced arbitrators'.¹⁶⁵

The fourth objection of the defence was that it was contrary to the United Nations Charter to confer on the Tribunal jurisdiction over individuals since the Security Council's authority was limited to states and did not extend to individuals.¹⁶⁶ In its response to this objection the Trial Chamber stated that in establishing the two Tribunals 'the Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so the Security Council

¹⁵⁹ Ibid para 13.

¹⁶⁰ Ibid para 22.

¹⁶¹ Ibid para 24.

¹⁶² Ibid para 7.

¹⁶³ Ibid para 8.

¹⁶⁴ Ibid para 7.

¹⁶⁵ Ibid para 8.

¹⁶⁶ Ibid para 33.

provided an important innovation of international law...'.¹⁶⁷ Interestingly, the Trial Chamber also rejected the argument that the Security Council's failure to establish an international tribunal in response to other comparable situations in the past (such as Congo, Somalia and Liberia) precluded it from doing so in respect of Rwanda.¹⁶⁸

The Trial Chamber stated that it respected the 'persuasive authority' of the decision of the Appeals Chamber of the ICTY in the *Tadic* case.¹⁶⁹ Kress writes that the ICTR's acceptance of *Tadic* as quasi-precedent for *Kanyabashi* is desirable as a matter of judicial policy.¹⁷⁰ Kress provides interesting criticism on the reasoning in *Kanyabashi* pertaining to the criminal responsibility of individuals under international law. In his opinion one would have expected the Trial Chamber to elaborate on the general statement in *Tadic* relating to the criminal liability imposed for serious violations of common Article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict. The Trial Chamber seemed to miss an opportunity to further clarify international criminal law in the context of internal armed conflict. What it does instead is to describe the approach of the Security Council as embodied in the ICTY and ICTR Statutes 'an important innovation of international law'. According to Kress this reasoning is surprising. He writes that this implies that the Security Council, by enacting the ICTR Statute, made use of legislative power. He writes that it is difficult to see how the Security Council, by enacting the ICTY and ICTR Statutes, could have 'innovated the law' without violating the principle of legality.¹⁷¹ The 'seriousness' of the crimes referred to by the Trial Chamber, does not, in the view of Kress, provide a sufficient justification for the extension of the law. In his view the Trial Chamber should have examined customary international law more carefully as was done in *Tadic*.¹⁷²

Fifth, the defense argued that the ICTR was not impartial and independent because of its establishment by the Security Council which is a political body. The defense characterised the ICTR as 'just another appendage of an international organ of policing and coercion, devoid of independence'.¹⁷³ The Trial Chamber responded by arguing that criminal courts worldwide are political bodies because

¹⁶⁷ Ibid para 35.

¹⁶⁸ The Trial Chamber stated: 'The fact that the Security Council, for previously prevailing geo-strategic and political reasons, was unable in the past to take adequate measures to bring to justice the perpetrators of crimes against international humanitarian law is not an acceptable argument against introducing measures to punish serious violations of international humanitarian law when this becomes an option under international law.' Ibid para 36.

¹⁶⁹ Ibid para 4.

¹⁷⁰ See the Commentary by Claus Kress in A Klip & G Sluiter (eds) *Annotated Leading Cases on International Criminal Tribunals, Vol. II The International Criminal Tribunal for Rwanda* (2001) 23.

¹⁷¹ Ibid para 25.

¹⁷² Ibid.

¹⁷³ Ibid para 37.

they are created by legislatures which are eminently political bodies.¹⁷⁴ The Trial Chamber noted that the ICTY in *Tadic* held a similar view.

The Trial Chamber concluded that the independence of the ICTR was demonstrated by: (1) its not being bound by national rules of evidence;¹⁷⁵ (2) the requirement that the judges ‘exercise their judicial duties independently and freely’, ‘are under oath to act honourably, faithfully, impartially and conscientiously’ and ‘do not account to the Security Council for their judicial function’;¹⁷⁶ and (3) the requirement of the personal independence of the judges underscored by Article 12 (1) of the Statute.¹⁷⁷ The subject of judicial independence at the Tribunals will receive more attention in Chapter 3.

12. Conclusion

Many have remarked that the existence of the Tribunals as a functional reality is in itself a great accomplishment.¹⁷⁸ It is of course necessary to look beyond the mere fact of establishment. It can be argued that only the *legitimate* establishment of the Tribunals would lend legitimacy both to the ‘ordinary’ work of the judges and to their more innovative lawmaking activities. It has been suggested that the legal arguments presented by the Trial Chamber and Appeals Chamber in the *Tadic* Jurisdictional Decision were not sufficient to legitimise a Tribunal with political, epic and foundational goals.¹⁷⁹ The position of the Trial Chamber is especially problematic. In light of the controversial nature of the Tribunals and the adventurous lawmaking by the judges the Trial Chamber should not have glibly dismissed the matter as non-justiciable.

Stronger reasoning in *Tadic* could have legitimised not only the work of the ICTY but also of successor Tribunals established by Security Council Resolution such as the ICTR. For similar reasons it is important that the Tribunals be independent. Questions such as whether the sources of a Tribunal’s funding affect its institutional independence should be taken seriously. Questions of independence, legitimacy and accountability will again be addressed in Chapter 3 when judicial independence is considered. Before discussing the judges and their work it is prudent to analyse the *concept* and theoretical underpinnings of the term ‘lawmaking’.

¹⁷⁴ Ibid para 39.

¹⁷⁵ Ibid para 40.

¹⁷⁶ Ibid para 41.

¹⁷⁷ Ibid para 42.

¹⁷⁸ Bassiouni (note 27) 236. See also Sir N Stephen ‘A Viable International Mechanism’ (2004) 2 *JICJ* 385; G Kirk McDonald ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 *JICJ* 558.

¹⁷⁹ Alvarez (note 134) 246.

CHAPTER TWO

WHEN THE RULES RUN OUT The Lawmaking Function of International Judges

1. Introduction

Great jurisprudential division exists about whether the judicial role is ever legitimately creative (or ‘legislative’) rather than exclusively declaratory (or ‘adjudicative’).¹ Blackstone, in his *Commentaries on the Laws of England*, was an enthusiastic proponent of the view that judges do not make the law but simply find the law. According to Blackstone the role of the judiciary is that of the ‘living oracle of the law’.² Montesquieu similarly believed that judges were only those through whose mouth the law spoke. In *L’Esprit des lois* he wrote: ‘Judges are but the mouthpiece which recites the law – inanimate beings who cannot moderate either its force or its vigour.’³ The principle that only the legislature may make law is a view closely connected to the principle of separation of powers - a principle considered fundamental to the American constitutional structure. Although this view has been fairly pervasive and tenacious it has also been described as removed from the reality of legal decisionmaking - a jurisprudential ‘model of straw’. It is part of the English positivist tradition, which will be discussed below, that judicial legislation is inevitable ‘when the law runs out’.⁴

Are the judges at the *ad hoc* Tribunals empowered to make law? The Report of the Secretary General states that the Tribunals will apply only *lex lata*, existing law.⁵ How will the judges then fill the gaps which many acknowledge exist in the ‘rudimentary’ body of law called international criminal law? Could it be argued that the ‘law’ by which the gaps are filled *exists* albeit not in written form and that it is the task of the judges to find and discover the unwritten law? Judge Cassese has spoken of the judges revealing the ‘hidden rules’ of customary international law.⁶ In his view development of the law would mean to ‘help push’ the law in a new direction and that development of the law is often more a matter of interpretation than lawmaking.⁷ In his view judges must help the law to see the light.⁸

¹ M D A Freeman (ed) *Lloyd’s Introduction to Jurisprudence* 7 ed (2001) 83.

² W Blackstone *The Commentaries on the Laws of England* (1876) 47.

³ Montesquieu wrote: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.’ *The Spirit of the Law* Vol 1 (1949) 152.

⁴ D Kennedy *A Critique of Adjudication* (2001) 81.

⁵ *Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 S/25704* para 34.

⁶ Interview with Judge Cassese, 6 June 2003, Florence.

⁷ *Ibid.*

⁸ *Ibid.*

This chapter will focus on the nature of adjudication, lawmaking, interpretation and gap-filling in the context of international law. The peculiar nature of international criminal law will first be explored. The question of what constitutes a gap in international law and the way international judges have interpreted the concept of 'lawmaking' will be examined. The sources from which judges can legitimately draw to make law will also be explored.

2. The (Rudimentary) Nature of International Criminal Law

As late as 1973, academics were of the opinion that international criminal law 'does not really exist'.⁹ Lack of conformity in the 'regulations' governing the applicability of this field of law and the absence of binding rules were presented as reasons for this state of affairs.¹⁰ Van Bemmelen described writing about international criminal law as a 'rather dismal task'.¹¹ In 1950 Schwarzenberger wrote that 'international law has not yet evolved a branch of criminal law of its own'.¹²

Much more recently, Cassese has written that international criminal law is a relatively new branch of law – a product of the late nineteenth century.¹³ It is also a rudimentary branch of law. He suggests at least three reasons for this: First, treaties, and to some extent customary rules, originally confined themselves to prohibiting acts without laying down the criminal consequences of these acts. Secondly, when international law did start criminalising certain conduct it initially relied on national courts to prosecute and punish such crimes. Thirdly, when the international Tribunals were created the classes of crimes contained in their Statutes constituted a specification of *jurisdictional* authority rather than a general criminal code. The crimes specified were germane to the court's jurisdiction and were not intended to have general applicability.¹⁴

It has often been said that the Nuremberg and Tokyo Tribunals were the major precedents and predecessors of the *ad hoc* Tribunals and presented the first opportunity for international judges to apply international criminal law in the context of the prosecution of war crimes. Schwarzenberger however calls the law applied by the international military tribunals *international law* and not international criminal law. He writes: 'In form, the law applied by the

⁹ J M van Bemmelen 'Reflections and Observations on International Criminal Law' in M C Bassiouni and V P Nanda (eds) *A Treatise on International Criminal Law* Vol I (1973) 93.

¹⁰ *Ibid.*

¹¹ *Ibid.* 77.

¹² Schwarzenberger emphasised not only the underdeveloped state of international criminal law but also of international law. G Schwarzenberger 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 278, 293.

¹³ A Cassese *International Criminal Law* (2003) 16.

¹⁴ *Ibid.* 17.

[Nuremberg] tribunal was international law: international customary law in so far as jurisdiction regarding war crimes in the technical sense was concerned, and newly established treaty law regarding crimes against peace and humanity.¹⁵ It was pointed out in the Nuremberg judgment that the signatories of the Nuremberg Charter only did jointly what each of the countries, if in sole control of Germany, could have done alone.¹⁶ He writes that in their capacity as co-sovereigns of Germany the Powers were not limited to the application of the customary laws of warfare in the exercise of their *condominium* over Germany but were free to agree on applying any additional legal principles.¹⁷

The ICTY and ICTR have often been described as *sui generis*, unique in their method of establishment, legal character and mandate. If one accepts the above view the *ad hoc* Tribunals *would* be the first true fora for the application of international criminal law in the context of the prosecution of war crimes. In light of the uncertain status of international criminal law it can be argued that the ICTY and ICTR have to help build a coherent new legal system. In the absence of clear codes and written rules the Tribunals might have to place strong reliance upon customary rules and unwritten general principles. Perhaps the judges should be understood as builders of a *system* rather than as fulfilling the traditional role of arbiters and interpreters of pre-existing laws and rules.

What makes this task of system building more difficult and interesting is the hybrid nature of international criminal law. It is a field of law which draws upon international human rights law, humanitarian law and national criminal law in a significant way. International criminal law has the unique characteristic that, more than any other branch of international law, it simultaneously derives its origin from, and continuously draws upon, human rights law and national criminal law.¹⁸

Within the corpus of international criminal lawyers one finds supporters of the view that humanitarian law should dominate and those who believe that the *criminal* law nature of the discipline should be emphasised. As a general rule, the humanitarian lawyers are in favour of maximising the protection afforded by

¹⁵ Schwarzenberger (note 12) 290.

¹⁶ 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.' *Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg*, London: HMSO 1946, (Miscellaneous no 12) 38.

¹⁷ In a similar way the unconditional surrender of Japan provided a sufficient legal basis for trying the Japanese war criminals in accordance with legal principles which went beyond the scope of international customary law. Schwarzenberger (note 12) 291.

¹⁸ Cassese (note 13) 18. See also Allison Marston Danner & Jenny S. Martinez 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 80 who write that international criminal law sits at the 'confluence' of various bodies of law.

humanitarian law whereas the criminal lawyers tend to be more cautious in their approach to development. Humanitarian lawyers are more liberal in extending the law, criminal lawyers more conservative. Criminal lawyers emphasise due process, fair trial and the importance of the principle of legality. At the Tribunals a further subdivision can be made. Most Tribunal judges can be divided into international law judges and criminal law oriented judges. Judges Wald, May and MacDonald are examples of criminal law oriented judges whereas Judges Cassese, Abi Saab, Meron and Shahabuddeen¹⁹ are more typical *international* law judges – judges with a strong background and academic interest in international law and its development. An important difference between these two fields of law is that international law, being more concerned with regulating the behaviour and peaceful relations between states, can be described as a more *normative* system of law (a system concerned with how states should behave) than criminal law which can be described as a coercive system, (a system concerned with the prevention of crime) with more severe consequences for individuals.

What are the consequences of the unwritten, rudimentary nature of international criminal law and how does this affect the lawmaking of the judges? International criminal law rules, because of their essentially unwritten nature, are relatively indeterminate, adaptable to new circumstances and possess a certain ‘malleability’ and flexibility. This malleability can also make this field of law easy to manipulate. Because there is less law and less precedent in international criminal law it seems more appropriate, even necessary, to make law. At the same time the need for lawmaking should be reconciled with fair trial guarantees, respect for individual freedom and respect for the principle of legality.

3. The Concept of Lawmaking

The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it would be unseemly to pry.

Hersch Lauterpacht²⁰

What does it mean to say that judges make law? Some believe that a judge makes law every time she interprets and applies a legal provision.²¹ Others reserve the term ‘lawmaking’ for instances where the law is extended to new areas of law or to the filling of legal gaps. For the purpose of this study lawmaking refers not simply to *every* application and interpretation of law. The term lawmaking is understood as applying to instances in which the Tribunals

¹⁹ For the professional background of ICTY judges, see Chapter 4.

²⁰ H Lauterpacht *The Development of International Law by the International Court* (1958) 21.

²¹ M Boot *Genocide, Crimes Against Humanity, War Crimes, Nullum Crimes Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002)18.

filled gaps or extended the law. Not every instance of interpretation will constitute lawmaking. Interpretation will only constitute lawmaking if interpretation serves to fill a gap in the law or to extend the law to new areas. The question of legal gaps will be addressed below.

Judicial lawmaking is often (negatively) described as judicial legislation. It is generally accepted that the process of lawmaking through legislating requires value judgments, which, by nature of their subjectivity, is also political. Because legislating is political it should be done by elected officials operating under a norm of accountability to their constituents. Adjudication, on the other hand, determines the rights of parties to a dispute. It is generally agreed that the rule of law requires that parties have a right to the determination of their rights by a process that is not tainted by subjective political preferences of judges.²² The exercise of force against citizens must be justified in two ways: First, by appeal to a norm produced by the democratic decisionmaking process embodied in legislation and, secondly, by the application of a norm to the facts in a process that is independent of the decisionmaking process that generated it.²³ Judicial legislation is problematic because it violates these requirements.

Many have interpreted the idea of ‘making law’ as ‘developing the law’. Lauterpacht writes that the indirect purpose of the ICJ is to develop international law.²⁴ To him the law applied by judges is not the ‘mechanical product of an effortless interpretation of the clear manifestations of the will of States’.²⁵ He describes the controversy of whether judges make law or merely reveal the law as ‘highly unreal’²⁶ and of insignificant practical importance.²⁷

Judges avoid the use of terms suggesting that they make law and prefer to use terms which indicate that all they are doing is to work out the true meaning of existing legal principles – they are just interpreting or developing the law.²⁸ In commenting on the *Tadic Jurisdictional Decision*²⁹ Cassese said that an effort was made not to create *criminal law*. He also admits that judges are reluctant to admit that they make law even if that is what they are doing.³⁰

²² Kennedy (note 4) 27.

²³ Ibid 27, 28.

²⁴ Lauterpacht (note 20) 66.

²⁵ Ibid 21, 22.

²⁶ Ibid 21.

²⁷ Ibid.

²⁸ According to Lauterpacht the denial of the ICJ judges of any intention to legislate is legitimate and proper. See Lauterpacht (note 21)156, 157. According to Kennedy any individual judge making any particular rule has an interest in presenting the rule choice as not being judicial legislation. See Kennedy (note 4) 29.

²⁹ *Prosecutor v Tadic* IT-94-1-AR72A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadic Jurisdictional Decision*).

³⁰ Interview Judge Casese, 6 June 2003, Florence.

What does ‘developing the law’ mean in the context of international criminal law? It is argued here that developing international criminal law will involve extending the application of concepts to areas where they were previously not applied to and updating international humanitarian law.

Judges themselves often announce that they are not automatons and that the judicial role is influenced by factors extraneous to the law. American judges provide one with particularly colourful pronouncements in this regard. For example, the American Judge McReynolds insists that a judge should not be ‘an amorphous dummy unspotted with human emotions’.³¹ What is the relationship between the claim that the judicial function can be influenced by factors outside the law and the question of whether judges should make law? If judges are influenced by extrajudicial considerations they will not *merely* be applying or stating existing law. Those opposed to judicial lawmaking state that judges *should* merely state or apply the law.

As will become evident in the discussion of the views of international judges such as Judges Lauterpacht and Cassese, it is especially international law judges with backgrounds as international law professors who insist on the desirability of *developing* the law.³² To some making law and developing law is almost indistinguishable. Judge Alvarez remarked that ‘in many cases it is quite impossible to say where the development of law ends and where its creation begins’.³³

Judge Shahabuddeen has given the question of lawmaking by international judges the most extensive academic attention. In addressing the ‘old quarrel’ of whether decisions of the ICJ create law he makes a number of observations relevant to lawmaking at the ad hoc Tribunals.³⁴ He presents the views of several ICJ Judges (such as Judges Krylov ³⁵ and Tanaka ³⁶) on the question whether the court is a lawmaking body. He concludes that the passages in question do not necessarily exclude the view that the court has a limited power

³¹ H Abraham *The Judicial Process* (1998) 352, 353.

³² See Antonio Cassese ‘Black Letter Lawyering v Constructive Interpretation: The *Vasiljević* Case’ (2004) 2 *Journal of International Criminal Justice*, 265 and Lauterpacht (note 20).

³³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Individual Opinion of Judge Alvarez, ICJ Reports 1949, 190.

³⁴ Shahabuddeen *Precedent in the World Court* (1996) 90.

³⁵ In Judge Krylov’s view ‘the Court can only interpret and develop the international law in force; it can only adjudicate in conformity with international law.’ *Reparation for Injuries Suffered* (note 34) Dissenting Opinion of Judge Krylov, 219, quoted in Shahabuddeen *ibid* 84.

³⁶ ‘Undoubtedly, a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities.’ *South West Africa, Second Phase*, Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka *ICJ Reports* 1966, 277, quoted in Shahabuddeen *ibid*.

of creativity.³⁷ Shahabuddeen points out that whereas a legislature can enact legislation where no relevant law existed, the court cannot do this and

...must proceed on the basis that the law which it lays down is somehow implicit in the existing legal system. However when it has done so, it may well appear that, contrary to the asserted mode of operation, new law has in fact been made.³⁸

He summarises the dilemma of judicial lawmaking in international law as a question of whether and at what point a process of development of the law eventuates in the creation of law.³⁹ Shahabuddeen concludes that even though the ICJ, if it ever had to answer the question of whether it makes law would give a negative answer,⁴⁰ it nevertheless has 'a power of limited creativity'.⁴¹ Just as it would be an exaggeration to suggest that the court is a legislator, so it would be an exaggeration to assert that it cannot create any law at all.⁴²

Shahabuddeen believes that the Tribunals can play an important role in the progressive development of international law.⁴³ He believes that *nullum crimen sine lege*, although important, does not have to impede the development of the law. He addresses the influence of the severity of the crimes the accused at the Tribunals are charged with on the interpretation of international criminal law at the Tribunals.⁴⁴ He maintains that the fact that the conduct of the accused 'would shock or even appal decent people is not enough to make it unlawful in the absence of a prohibition'.⁴⁵

According to Shahabuddeen it does not accord with reality to suggest that the ICJ may develop the law only in the limited sense of bringing out the true meaning of existing law in relation to particular facts. The development of the law is not limited (as it is in domestic law) to determining, for example, whether a statutory reference to 'domestic animal' includes a particular animal.⁴⁶ Shahabuddeen believes that another way of asking whether development of law results in the creation of law is to ask whether decisions of a court can serve as sources of law.⁴⁷

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid 91.

⁴⁰ Shahabuddeen writes that the court has been careful never to assert a power to make law. However this does not mean that it has managed to avoid the use of language susceptible to the interpretation that it has such a power. As an example he refers to *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal*, Advisory Opinion of 27 May 1987, *ICJ Reports* 1987, 33 para 27. Ibid.

⁴¹ Ibid.

⁴² Shahabuddeen (note 34) 86.

⁴³ M Shahabuddeen 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *JICJ* 1007

⁴⁴ Ibid.

⁴⁵ Ibid 1010.

⁴⁶ Shahabuddeen (note 34) 68.

⁴⁷ Ibid 69.

But it does not follow from the fact that judicial decisions are not primary sources of international law that judges do not create new law. In spite of the absence of a system of precedent at the Tribunals⁴⁸ ICTY decisions are increasingly cited by domestic and international courts and are expected to form an important source of authority for future ICC decisions.⁴⁹ The *Bouterse* decision of the Court of Appeals of Amsterdam⁵⁰ is an example of a case that was directly inspired by ICTY jurisprudence.⁵¹ In the *Jorgic* case the German Federal High Court of Germany relied on the *Akayesu* case in its interpretation of destructive intent as an element of genocide.⁵²

In the context of the ICJ one encounters conflicting pronouncements by judges on the issue of judicial lawmaking. Judge Read declared that the court 'is not a law-making organ'.⁵³ In the *Barcelona Traction* case, however, Judge Armand-Ugon said: 'The Permanent Court and the International Court, which were created by states, have the capacity to lay down mandatory rules of law in the same way as any national legislature.'⁵⁴ On the other hand, Judge Krylov has stated: 'The court can only interpret and develop the international law in force; it can only adjudicate in conformity with international law.'⁵⁵

In the *South West Africa* case Judge Tanaka stated the position as follows:

Undoubtedly, a court of law declares what is the law, but does not legislate. In reality, however where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law; but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred

⁴⁸ The Appeals Chamber in *Aleksovski* held that the interests of certainty and predictability require the Appeals Chamber to follow its previous decisions. It will however be free to depart from them for cogent reasons in the interests of justice. *Prosecutor v Zlatko Aleksovski* IT-95-14/1-A, 24 March 2000 para 107.

⁴⁹ See, eg *Vučković*, Mitrovicë District Court, CC No 48/01, 25 October 2002 (Federal Republic of Yugoslavia); *Ford v Garcia and Vides-Casanova*, 289 F.3d 1283, US Court of Appeals, Eleventh Circuit, 30 April 2002 (United States); *Niyonteze*, *Tribunal Militaire d' Appel* 1A, 26 May 2000 (Switzerland).

⁵⁰ Hof Amsterdam 20 November 2000, NJ 2001/51 (*Bouterse*).

⁵¹ According to Nollkaemper the decision of the *Bouterse* court could only be based on a liberal reading of customary law on torture as it stood in 1984 that is in line with the flexible approach towards custom taken by the Tribunal. A Nollkaemper 'The legitimacy of International law in the case law of the International Criminal Tribunal for the former Yugoslavia' in T A J A Vandamme & J-H Reestman (eds) *Ambiguity in the Rule of Law, The Interface between National and International Legal Systems* (2001) 13-23.

⁵² *Jorgic* (BVerfG) Decision, 12 December 2000, 2 BvR1290/99, 23.

⁵³ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion of 18 July 1950, Dissenting Opinion of Judge Read, *ICJ Reports* 1950, 244.

⁵⁴ *Barcelona Traction Light and Power Company Limited, Preliminary Objections*, Judgment of 24 July 1964, Dissenting Opinion of Judge Armand-Ugon *ICJ Reports* 1964, 116.

⁵⁵ *Reparation of Injuries Suffered* (note 33) Dissenting Opinion of Judge Krylov, 219.

from the *raison d'être* of a legal system, institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled.⁵⁶

This passage seems to leave open the possibility that the court may have a limited power of creativity. Whereas a legislature can enact legislation where no relevant law existed or deliberately change the accepted law, the court must proceed on the basis that the law it lays down is somehow implicit in the existing legal system.⁵⁷

Lauterpacht acknowledged the lawmaking function of judges. He writes that 'the fact remains that judicial lawmaking is a permanent feature of administration of justice in every society'.⁵⁸ According to Lauterpacht judicial caution or judicial hesitation⁵⁹ has been a characteristic feature of the ICJ. The understanding has been that judges may cautiously shape and alter the law but it is not within their province to make law. Judges have to apply the law in force – it is not their function to change the law deliberately to make it conform to their own views of justice.⁶⁰

According to Lauterpacht one reason for the exercise of restraint is the importance of the subject matter on which courts have to decide.⁶¹ The judges cannot experiment or innovate as easily in matters in which states have an interest as in those involving private individuals.⁶² This reason does not apply directly to the work of the Tribunals. Whereas states have direct and indirect interests in the work of the Tribunals, the Tribunals are primarily concerned with *individual* criminal responsibility which gives rise to its own set of reasons for practising restraint – one such reason being the fact that severe sentences can be imposed. Another reason for restraint is the importance of the principle of legality. Lauterpacht provides a third reason for the advisability of restraint: 'If Governments are not prepared to entrust with legislative functions bodies composed of their authorised representatives, they will not be prepared to allow or tolerate the exercise of such legislative activity by a Tribunal enjoined by its Statute to apply existing law.'⁶³ In the context of the Tribunals it can be asked whether the drafting of the Statute and Rules (which was authorised by governments) does not amount to authorisation of some measure of legislative activity.

The ICJ, in taking a cautious approach, has been confronted with the question of whether it should only act on principle or whether it should also explicitly state the principle in question. Similarly, the ICJ has to decide whether it ought to state not

⁵⁶ *South West Africa, Second Phase* (note 35) 277.

⁵⁷ Shahabuddeen (note 34) 85.

⁵⁸ Lauterpacht (note 20) 155.

⁵⁹ *Ibid* 116.

⁶⁰ *Ibid*.

⁶¹ *Ibid* 75.

⁶² *Ibid* 75, 76.

⁶³ *Ibid* 76.

only the legal rule it applies but whether it should also state the wider principle underlying the rule. If one supports a wide interpretation of the scope of the court's work one will be in favour of the court explicitly stating the principles underlying its decisions. It can be argued that in its capacity as an organ which can be expected to develop international law, in addition to deciding cases, and to secure the requisite degree of certainty in the administration of justice, the court ought to give a wider interpretation of the scope of its task.⁶⁴ The fact that Tribunal decisions are increasingly important for the development of international criminal law *generally* also calls for 'wider interpretation' of the scope of the task of the Tribunals. In the *Celibici* Appeals decision it was agreed that

so far as international law is concerned, the operation of the desiderata of consistency, stability and predictability does not stop at the frontiers of the Tribunal [...] The Appeals Chamber cannot behave as if the law in the international community whose interests it serves is none of its concern.⁶⁵

In spite of the arguments for restraint it is argued that the necessity for bold judicial action is particularly great in the international sphere. An important reason is that this is a system of law in which legislative opportunities for modifying rigid, unjust and obsolete rules are nominal.⁶⁶ According to Lauterpacht the need for judicial lawmaking is intensified by the strong inducement to supplement and remedy the deficiencies and inconsistencies in an imperfect system of law.⁶⁷

Lauterpacht distinguishes between five different ways in which judicial legislation takes place at the ICJ: First, judicial legislation takes place where an appearance of legislative novelty has occasionally been created as the result of the application of a general principle of law. Secondly, judges have made law by relying on principles which might seem novel but have merely drawn consequences from parallel developments in other spheres of international law. Thirdly, in some decisions the court has proceeded on the assumption that there was no generally accepted rule of international law on the subject and has laid down principles governing the matter. Fourthly, it has allowed what it considers to be the flexibility of international law to serve as a basis for decisions of a legislative character. Fifthly, it has made an attempt to regulate the interests involved in the dispute before it by going beyond the interpretation of the existing law.⁶⁸

The *ad hoc* Tribunals have made law in similar ways. They have applied general principles of law and have drawn from parallel developments in other areas, most frequently from developments in international humanitarian law and human rights

⁶⁴ Lauterpacht (note 20) 83.

⁶⁵ *Prosecutor v Delalic, Mucic, Delic and Landzo*, IT-96-21-A, 20 February 2001 ('*Celibici*') quoting Separate Opinion of Judge Shahabuddeen in *Le Procureur v Laurent Semanza*, ICTR-97-20-A, 31 March 2000.

⁶⁶ Lauterpacht (note 20)77.

⁶⁷ *Ibid* 155.

⁶⁸ *Ibid* 157.

law. The Tribunals have often relied on the flexible nature of international criminal law. When there has been no generally accepted rule in international law (such as the definition of rape for example) the Tribunals have gone beyond the interpretation of existing law to create new law. The *Tadic* Appeals Chamber went beyond the interpretation of existing law when it decided to abandon the literal definition of protected persons by focusing more on the factor of allegiance than formal nationality in determining the protective regime.⁶⁹ By finding that the Bosnian Serbs acted as *de facto* agents of another state (the FRY), (which was necessary to qualify the conflict as international), the Appeals Chamber expanded the scope of protection of humanitarian law. In order to try Tadic for grave breaches, such a finding was crucial for both the Trial and Appeals Chambers.

4. Interpretation as Lawmaking

It is widely acknowledged that judges make law through interpretation. In a common law system when judges reformulate rules in the process of applying them to particular cases, the reformulations become part of the body of ‘sources’ of law in later cases.⁷⁰

Adventurous interpretation is often attacked as constituting lawmaking.⁷¹ In his separate opinion in *Tadic* Judge Li described the majority decision as ‘an unwarranted assumption of legislative power.’⁷² But it is clear that the tools of interpretation have helped judges to fill gaps in the Statutes and the law.

Since the *ad hoc* Tribunals were established by the Security Council and are therefore ‘derived’ from the UN Charter⁷³ the provisions of the Vienna Convention on the Law of Treaties on interpretation can be applied. In the *Tadic* decision it was decided that even though the Statute is not a treaty the rules of treaty interpretation contained in the Vienna convention are relevant.⁷⁴ Even though Tribunal judges have not always explicitly mentioned the Vienna Convention they have used the interpretative scheme of the Convention,⁷⁵ including the support it provides for a purposive or contextual approach.⁷⁶ For instance, in order to give effect to the purpose of the ICTY Statute, to prosecute persons for serious violations of international humanitarian law, the *Tadic* Appeals

⁶⁹ See *Prosecutor v Tadic* II-94-1-A, 15 July 1999, paras. 163-169 (*Tadic Appeals Judgment*).

⁷⁰ Kennedy (note 4) 32. According to Kennedy this means that law can be made even in the most routine application of rule to facts. *Ibid* 26.

⁷¹ W Schabas ‘Interpreting the Statutes of the Ad Hoc Tribunals’ in LC Vohrah, F Pocar, Y Featherstone, O Fourmy (eds) *Man’s Inhumanity to Man* (2003) 848.

⁷² *Tadic Jurisdictional Decision* (note 29) Separate Opinion of Judge Li, para. 13

⁷³ Schabas (note 71) 847.

⁷⁴ *Tadic Jurisdictional Decision* (note 29) para. 18

⁷⁵ *Ibid* paras. 71-142.

⁷⁶ *Ibid*.

Chamber decided to classify the conflict as international.⁷⁷ The ICTY's use of the purposive approach is discussed in Chapter 6.

The Tribunals have also relied on the literal approach or the 'ordinary meaning' of words⁷⁸ but have not made law in this way. The purposive approach is of course the approach more suitable to making law. Nollkaemper describes the ICTY's approach to the identification of law as 'quintessentially teleological'.⁷⁹ In the spirit of the purposive approach, the Tribunals have, for example, referred to their purpose in protecting 'human dignity'. In *Furundžija* the Trial Chamber redefined rape and stated that the broader definition helped to promote the 'fundamental principle of protecting human dignity.'⁸⁰ It can be argued that the Tribunals have at times been more concerned with what is *desirable* than with what is required by positive law.

Schabas argues that in criminal cases the rule of strict construction can be a more appropriate method of interpretation than purposive interpretation.⁸¹ Strict construction requires one to interpret a law against the state.⁸² The Tribunals have however made use of strict construction only to a very limited extent. In *Tadić* the Appeals Chamber held that '...in applying these criteria, any doubt should be resolved in favour of the Defence, in accordance with the principle *in dubio pro reo*.'⁸³ The principle of strict construction was discussed in the *Celebici* case.⁸⁴

5. Gap Filling as Lawmaking

The indeterminacy of law is often discussed under the doctrine of 'gaps' or *lacunae* in the law. Cassese describes international criminal law as a body of law which is still rudimentary and 'replete with *lacunae*'.⁸⁵ Schabas writes of the 'laconic Statute' of the ICTY.⁸⁶

⁷⁷ *Prosecutor v Tadić*, IT-94-1-A, 15 July 1999, para. 162.

⁷⁸ The Tribunals applied the 'ordinary meaning' *inter alia* in *Prosecutor v Bagasora et al* ICTR-98-37-A, 8 June 1998, paras. 28-29 and *Prosecutor v Aleksovski* IT-95-14/1, 25 June 1999, para. 35.

⁷⁹ Nollkaemper (note 51) 18.

⁸⁰ *Prosecutor v Furundžija* IT-95-17/1, 10 December 1998, para. 184. See also the ICTY's reliance on the 'elementary considerations of humanity and common sense' in *Tadić* on the question of whether restrictions on certain categories of weapons apply in internal armed conflict. *Prosecutor v Tadić* IT-94-1, 2 October 1995, para. 119.

⁸¹ *Ibid.*

⁸² J C Jeffries 'Legality, Vagueness and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 198

⁸³ *Prosecutor v Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 73. Strict construction was also employed in *Prosecutor v Kayishema and Ruzindana* ICTR-95-1, 21 May 1999 para. 03 and *Prosecutor v Akayesu* ICTR-96-4, 2 September 1998, para. 319.

⁸⁴ *Prosecutor v Delalić et al* IT-96-21, 16 November 1998, paras 408-413.

⁸⁵ A Cassese *International Law* (2001) 158.

⁸⁶ Schabas (note 71) 848.

Judges often have the job of filling gaps and resolving ambiguities or conflicts in the law.⁸⁷ The need for gap filling has perhaps been expressed most eloquently by American Supreme Court judges. Judge Cordozo discussed the need for judicial creativity and the limits on such creativity imposed by the specific and restricted sphere of judicial action. Cordozo asserted, paraphrasing Oliver Wendell Holmes, that the judge's power of innovation is '[i]nsignificant ... when compared with the bulk and pressure of the rules that hedge him on every side'. A judge, Cordozo maintained, 'legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him on a chart...'.⁸⁸ Cordozo believed that a judge must respect 'the bounds set to judicial innovation by precedent and custom'.⁸⁹

The doctrine of 'gaps' is premised on the idea of the law as a complete system. Writers as diverse as Lauterpacht and Kelsen believed in the existence of a closing rule underlying any legal system.⁹⁰ These writers believed that anything that the law does not explicitly prohibit, is *ipso facto* permitted to its subjects.⁹¹ Some, such as Lauterpacht, would then argue that the existence of a closing rule makes international law, as a system, complete. To Lauterpacht the completeness of law has the status of an '*a priori* assumption'.⁹²

What is an example of a substantive gap in the law? Bodansky uses the following example: Two people who do not know the rules of tennis decide to invent their own rules and decide that if a ball hits the court inside the line the ball is 'in' and if it hits outside the line it is 'out'. They begin playing and after a while a ball hits the line. Is the ball 'in' or 'out'? The rules they agreed upon do not cover this case. This is also an example of what Bodansky calls 'an ontological *non liquet*'.⁹³ This illustrates the relation between the doctrine of gaps and the doctrine of *non liquet*. An ontological *non liquet*, according to Bodansky, could result from a substantive gap in the law, such that the law fails to answer a legal question.⁹⁴ The inability of the ICJ in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* to determine whether the use of nuclear weapons in an extreme

⁸⁷ Ibid 28.

⁸⁸B N Cardozo *The Nature of the Judicial Process* (1921) 113, 114. See also AL Kaufman *Cardozo* (2000) 213.

⁸⁹ Ibid.

⁹⁰ I F Dekker and W G Werner 'The Completeness of International Law and Hamlet's Dilemma' in I F Dekker & HG Post (eds) *On the Foundations and Sources of International Law* (2003) 14, 15.

⁹¹ Ibid 15. See H Lauterpacht *The Functions of Law in the International Community* (1933) 392.

⁹² Ibid 64. Lauterpacht also argues that the function of international law and the 'primordial' duty of all law, the preservation of peace, demand that a tribunal should not declare a *non liquet*. Ibid.

⁹³ D Bodansky '*Non Liquet* and the Incompleteness of International Law' in P Sands & L Boisson De Chazournes (eds) *International Law, the International Court of Justice and Nuclear Weapons* (1999) 154. Bodansky distinguishes between an 'ontological' *non liquet* and an 'epistemological' *non liquet*. Unlike an ontological *non liquet*, an epistemological *non liquet* does not presuppose an actual gap in the law. In the case of an epistemological *non liquet* the law might be complete but still lack the answer to a specific question. Ibid 154, 155.

⁹⁴ Ibid.

circumstance of self-defence is lawful or unlawful is one of the most dramatic examples of the finding of a *non liquet* in the international context.⁹⁵

Similar to the doctrine of gaps, the *non liquet* doctrine is also premised on the idea of international law as a complete system. The literal meaning of *non liquet* is 'it is not clear' - the term refers to an insufficiency in the law.⁹⁶ The doctrine of *non liquet* implied that international law as a legal system was incomplete.⁹⁷ According to this doctrine states were only subject to the rule of law in so far as they have consented to a certain rule. This means that not all conflicts between states could be resolved through the law and that international courts could refuse to adjudicate if they found the law to be incomplete.⁹⁸

Dekker and Werner distinguish between three different types of gaps in the law: material gaps, jurisdictional gaps and judicial gaps.⁹⁹ According to these writers the problem of *non liquet* is related to the third kind of gap: judicial gaps. A legal system has judicial gaps if its tribunals 'otherwise endowed with jurisdiction to fill in material gaps by means of interpretation or the creation of new rules and principles' can refuse to decide a legal question on the ground that the law is insufficient, lacking clarity or non-existent.¹⁰⁰ To them the relevant question is whether a competent legal tribunal is in the position to refuse to answer a legal question on the basis of material gaps in the legal system.¹⁰¹ Lauterpacht states that the question of *non liquet* only arises when a court refuses to give a decision after it has already assumed jurisdiction and when the refusal is based 'on the absence or insufficiency of the applicable substantive law'.¹⁰²

Much of the work of Hart has been concerned with the question of what happens when legal rules run out. He believed that judges must use their discretion to make

⁹⁵ Ibid 154.

⁹⁶ Ibid.

⁹⁷ R Lesaffer 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *EJIL* 28.

⁹⁸ Ibid.

⁹⁹ Material gaps exist when legal rules and principles are unclear or insufficient in relation to a concrete case or when the law is silent on a certain matter. One would find a material gap when two legal rules conflict and there is no higher-order rule determining which of the conflicting rules take precedence over the other. According to Dekker and Werner material gaps are inevitable in both national and international law since no system of law can provide rules and principles to provide for all legal eventualities. The second type of gap is a *jurisdictional gap*. Jurisdictional gaps arise when tribunals lack jurisdiction over certain legal questions. The limited jurisdiction of the ICJ due to its principles of sovereignty and consent would be an example of a jurisdictional gap in international law. Legal systems also have *judicial gaps*. Dekker & Werner (note 90) 8, 9. Raz similarly distinguishes between jurisdictional gaps and legal gaps. See J Raz *The Authority of Law* (1979) 70.

¹⁰⁰ Dekker & Werner (note 90) 9.

¹⁰¹ Ibid.

¹⁰² H Lauterpacht 'Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Law' in *Symbolae Verzijl* (1958) 199.

law when legal rules have ‘open texture’.¹⁰³ There are a number of ways in which legal rules may fail to cover factual situations. Hart’s example is the rule: ‘No vehicles in the park’.¹⁰⁴ Does this rule apply to motorcycles or roller skates? Hart argued that with all general rules there will be a core of certainty and a ‘penumbra of doubt’ when the application of the rule would be uncertain.¹⁰⁵ Because of this ‘open texture’ of language it happens that although the vast majority of cases brought before the courts uncontroversially fall within or without of the purview of established law there will remain a number of cases in which judges must go outside authoritative *legal* sources in making their pronouncements. Because of this indeterminacy a judge cannot be criticized on legal grounds for choosing one of the alternatives. In this sense a judge has a discretion.¹⁰⁶

Raz writes that a gap arises in one of two situations: ‘where the law speaks with an uncertain voice’ (indeterminacy or vagueness) or ‘where it speaks with many voices’ (unresolved conflicts).¹⁰⁷ Raz might object to the practice of the Tribunals to resort to general principles to fill gaps in the law on the basis that general principles themselves are often vague. It is however important to keep in mind that Hart and Raz’s theory of gaps belongs to the school of legal positivism and that international lawyers and judges often refer to gaps more freely or loosely and outside of the context of positivism.

Some believe that the prohibition of a *non liquet* says something about the duty of judges. A judge is said to have a duty never to refuse to give a decision ‘on the ground that the law is non-existent, or controversial, or uncertain and lacking in clarity’.¹⁰⁸ In some systems the duty is explicitly stated. The French Civil Code provides that ‘a judge who refuses to decide a case, on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of denial of justice’.¹⁰⁹ In the context of international criminal law allowing judges to only apply the law would make a finding of *non liquet* the rule rather than the exception. The fact that there are areas and questions which are not covered or regulated by international law does not give rise to *non liquet*. What gives rise to *non liquet* is the existence of gaps *within* international law.¹¹⁰ Some believe that international courts are not absolutely prohibited from finding a *non liquet* and that finding a *non liquet* may be a good alternative to accepting the unsatisfactory status quo and undermining the credibility of a court through rampant lawmaking.¹¹¹ In the

¹⁰³ H L A Hart *The Concept of Law* (1961)128.

¹⁰⁴ Ibid 126 -127.

¹⁰⁵ H L A Hart ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 607.

¹⁰⁶For a discussion on the ‘problems of the penumbra’ see *ibid* 607 – 610.

¹⁰⁷ Raz (note 99) 77.

¹⁰⁸ Lauterpacht (note 91) 216.

¹⁰⁹Article 4, French Civil Code (1804). See A M Rabello ‘*Non Liquet*: From Modern to Roman Law’ (1974) 9 *Israel Law Review* 64.

¹¹⁰ Bodansky (note 93) 157.

¹¹¹ *Ibid* 170.

context of the ICTY, Nollkaemper has suggested that, instead of artificially relying on customary international law to fill gaps, the Tribunal could simply recognise that however reprehensible the acts in the former Yugoslavia might have been, the international community has not yet been able to adopt all the necessary rules criminalising such acts.¹¹²

The fact that the ICJ in the *Legality of Nuclear Weapons* opinion eschewed a law-creating role and took a modest view of the function of the ICJ can also be described as an extreme example of judicial restraint.¹¹³ President Bedjaoui stated that the Court should resist ‘any temptation’ to create new law.¹¹⁴ In his Declaration in this case he stated that if there are imperfections in international law (as there appears to be in the area of nuclear weapons), it would be a task of the international community to correct these imperfections.¹¹⁵

Koskenniemi writes that when uncertainty (gaps) arises, there seems to be two ways to ‘salvage’ the idea of completeness: a judge may note that the gap is only ‘spurious’ in which case he may simply note that the law provides no remedy or he may refer to the use of constructive principles which provide a substantive legal decision.¹¹⁶ According to Kennedy, international courts faced with gaps may have recourse to such gap-filling tools as the rules of interpretation, thumb-rules and procedural presumptions.¹¹⁷ Werner and Dekker however write that the problem of *non liquet* is not whether material gaps in the law can be filled or remedied by extensive interpretation of rules or by resorting to general principles of law. The authors quote Higgins who wrote:

To accept the possibility of *non liquet*, one has to accept not only that international law has gaps, but that these gaps are not remediable either by a liberal interpretation of the judicial function or by reference to Article 38 (1)(c) of the Statute of the International Court of Justice or the ‘general principles of law recognised by civilised nations’.¹¹⁸

The ICTY was confronted with a gap in the law in deciding whether Article 3 of the Statute was applicable in both international armed conflicts and internal armed conflicts. Article 3 concerns violations of the laws and customs of war and lacks express reference to the kind of conflict required. The Appeals Chamber in the *Tadic Jurisdictional Decision* made use of purposive interpretation to fill this gap in

¹¹² Nollkaemper (note 51) 13.

¹¹³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Declaration of President Bedjaoui, *ICJ Reports* 1996, 269.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ According to Koskenniemi a gap is ‘spurious’ if it results from an evaluative preference. For a strong preference for the second option see Lauterpacht (note 92) 196 – 221. See also M Koskenniemi *From Apology To Utopia* (1989) 24 fn 78.

¹¹⁷ Kennedy (note 4) 25.

¹¹⁸ R Higgins ‘Policy Considerations and the International Judicial Process’ (1968) 17 *International & Comparative Law Quarterly* 67.

the law.¹¹⁹ This instance of gap-filling is discussed in Chapter 6. It illustrates how applying purposive interpretation can be a gap-filling tool.

According to Dekker and Werner it is beyond doubt that judges can decide any case before them on the basis of rules and principles or on the basis of unarticulated principles or aims and values underlying the legal system. Courts and tribunals will therefore in their view always have the possibility to prevent a *non liquet*. In their opinion the important questions are (a) whether a court should always refrain from pronouncing a *non liquet* and (b) whether the possibility of a *non liquet* would be ruled out by a closing rule.¹²⁰ It is suggested that even though it would be difficult to accept that the existence of a closing rule would rule out a *non liquet*¹²¹ in all circumstances, the practical implications of pronouncing a *non liquet* would probably prevent Tribunal judges from doing so. Pronouncing a *non liquet* will probably lead to the acquittal of an accused. The argument of Nollkaemper, that the Tribunals should sometimes state that there is no law rather than resort to weak reasoning or reach for general principles to ‘find’ or create law,¹²² might have intellectual appeal but it is highly unlikely that the Tribunals would acquit on this basis.

6. Common Law Lawmaking

The common law has often been described as law developed by judges.¹²³ Initially the common law was understood as a preexisting body of rules which judges merely ‘discovered’ rather than created. Some believe that it is only in the twentieth century with the rise of legal realism that there has been an acknowledgement that judges in fact ‘make’ the common law.¹²⁴ But the idea that common law judges make law is not a recent one. In 1882 Sir James Stephen acknowledged that judges have a lawmaking function: ‘[E]very decision on a debated point adds a little to the law by making that point certain for the future.’¹²⁵ According to Rantoul the doctrine of *stare decisis* is an absolute prerequisite of common law lawmaking; without this principle common law courts

¹¹⁹ *Tadic Jurisdictional Decision*, (note 29).

¹²⁰ Dekker & Werner (note 90) 10.

¹²¹ It has been argued that the view that legal systems can be closed by virtue of a residual ‘closing’ rule is unfounded because it ignores the fact some forms of behaviour are unregulated by law (‘non-norm-governed conduct’). See the discussion by Dekker and Werner. Most probably there are areas which international law does not regulate at all. It can therefore not be said that all conduct not prohibited by international law would necessarily be permitted. Ibid 19-23.

¹²² See Nollkaemper (note 51) 22.

¹²³ A Scalia ‘Common-Law courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws’ The Tanner Lecture on Human Values, Princeton University, 8 and 9 March 1995, www.tannerlectures.utah.edu/lectures/scalia published in A Scalia *A Matter of Interpretation: Federal Courts and the Law* (1997).

¹²⁴ O W Holmes *The Common Law* (1881 new ed. 2005) 86.

¹²⁵ *R v Coney* (1882) 8 QBD 534, 550-551.

will not be making any law, they will just be resolving a particular dispute that comes before them.¹²⁶

Abraham describes common law as ‘judge-made, bench-made law’ rather than a fixed body of definite rules such as the modern civil codes.¹²⁷ The common law, in the view of Pound is ‘a mode of judicial and juristic thinking, a mode of treating legal problems.’¹²⁸ Because it is based on precedent, the common law grows and develops by virtue of judicial decisions.

Since common law is predominantly judge-made law, the judge is the creator, interpreter and modifier of the laws.¹²⁹ Abraham believes that even if a judge is just interpreting the law, he may be creating it. The three characteristics of the common law that have enabled it to develop and expand have been first, its vitality and capacity to sustain change, secondly, its practical quality and, thirdly, the rendition of law as a moral obligation to be obeyed.¹³⁰ Holmes emphasised the fact that the common law cannot be understood ‘as a book of mathematics’ – the law is vital and must grow according to what is expedient for the community concerned.¹³¹

But what are the implications of the fact that common law judges help create law for the field of *criminal law*? Judges clearly have to be more careful about making criminal law than civil law. Whereas the field of civil law may be inherently retrospective in operation and character, criminal law (because of the importance of the principle of legality) must be prospective.¹³²

Considerable controversy exists over the question of whether English judges still have power to create new offences. It seems clear that, historically, English judges had this power.¹³³ In *R v Shaw* the House of Lords asserted a right to create new offences as required to enable it to carry out its role as *custos morum*.¹³⁴ This idea has attracted much criticism. The House of Lords hinted in *R v Kneller* that it would not seek to exercise such powers even though it continues to possess such powers.¹³⁵ In this case however the House of Lords gave birth to a new crime of conspiracy to outrage public decency. In 1975 in the *Withers* case the House of Lords conceded that it had given up this power.¹³⁶ The obvious objection to the

¹²⁶ See R Rantoul in K L Hall, W M Wiecek, P Finkleman *American Legal History* (1991) 83.

¹²⁷ Abraham (note 31) 6.

¹²⁸ R Pound *The Spirit of the Common Law* (1921 new ed. 1998)1.

¹²⁹ Abraham (note 31) 9.

¹³⁰ *Ibid* 10.

¹³¹ *Ibid* 11. Holmes (note 124) 1-2.

¹³² A T H Smith ‘Judicial Law Making in the Criminal Law’ (1984) 100 *Law Quarterly Review* 47.

¹³³ *Ibid* 54.

¹³⁴ [1962] AC 220.

¹³⁵ [1973] AC 435.

¹³⁶ [1975] AC 842. See the decision in *R v Lemon* [1979] AC 617 when the House of Lords denied that *mens rea* was an essential element of blasphemous libel was criticised as ‘opening up the spirit of

court's power to create offences was that this power is inevitably retrospective in character. The power to create offences will be discussed in Chapter 5.

Increasingly the Anglo-American system consists of a mixture of common and statutory law. Because of the constraints on judicial activism in the criminal law it can be argued that criminal law is not really illustrative of how common law works.¹³⁷ Criminal law is also becoming more and more codified in common law countries. In certain areas of statutory law little discretion is left to the judge.¹³⁸ With regard to the application of the US Criminal Code, for example, a court only has discretion regarding the laws that prescribes what constitutes a crime but almost no discretion with regard to penalties.¹³⁹

7. Sources of International Criminal Law

(i) Article 38

A distinction should be drawn between law and the sources of law. In the introduction to this study, the term 'law' is defined as a system of rules.¹⁴⁰ Brownlie defines a source of law as '[I]hose legal procedures and methods for the creation of rules of general application which are legally binding on the addressees.'¹⁴¹

If one accepts that international judges make law, what are the sources of international criminal law Tribunal judges can legitimately draw on when making law? The scope of this chapter does not allow for a complete exposition of the traditional sources. Since the ICTY and ICTR Statutes unlike the ICC Statute do not contain a special list of sources, the focus will be on the lawmaking capacity of the sources listed in Article 38 of the ICJ Statute. It will be argued that these sources can be lawmaking tools, that they have potential to develop the law when used creatively.

Article 38 refers to the two most important sources of international law, that of treaties and custom. Article 38 also refers to other sources of international law, namely general principles of law recognised by civilised nations and, as a subsidiary source, judicial decisions and writings of publicists. In Bassiouni's view the writings of publicists cannot be deemed a source of international criminal law since it could violate the principle of legality.¹⁴² Treaties as a source of international law will receive less attention here than custom, general principles or judicial decisions. The existence of a relevant treaty will usually obviate the need

Shaw all over again' and as deliberate judicial extension of the common law, inflated broad common law offences and penalising in generous terms.

¹³⁷ Smith (note 132) 46.

¹³⁸ Abraham (note 31) 14.

¹³⁹ The 1984 Sentencing Reform Act created the US Sentencing Commission and authorised it to promulgate binding 'sentencing guidelines' for all categories of federal crimes. Abraham *ibid* 15.

¹⁴⁰ See WJ Hosten, AB Edwards (eds) *Introduction to South African Law and Legal Theory* (1983) 220.

¹⁴¹ I Brownlie *Principles of Public International Law* (1998) 1. See the discussion in R Kolb "Principles as Sources of International Law" (2006) *Netherlands International Law Review* 2-5.

¹⁴² M C Bassiouni (ed) *International Criminal Law* Vol. 1 (1999) 4

for lawmaking. Since treaties tend to regulate only specific matters of concern to relevant contracting states they are also not ideally suited to be used as lawmaking tools. For purposes of facilitating lawmaking at the Tribunals, custom and general principles are resorted to most frequently.

Cassese writes that resort to these sources should be made in order of hierarchy.¹⁴³ One should first look for a treaty and, failing an applicable treaty, one should look for a customary rule or a general principle of international law. Only if no relevant rule can be found in this way can one apply general principles of law recognised by the domestic legal orders of states.

(ii) Custom

Article 38 (1) (b) lists ‘international custom, as evidence of a general practice accepted as law’ as a source of law. According to Cassese the main feature of custom is that it is not a deliberate lawmaking process.¹⁴⁴ Kelsen described custom as ‘unconscious and unintentional lawmaking’.¹⁴⁵ When states participate in creating norms of custom they do not act for the primary purpose of laying down international rules. Their primary concern is to safeguard some economic, social or political interest.¹⁴⁶ The birth of a new international rule is only the side effect of a state’s conduct in international relations.¹⁴⁷

The two main requirements for the existence of a rule of customary law are state practice (*usus*) and *opinio juris*.¹⁴⁸ Since proof of *opinio juris* is often difficult to obtain *opinio juris* will often be presumed to be present when sufficient evidence of state practice can be found.¹⁴⁹ It seems as if custom in international criminal law and specifically at the Tribunals is determined in a different way from the way custom is traditionally determined in international law. Mettraux remarks that *opinio juris* has played a dominant role in the determination of custom by the Tribunals.¹⁵⁰ He explains that state practice often assists in explaining or justifying the finding by the Tribunals that a norm is a customary norm. The practice however rarely *constitutes* the rule.¹⁵¹ As a result customary rules in international criminal law have emerged even where state practice was rare and far from consistent. Nollkaemper comments on the fact that, in determining custom, the

¹⁴³ Cassese (note 13) 26.

¹⁴⁴ Ibid 119.

¹⁴⁵ H Kelsen *Principles of International Law* (1952) 307-8.

¹⁴⁶ Cassese (note 85) 119.

¹⁴⁷ Ibid.

¹⁴⁸ Dugard defines *opinio juris* as a sense of obligation, a feeling on the part of states that they are bound by a certain rule. J Dugard *International Law: A South African Perspective* (2005) 33.

¹⁴⁹ Ibid 34. Dugard however points out that certain ICJ judgments such as the *Nicaragua Case* (ICJ Reports 1986, 14 at 108-109) and the *North Sea Continental Shelf Cases* (ICJ Reports 1969, 176) do not support this presumption.

¹⁵⁰ G Mettraux *International Crimes and the Ad Hoc Tribunals* (2005) 13.

¹⁵¹ Ibid.

Tribunals have often been satisfied with ‘extremely limited case law’.¹⁵² Although the accepted rule is that the existence of a customary norm is established ‘by induction based on an analysis of a sufficiently extensive and convincing state practice, and not by deduction based on preconceived ideas’ as to what the law should be in international criminal law the Tribunals have frequently ‘turned the customary process on its head’¹⁵³ stating the rule first and then explaining subsequent state practice in light of the rule.¹⁵⁴ Mettraux writes the following:

The statement that a norm is customary is therefore only ever as good as the explanation referred to by the court in support of its finding to that effect. Regrettably, many a Chamber of the *ad hoc* Tribunals has been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion.¹⁵⁵

The Martens Clause has similarly had an important influence on the unconventional determination of custom at the Tribunals. Cassese claims that because of the influence of the Martens clause,¹⁵⁶ *usus* and *opinio juris*, as elements of customary law, play a different role in humanitarian law than in international law generally.¹⁵⁷ The clause, which has been taken up in the 1949 Geneva Conventions and the First Additional Protocol, puts the ‘laws of humanity’ and the ‘dictates of the public conscience’ on the same footing as the ‘usages of States’ (ie state practice) as historical sources of international law.¹⁵⁸ Cassese states that as a consequence, it is logically admissible to infer that the requirement of state practice may not be strictly required for the formation of a principle or rule based on the laws of humanity. The Martens Clause loosens the requirement of *usus* while at the same time elevating *opinio juris* to a rank higher than normally admitted.¹⁵⁹ The ICTY relied on the Martens clause quite extensively in the

¹⁵² Nollkaemper (note 51) 17.

¹⁵³ Mettraux (note 150) 13.

¹⁵⁴ Examples include the *Tadic* Appeals Judgment regarding the scope of the ‘protected person’ status under the grave breaches regime. See *Tadic Appeals Judgment* (note 69). Another example is the *Furundžija* Trial Chamber Judgment regarding the extension of the definition of torture under customary international law. See *Furundžija* (note 81) paras. 162, 253.

¹⁵⁵ Mettraux (note 150) 15. In Mettraux’s view this has also been the case in the *Congo v Belgium* case. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*, 14 February 2002, ICJ Reports 2002.

¹⁵⁶ The Martens Clause which was adopted at the Hague Peace Conference reads as follows: ‘Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule (*sous la sauvegarde et sous l’empire*) of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.’ The Martens Clause was first inserted in the preamble of the 1899 Hague Convention II. The English translation of the Clause was reported in JB Scott (ed) *The Hague Conventions and Declarations of 1899 and 1907* (1915) 101-2.

¹⁵⁷ Cassese (note 13) 126.

¹⁵⁸ *Ibid* 122.

¹⁵⁹ *Ibid*.

Kupreskic case.¹⁶⁰ The ICTY's use of the Martens Clause in *Kupreskic* is described in Chapter 6.

Judges look to customary law to determine the elements of the offences contained in the Statutes. After identifying these elements the judges will incorporate them in their judgments. This process of culling the elements of the offences from customary law is necessary to decide cases. Mundis writes that the judges are exercising a quasi-legislative function in so far as substantive crimes are defined or created in much the same way as legislatures do in a domestic context.¹⁶¹ According to Mundis this means that judges go beyond simply interpreting the statute. Judges fill lacunae with respect to substantive crimes and evidentiary rules.¹⁶² Mundis is of the opinion that this quasi-legislative function resembles the quasi-legislative function exercised by the judges when making the rules.¹⁶³

The Tribunals often conclude that a rule of customary law exists or has come into existence after examining various national cases.¹⁶⁴ Decisions of municipal courts within any particular state, when sufficiently uniform and authoritative, may be regarded as expressing the *opinio juris* or state practice within that state. When a point of international law is covered by a series of authoritative decisions of municipal courts of various states such decisions can be regarded as evidence of international custom.¹⁶⁵ The Permanent Court of International Justice (PCIJ) considered national judicial acts as 'facts that express the will and constitute the activities of States.'¹⁶⁶ Nollkaemper writes that large parts of customary law have been developed in accordance with the practice of national courts.¹⁶⁷

The Appeals Chamber in *Erdemović* extensively discussed to what extent national case law provided support for a rule on customary law regarding the availability or

¹⁶⁰ *Prosecutor v Kupreskic* IT-95-16-T, 14 January 2000, para 525.

¹⁶¹ D Mundis 'The Legal Character and Status of the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunals' (2001) 4 *International Criminal Law Review* 4.

¹⁶² *Ibid.*

¹⁶³ *Ibid.* See Chapter 7.

¹⁶⁴ In the *Tadic* Appeals Chamber decision the Appeals Chamber, after considering various national cases, established that the doctrine of acting with a common purpose covered the case where one of the perpetrators committed an act, while outside the common design was nevertheless a foreseeable consequence of pursuing that common design. The court stated: 'the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down in the [ICTY] Statute and general international criminal law and in national legislation, warrant the conclusion that the case law reflects customary rules of international criminal law.' *Tadic Appeals Judgment* (note 69) para 226.

¹⁶⁵ H Lauterpacht (note 20) 20, 21.

¹⁶⁶ *German Interests in Polish Upper Silesia*, PCIJ Rep., Series A, No 7 (1926), 19.

¹⁶⁷ Nollkaemper mentions in particular the fields of jurisdiction and immunities. A Nollkaemper 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' G Boas, W Schabas (eds) *International Criminal Law Developments in the Case Law of the ICTY* (2003) 282.

non-availability of duress as a defence to a charge of murder.¹⁶⁸ The Appeals Chamber concluded that insufficient evidence existed for the existence of such a rule. *Erdemović* is discussed extensively in Chapter 6.

Although the Tribunals have relied heavily on representative municipal case law in determining custom, they have not regarded the lack of such case law as an insurmountable obstacle in determining custom. In *Tadić* the Appeals Chamber showed its resourcefulness in determining custom by making reference to Nigerian prosecutions and also referred to ‘many elements of international practice [which] show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts’, including national military manuals and national legislation.¹⁶⁹

(iii) General Principles

Where there is no treaty provision on a particular subject or customary international law, general principles of international criminal law may be resorted to and failing such principles, general principles of international law.¹⁷⁰ Failing any of these, it is necessary to look for ‘principles of criminal law common to the major legal systems of the world’ that may be derived, ‘with all due caution’, from national laws.¹⁷¹ General principles recognised by domestic legal orders form only a subsidiary source of international law.

The *ad hoc* Tribunals have frequently resorted to general principles of law as a lawmaking tool. Cassese describes general principles as ‘sweeping and rather loose standards of conduct that can be deduced from the various rules by extracting and generalising some of their most significant points’.¹⁷² He has also described it as ‘the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the [international] community’.¹⁷³ Cassese addresses the following general principles of international criminal law: the principle of individual criminal responsibility,¹⁷⁴ the principle of legality of crimes¹⁷⁵ and the principle of legality of penalties.¹⁷⁶ According to Kolb each one of the general principles is in itself a source of law. He calls them ‘norm sources’ which are not concerned with the fixed meaning of rules to be applied but with

¹⁶⁸ *Prosecutor v Erdemović* IT-96-22-A, 7 October 1997, para 55. See Chapter 6.

¹⁶⁹ *Tadić Appeals Judgment* (note 69) para 131-132.

¹⁷⁰ General principles of international law include principles of criminal law such as the principle of legality. Cassese (note 13) 31. For a discussion of this source of international law see M C Bassiouni *Crimes Against Humanity in International Criminal Law* (2nd ed) (1999) 284 – 290.

¹⁷¹ *Furundžija* (note 80) para 177.

¹⁷² Cassese (note 85) 151.

¹⁷³ *Ibid.*

¹⁷⁴ Cassese (note 13) 136.

¹⁷⁵ *Ibid.* 145.

¹⁷⁶ *Ibid.* 157.

the adaptation of the rules to certain constitutional necessities and to new developments and needs.¹⁷⁷

The role of general principles is to provide guidelines for the proper interpretation of the law when specific rules prove insufficient. According to Starke general principles were inserted into the ICJ Statute in order to provide an additional basis for a decision if there were no other materials to rely on.¹⁷⁸ Lauterpacht states that ‘Article 38 (1), providing that the ICJ is bound to apply the general principles of law recognised by civilised nations’, was drafted in order to prevent the possibility of a *non liquet*.¹⁷⁹ Lauterpacht even holds that Article 38(1) directly prohibits the finding of a *non liquet*.

Since the very purpose of general principles could be said to facilitate lawmaking, general principles lend themselves to lawmaking *par excellence*. General principles enable courts to fill the gaps of written or unwritten norms.¹⁸⁰ It is precisely the ‘looseness’ of these principles which makes them good lawmaking tools.

International courts and tribunals play an increasingly important role in formulating principles: they identify and set out principles ‘hidden’ in the interstices of the normative network. Cassese writes that it cannot be denied that courts which act in this manner are fulfilling a function very close to the creation of law.¹⁸¹ Apart from the gap-filling role of general principles, the purpose of resorting to such principles has also been to avoid a finding of *non liquet*.¹⁸²

The following examples illustrate the use of general principles. The ICTY has referred to ‘general principles of law’ in order to establish jurisdiction and confer individual criminal responsibility. In *Prosecutor v Delalic* the Appeals Chamber enunciated: ‘it is universally acknowledged that the acts enumerated in common Article 3 [of the Geneva Conventions] are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15 (2) of the ICCPR ‘criminal according to the general principles of law recognised by civilised nations’.¹⁸³

In *Furundzija* the ICTY Trial Chamber held that the definition of rape as a crime against humanity resulted from the convergence of the principles of the major systems of the world.¹⁸⁴ The Trial Chamber stated that these principles may be

¹⁷⁷R Kolb ‘Principles as Sources of International Law’ (2006) *Netherlands International Law Review* 9.

¹⁷⁸J G Starke *Introduction to International Law* (1989) 32.

¹⁷⁹Lauterpacht (note 92) 205–6. See also the Dissenting Opinion of Judge Schwebel in *Legality of the Threat or Use of Nuclear Weapons* (note 102) 840.

¹⁸⁰Cassese (note 13) 135.

¹⁸¹Cassese (note 85) 152.

¹⁸²*Ibid.*

¹⁸³*Prosecutor v Delalic* IT-96-21-A, 20 February 2001, para 173.

¹⁸⁴*Furundzija* (note 80) para 174–181.

derived ‘with all due caution’ from national law.¹⁸⁵ The idea that concepts from national law will only be applied with due caution in the international legal order was also recognized by the ICJ in the *International Status of South West Africa* case.¹⁸⁶

A good example of a case in which the Tribunal decided not to rely on national concepts is *Kupreskic*.¹⁸⁷ In *Kupreskic* the Appeals Chamber relied on general principles to determine the standard of review of the factual findings of the Trial Chamber. The Appeals Chamber however decided against relying on national concepts in determining under what tests additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice.¹⁸⁸

The Appeals Chamber in *Kupreskic* extensively discussed national case law as evidence of general principles. After declaring the standard it applied with respect to the reconsideration of factual findings by the Trial Chamber, the Appeals Chamber examined the degree of caution required to be observed by a court before convicting an accused person based upon eyewitness identification made under difficult circumstances.¹⁸⁹ The Appeals Chamber analysed domestic criminal systems under the heading ‘General Principles’ and cited cases from common law countries (the United Kingdom, Canada, Australia, Malaysia and the United States). Citing cases from Germany, Austria and Sweden, the Appeals Chamber concluded that most civil law jurisdictions allow judges considerable scope in assessing the evidence before them, but that in a number of cases courts have emphasised that that trial judges must exercise great caution in evaluating eyewitness identification, particularly when the identification of the accused rests on the credibility of a single witness.¹⁹⁰

It is important that the ICTY has stated that the threshold for identification of general principles is high. It must be shown that the principle is part of most, if not all, national legal systems. The Appeals Chamber in *Tadic* noted:

...[i]n the area [of common purpose] national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world; for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose.¹⁹¹

¹⁸⁵ Ibid.

¹⁸⁶ See the Separate Opinion of Judge McNair in *International Status of South West Africa Case*, Advisory Opinion of 3 March 1950, *ICJ Reports* 1950, 148-149.

¹⁸⁷ *Prosecutor v Kupreskic* IT-95-16-A, 23 October 2001.

¹⁸⁸ Ibid para 75.

¹⁸⁹ Ibid para 34.

¹⁹⁰ Ibid para 38.

¹⁹¹ *Prosecutor v Tadic* IT-94-1-A, 15 July 1999, para 225.

In *Blaskic* the Trial Chamber held that the proportionality of the penalty to the gravity of the crime is a general principle of criminal law common to the major legal systems of the world.¹⁹² In *Erdemović* the Trial Chamber held that ‘there is a general principle of law common to all nations...whereby the most severe penalties may be imposed for crimes against humanity’.¹⁹³

(iv) Judicial Decisions

According to Article 38(1)(d) of the ICJ Statute, the court ‘shall apply...judicial decisions...as subsidiary means for the determination of the rules of law.’ The status of judicial decisions in the hierarchy of sources has been hotly debated. But according to Oppenheim judicial decisions have become ‘a most important factor’ in the development of international law.¹⁹⁴ Because of the rudimentary nature of international criminal law many decisions of the most authoritative courts (such as the ICJ) will have an important influence in establishing the existence of customary rules.¹⁹⁵

It is clear that judicial decisions are only a secondary and indirect source of international law. Oppenheim writes: ‘Since judges do not in principle make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source.’¹⁹⁶ Another important reason why judicial decisions only have a secondary role is because of the absence of the common law doctrine of *stare decisis* in international adjudication.¹⁹⁷ The ICJ, a court that, like the *ad hoc* Tribunals, is not bound by precedent, has in the interest of consistency increasingly referred to its own previous decisions.

The ICTY has resorted to judicial decisions as a source of law on many occasions. An important example is the *Tadić* Trial Chamber’s reliance on the *Nicaragua* case in deciding on the criminality of violations of international laws of war in the context of internal armed conflict.¹⁹⁸ The Trial Chamber in *Kvočka*,¹⁹⁹ in deciding how to distinguish co-perpetrators from aiders and abettors in the case of the participation of a number of persons in a joint criminal enterprise, relied exclusively on case law. The court looked at various decisions of the British²⁰⁰

¹⁹² *Prosecutor v Blaskic* IT-95-14-T, 30 March 2000, para 796.

¹⁹³ *Prosecutor v Erdemovic* Sentencing Judgment, IT-96-22-T, 29 November 1996, para 31.

¹⁹⁴ R Jennings & A Watts (eds) *Oppenheim’s International Law* 9 ed (1992) Vol I, 41, para 13.

¹⁹⁵ Cassese (note 13) 159.

¹⁹⁶ *Ibid.*

¹⁹⁷ See *Aleksowski* (note 48).

¹⁹⁸ *Prosecutor v Tadic* IT-94-1-T, Opinion and Judgment, 7 May 1997, para 585 citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Merits, ICJ Reports 1986, 14.

¹⁹⁹ *Prosecutor v Kvočka et al.* IT-98-30/1, 19 December 2003.

²⁰⁰ *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, Germany, 1-8 March, 1946, UNWCC, Vol I, 93-103 (‘Zyklon B’). *Trial of Max Wielen and 17 others*, British Military Court, Hamburg, Germany, 1 July-3 September 1947, UNWCC, Vol XI, 31-53, (‘Stalag Luft III’). *Trial of*

and US Military Courts²⁰¹ including the *Dachau*²⁰² and *Belsen*²⁰³ Concentration Camp cases. The importance of decisions of national courts was also emphasised in *Kupreskic*. In this case the judges virtually equated national judgments given pursuant to treaties to judgments of international courts and tribunals.²⁰⁴

Shahabuddeen claims that in the context of the ICJ, judicial decisions can generate new law but that they can do so only through the process through which international customary law is developed.²⁰⁵ In his view a decision may recognise the existence of a new customary law and may in that limited sense be regarded as the final stage of development of the new law but the decision in itself does not create the law.²⁰⁶ He argues that unless and until a new rule becomes a part of customary international law, it is not law.²⁰⁷ This view seems to be consistent with Secretary General's statement in his *Report* that the Tribunal should apply rules of the international humanitarian law which are *beyond any doubt* part of customary law.²⁰⁸

The ICTY has held that in order to avoid violating the principle of *nullum crimen sine lege*, it should either apply rules of customary law or rules from treaties binding

Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals, Almelo, Holland, 24-26 November 1945, UNWCC, Vol I, 35, 43 (*'Almelo'*), *Trial of Rear-Admiral Nisuke Masuda and Four Others* of the Imperial Japanese Navy, US Military Commission, United States Naval Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945, UNWCC, Vol. I, 71 *et seq.* (*'Jaluit Atoll case'*). *Trial of Heinrich Gerike and Seven Others*, British Military Court, Brunswick, 20 March-3 April 1946, UNWCC, Vol. VII, 76-81 (*'Velpke Children's Home'*), *Trial of Josef Alkstoetter et al* Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 17 February-4 December 1947, UNWCC, Vol III, 1-110.

²⁰¹ *Trial of Alfons Klein and Six Others* US Military Commission Appointed by the Commanding General Western Military District, USFFT, Weisbaden, Germany, 8-15 October 1945, UNWCC, Vol. I, 46-54 (*'Hadamer Trial'*). The *Kvočka* court also considered the South African case of *S v Safatsa and Others*, 1988 (1) SA 868 (A), 901 and the US case of *US v Long*, 190 F.3d 471, 475 (6th Cir. 1999).

²⁰² *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15 November -13 December 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947, UNWCC Vol XI, 5, (*'Dachau Concentration Camp'*).

²⁰³ *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17 September -17 November 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947, UNWCC Vol II, 1, (*'Belsen'*).

²⁰⁴ The court stated: 'In many instances no less value [than decisions of international courts] may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Geneva Convention, or the 1949 Geneva Convention or the 1977 Additional Protocols or similar international treaties.' *Kupreskic* (note 160) para 541.

²⁰⁵ Shahabuddeen (note 34) 69.

²⁰⁶ *Ibid* 72.

²⁰⁷ *Ibid* 73.

²⁰⁸ *Secretary General's Report* (note 5).

on the parties.²⁰⁹ The role of national case law in determining custom was discussed above. The Tribunal may also consider national case law when engaging in treaty interpretation.

In the *Jelisić* case, in which the ICTY interpreted the Genocide Convention, the Tribunal stated that the Convention's terms should be interpreted according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties.²¹⁰ The Tribunal also stated that when interpreting treaties it could take account of subsequent practice grounded upon the Convention. The Tribunal mentioned the *Akayesu* and *Kayishema* judgments as 'the only international case law on the issue'.²¹¹ The Tribunal then stated that the practice of states 'notably through their national courts' have also been taken into account.²¹² In *Krstić* the ICTY similarly interpreted the Genocide Convention pursuant to Articles 31 and 32 of the Vienna Convention. But the Trial Chamber in *Krstić* 'also looked for national guidance in the legislation and practice of states, especially their judicial and interpretations and decisions'.²¹³

In *Krstić* the judges came to the conclusion that widespread national judicial practice on the application of the Genocide Convention could not be found. The Trial Chamber in *Krstić* cited six national cases: three decisions of a German court, two of the Polish Supreme Court and one of the United States Military Tribunal at Nuremberg.²¹⁴ Six cases did not constitute enough practice to determine the interpretation of a treaty. Nollkaemper concludes that the Tribunal in *Krstić* recognised that judicial decisions should be used to supplement other sources or tools of interpretation such as the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work, and reports of the International Law Commission, General Assembly resolutions and international legal practice.²¹⁵

8. Procedural Lawmaking versus Substantive Lawmaking

A distinction should be made between the making of substantive and procedural law. Whereas procedural lawmaking involves the drafting of new procedural rules

²⁰⁹ *Tadić Jurisdictional Decision* (note 29) para 143.

²¹⁰ *Prosecutor v Jelisić* IT-95-10-T, 14 December 1999, para 61.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Prosecutor v Krstić* IT-98-33-T, 2 August 2001, para 541. Nollkaemper describes the analysis of the ICTY in both *Jelisić* and *Krstić* as 'awkward' because in both cases the Tribunal indicated that it used the Genocide Convention as customary law rather than as treaty law. It was therefore not clear why it had to resort to Articles 31 and 32 of the Vienna Convention. In his view however the cases remain relevant since given the fact that the Trial Chamber assumed it had to apply the Vienna Convention, it considered national case law to be relevant in the interpretation of treaties. See Nollkaemper (note 51) 280.

²¹⁴ *Krstić* *ibid* para 541.

²¹⁵ Nollkaemper (note 167) *ibid.*

and the amendment of these rules, substantive lawmaking includes deciding on and codifying the elements of a crime, the defining of crimes and creating new crimes, offences and defences. Substantive law has been defined as the law that provides for rights and duties whereas procedural (or adjectival) law has been defined as providing the procedural mechanisms by which those rights and duties are enforced.²¹⁶ But procedural law could also provide for rights and duties as illustrated by procedural rights such as the right to a fair trial and the right not to be detained unlawfully. The distinction between substance and procedure is therefore not always clear.

The rudimentary nature of international criminal law has been discussed above. As in the case of substantive international criminal law, the procedural side of international criminal law is underdeveloped. The Rules of Nuremberg and Tokyo Tribunals, the only relevant predecessors, were few in number and provided very little guidance. To be effective, the *ad hoc* Tribunals have had to draft new sets of procedural and evidentiary rules. The fact that the judges of the Tribunal have the quasi-legislative task of both drafting and amending the rules has, however, been criticised. The rulemaking activity of Tribunal judges is discussed in Chapter 7.

The ICTY and ICTR judges have introduced innovations to many of the Rules of Procedure and Evidence (RPE), trying to fill in gaps and eliminate shortcomings in the Statute.²¹⁷ The distinction between procedure and substance is often tenuous and should not be overemphasised. Whereas substantive lawmaking by the judges would perhaps seem more problematic than procedural lawmaking (it is after all quite common for courts in common law jurisdictions to make their own rules and regulate their own procedure)²¹⁸ frequent changes made to the RPE will threaten legal certainty and consistency. Amendments to the Rules could infringe on the *nullum crimen* principle in just as serious a manner as in the case of substantive lawmaking.

9. Conclusion

Almost everyone will agree that lawmaking, when understood as *development* of international law, is a good thing. If, however, lawmaking takes the form of judicial legislation it seems less desirable. It is not clear from judicial pronouncements and academic writing on the topic just where development ends and legislating begins. One's view of the acceptability of lawmaking will also depend on whether one considers oneself a humanitarian lawyer, criminal lawyer or international lawyer. Even more fundamentally, one's view of the acceptability of lawmaking will depend on one's jurisprudential allegiance. Only formalists, adherents to a classical version of natural law and an extreme positivist view of

²¹⁶ E van der Berg 'The Law of Evidence and Substantive Law' in P J Schwikkard, A Skeen, SE van der Merwe (eds) *Principles of Evidence* (1997) 32.

²¹⁷ P Tavernier 'The Experience of the International Criminal Tribunal for the former Yugoslavia and for Rwanda' (1997) 321 *ICRC Review* 611.

²¹⁸ See the section on rulemaking in common law jurisdiction in Chapter 7.

law, would say that judges never make law but merely declare pre-existing law. In the international context a more productive question would be: How much discretion should an international judge have?

There seems to be general agreement that the largely unwritten, rudimentary nature of international criminal law allows for a certain amount of lawmaking. The development of international criminal law since the Second World War can be described as '*ad hoc*, piecemeal and somewhat chaotic'.²¹⁹ It can be considered to be the task of Tribunal judges to transform the ICTY Statute from an 'incomplete shopping list' of crimes into a coherent and progressive codification.²²⁰ To do so the judges need a measure of freedom to make law.

There seems to be general agreement that the largely unwritten, rudimentary nature of international criminal law allows for a certain amount of lawmaking. The judges of the *ad hoc* Tribunals can be seen as builders of a system. The sets of written rules (such as the ICTY and ICTR Statutes and Rules) that have been introduced have not been sufficient for building such a new system. This is evident from the 'Tribunals' heavy reliance upon customary law and general principles as tools of lawmaking. Since international law is a field of law in which legislative opportunities for modifying law is limited it is accepted that judges will play a bigger role in developing international law than would be the case with municipal law. In addition, Cassese and Lauterpacht have pointed out that international law is an imperfect or rudimentary system of law.²²¹ The statement by Lauterpacht that it is the indirect purpose of the ICJ to develop international law indicates that international judges themselves understand lawmaking to be part of their duty. Tribunal judges such as Shahabuddeen and Cassese have long acknowledged the need for judicial activism. Because the precedents created by the ICTY and ICTR have wider application and significance than the territories they were created for, the judges should be guided by a responsible interpretation of the sources and respect for the principle of legality.

²¹⁹Schabas (note 71) 848.

²²⁰ Ibid.

²²¹ See Lauterpacht (note 20) 221; Cassese (note 13) 17.

CHAPTER 3

JUDICIAL INDEPENDENCE AT THE TRIBUNALS

1. Introduction

This chapter will examine the question of judicial independence in the international context. The work of the Tribunals can only be legitimate if the judges are independent. Many believe that independence enhances the effectiveness of international tribunals and spreads the rule of law.¹ Franck claims that adjudication by authentic international courts contributes to the legitimacy of international law and that an international court will not be authentic without independent judges.² Cockayne writes that ‘judicial independence and propriety are at the heart of the liberal democratic project that underpins contemporary institution-building in international criminal justice’.³

In the *Tadic Jurisdictional Decision* the Trial Chamber stated that the question of whether a court is independent and impartial depends ‘not on the body that creates it but upon its constitution, its judges and the way in which they function’.⁴ Although it is argued in this thesis that the independence of the *ad hoc* Tribunals is affected by the fact that they are created by Security Council Resolution, the independence of the Tribunals is measured and viewed, especially in the public eye, according to the behaviour of the judges. The judges’ behaviour must be scrutinised because they are the lawmakers. Questions of independence, accountability and legitimacy run through this thesis. Lawmaking by the judges can only be legitimate if the judges themselves have been legitimately appointed and adhere to standards of accountability and legitimacy. Although the fact that a judge is deemed impartial and independent does not in itself constitute an argument in favour of lawmaking, the fact or perception of judicial bias will cast greater doubt on the lawmaking activities of the judges.

¹ Supporters of this view include Laurence R. Helfer & Anne-Marie Slaughter ‘Toward a Theory of Effective Supranational Adjudication’ (1999) 107 *Yale Law Journal* 273 and Benedict Kingsbury *Neo-Madisonian Global Constitutionalism: Thomas M Franck’s Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-First Century* 35 N.Y.U.J INT’L & POL 291, 296 (2003). Posner and Yoo acknowledge that the most successful supranational court is the ECJ, a relatively independent court. See E A Posner & J C Yoo ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 13. But Posner and Yoo argue that when it comes to international cooperation independence *reduces* efficiency. They argue that independent tribunals (where judges are appointed in advance of hearing particular disputes and serve fixed terms) can pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. *Ibid* 1.

² T M Franck *The Power of Legitimacy Among Nations* (1990) 29-33.

³ J Cockayne ‘Decision on the Recusal of Judges Robertson and Winter’ (2004) 2 *JICJ* 1161.

⁴ *Prosecutor v Tadic*, Decision on the Defence Motion on Jurisdiction, IT-94-1-T, para 32.

The standards of appointment of a judge reflect the qualities a judge should possess as well as the established standards of behaviour expected of him or her.⁵ The processes by which Tribunal judges are elected will therefore be examined. Comparisons will be made to the ICJ and ICC process.

Finally, the merit and demerit of the claims that Judge Mumba, Judge Odio Benito and the 'NATO Judges' have, for different reasons, not been impartial or seen to be impartial, will be examined.

2. On Judicial Independence

The right to a fair trial is a general principle of law.⁶ A right to a fair trial requires that judges are free from bias or prejudice so that they can act impartially. Judges must also be institutionally and personally independent of political or administrative control.⁷ The right to an impartial and independent tribunal is recognised in various international instruments.⁸

According to the International Bar Association Standards for Judicial Independence there are two fundamental aspects to judicial independence: the independence of the individual judge and the independence of the judiciary as a body.⁹ Shetreet writes that in considering the independence of individual judges a distinction is made between substantive independence and personal independence.¹⁰ Substantive independence means that judges should not be subject to any authority but the law in making judicial decisions. Personal independence means that their terms of office and tenure should be adequately secured.¹¹ These concepts of substantive and personal independence are universally recognised.¹²

To be independent a judge must be impartial and unbiased. The rule against bias, a rule of natural justice, is captured in the phrase *nemo iudex in re sua* and entails that a person cannot be a judge in his own case. The purpose of this rule is to preclude either the appearance or the possibility of judicial bias.¹³ The rule applies not only to cases in which a judge is a party to the proceedings, but also to those in which a judge has a personal or pecuniary interest in the outcome. In England this is

⁵ S Shetreet *Judges on Trial* (1976) 61.

⁶ M C Bassiouni *Introduction to International Criminal Law* (2003) 604.

⁷ *Ibid* 207.

⁸ ICC Statute part IV, articles 40, 41; ICCPR part III art 14 (1) stating that the tribunal 'must be established by law', Universal Declaration of Human Rights art 10 at 73; African Charter of Human and People's Rights part 1, ch 1, art 7 (1) (d); American Convention on Human Rights part 1 ch II arts 4 (1); 7 (1); 7(2) .

⁹ S Shetreet & J Dechenes (eds) *Judicial Independence: The Contemporary Debate* (1985) 398.

¹⁰ *Ibid* 598.

¹¹ *Ibid*.

¹² *Ibid* 599.

¹³ T Jones 'Judicial Bias and disqualification in the Pinochet case' (1999) *Public Law* 394.

sufficient to cause automatic disqualification without any further investigation of the likelihood or otherwise of actual bias.¹⁴ In the *Pinochet* case Lord Hope pointed out that ‘judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as a defendant or as a prosecutor’.¹⁵ A second meaning attributed to the *nemo iudex* principle, arises where a judge, although he may not have an interest in a case, acts in a way that raises a suspicion that he might not be impartial.¹⁶

Shetreet writes that the concept of judicial independence must recognise the realities as well as the perceptions.¹⁷ In the important Canadian case of *R v Valente* it was stated that ‘it is most important that the judiciary be independent and be so perceived by the public.’¹⁸ Public perception matters since perceptions of judicial bias threaten public confidence in the courts.

In *Incal v Turkey*, the European Court of Human Rights identified a core of criteria to be used in assessing the independence and impartiality of judges within the meaning of Article 6 (1) of the ECHR ‘the right to be heard before an independent and impartial tribunal’.¹⁹ The *Incal* criteria include: the manner of appointment of judges; their terms of office; the existence of safeguards against outside pressure; and whether they reflect an appearance of independence.²⁰

Much has been written on the subject of judicial independence in domestic settings. Some measure the strength of the rule of law by the degree of respect shown for judicial independence. Judicial independence has also been described as an integral part of the separation of powers.²¹ Less attention has been paid to the independence of international judges.

The proliferation of new international courts has been accompanied by the proliferation of international judges. Whereas for fifty years the number of international judges was limited to the 15 judges of the PCIJ and ICJ, with the

¹⁴ The best authority for this point is *Dimes v Proprietors of Grand Junction Canal* 1852 3 HL Cases 759.

¹⁵ *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet* (no 2) 1999 2 WLR 272 at 289I.

¹⁶ See *Webb v The Queen* (1994) 181 CLR, 30 June 1994, 41 at 47 per Mason CJ and McHugh J.

¹⁷ Shetreet (note 5) 596.

¹⁸ *R v Valente* 2 C.C.C. (3d) 417 at 423 (1983).

¹⁹ ECHR Judgment of 9 June 1998 41/1997/825/1031 para 65.

²⁰ Two tests of impartiality of a judge were used in the *Incal* case. First, determination of a personal conviction of a particular judge in a given case; and secondly, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. See para 65 of the judgment *ibid*. This two part test was also used in the *Piersack* judgment. See *Piersack v Belgium* (1983) 5 EHRR 169 para 30.

²¹ See D P Kommers ‘*Autonomy versus Accountability, The German Judiciary*’ in P H Russell & D M O’ Brien (eds) *Judicial Independence in the Age of Democracy, Critical Perspectives from around the World* (2001) 134, 135; R Stevens ‘Judicial independence in England, A Loss of Independence’ in Russell & O’Brien *ibid* 155.

establishment of the *ad hoc* Tribunals and ICC the number has risen to 71.²² The international community now sees the emergence of what can be called an ‘international judiciary’.²³ Brenninkmeijer writes that in an increasingly globalised world, the role of the independent, impartial international judge is becoming increasingly significant. Referring to the judges of the ICJ, ICC and ICTY he writes:

Deze rechterlijke colleges vormen een illustratie van... de opkomst van de rechtsstaat zonder staat. De onafhankelijke, onpartijdige rechterlijke functie is in de zich Europeaniserende en globaliserende wereld van toenemende betekenis en wordt bovennationaal van belang. De waarborging van de rechten van de mens met inbegrip van toegang tot een onpartijdige rechterlijke instantie is uiteindelijk geen nationale zaak omdat te vaak juist misbruik op nationaal vlak plaats vindt...de behoefte voor ‘bovennationale’ instrumenten voor de bescherming van mensenrechten zal alleen toenemen.²⁴

The independence required of judges in a domestic setting applies in equally strong measure to international judges. While still a member of the ICJ, Justice Tanaka wrote that judicial independence was the *condictio sine qua non* of an international judge.²⁵

At the core of judicial independence, as traditionally understood, lies the idea that the judiciary should be independent from the executive and legislative arms of government. It was reported in the 1991 *World Jurist Association* that the judiciary should, above all, have ‘independence from the influence of other institutions viz the principle of the separation of powers’.²⁶ The need for judicial independence was recognised by Sir Ninian Stephen, later to be appointed as an ICTY judge, who asked the question: ‘of whom must the judiciary be independent?’ to which he answered: ‘I will be concerned only with independence from the other arms of government, the lack of dependence upon either the legislature or the executive.’²⁷ This separation between the executive or legislative branches on the one hand and

²² This number reflects the number of permanent judges and does not include *ad litem* judges. The Law of the Sea Tribunal has 21 judges, ICTY and ICTR both have 16 judges. The 18 ICC judges increases the number of international judges to 71. See Article 36 of Rome Statute.

²³ J Allain ‘Judicial Independence in Practice: The Case of Judge Odio Benito, Vice President of Costa Rica’ (1999) 77 *Revue de droit international* 1.

²⁴ A F M Brenninkmeijer ‘De onafhankelijke en onpartijdige rechter; een internationaal perspectief’ (2003) 29 *Rechter en Sa menleving* 102. ‘These judicial bodies form an illustration of .the rise of the *Rechtsstaat* without state. The independent, impartial judicial function in the ‘Europeanising’ and globalising world is of increasing importance and becoming of supranational importance. Guaranteeing human rights, including access to an independent judiciary is ultimately no national matter because it is often precisely at the national level where abuse takes place ... the need for ‘supranational’ instruments for the protection of human rights will therefore become greater and greater.’

²⁵ K Tanaka ‘Independence of International Judges’ (1975) 14 *Comunicazioni e Studi* 858.

²⁶ See Y S Yuen ‘The Independence of the Judiciary’ *Report of the World Jurist Association* (1991) 3.

²⁷ Sir N Stephen ‘Judicial Independence - A Fragile Bastion’ in S Shetreet & J Dechenes (eds) *Judicial Independence: The Contemporary Debate* (1985) 529.

the judicial branch on the other has been emphasised by various international non governmental actors such as the International Bar Association and the International Congress of Jurists. Another ICTY judge, Jules Dechenes, precipitated the gathering of various international actors to develop a Universal Declaration on the Independence of Justice. A fundamental tenet of this Universal Declaration is that the judiciary shall be independent from the executive and legislative.²⁸

Because of the absence of a central legislature and executive in international law the principle of separation of powers does not apply, at least not in its original form. As a result one might not be able to say that ICTY judges should be independent of a 'legislature' or 'executive'. ICTY judges should, however, be independent from the influence of the UN and the governments that elected them. It can also be argued that because of the 'political' nature of international law²⁹ international judges are especially vulnerable to extra-legal pressures and considerations and they should therefore be especially careful to avoid creating any impression of partiality.

It is important that the judges be independent from the United Nations. Security Council Resolution 808 stated that one of the legal bases for the establishment of the Tribunal was that it be independent from the Security Council 'with regard to the performance of its judicial functions'. The Secretary General's Report states:

As an enforcement measure under Chapter VII, however, the life of the international tribunal would be linked to the restoration and maintenance of peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.³⁰

This means that the only item which the Security Council can regulate is the life span of the Tribunal. But the Security Council has shown its willingness to interfere on two occasions. The Security Council first amended Articles 11, 12 and 13 of the Statute which had the effect of adding a Third Trial Chamber. The second of these Resolutions related to Judge Odio Benito's position on the *Celibici* Bench and will be discussed below.

The statutory requirements for judgeship at the ICTY and ICTR are intended to ensure that only judges of the highest calibre presumed to respect the principle of

²⁸ Article 2.04, Universal Declaration on the Independence of Justice, See Shetreet & Dechenes *ibid*, 450.

²⁹ Shaw writes that the 'inextricable bonds linking law and politics' must be recognised. He is of the opinion that politics is much closer to the heart of the international law system than is perceived within national legal orders and there is more evidence of the influence of power. M Shaw *International Law* (2003) 11, 12.

³⁰ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) para 28.

independence and impartiality are appointed.³¹ At the Tribunals, however, it seems as if considerations such as the nature of the appointment process, the language requirement and international politics could unduly influence such appointment. Some doubt has been expressed about the suitability and quality of the judges appointed. These questions will now be considered.

3. Judicial Independence at the ICTY

Article 13, which deals with the qualifications for and election of the judges in the ICTY Statute, provides that the judges should be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.³² Article 13 (1) further provides that in the overall composition of the Chambers, due account shall be taken of the experience of the judges in criminal law and international law, including international humanitarian and human rights law. The Statute provides that the Chamber as a whole, rather than individual judges, should reflect the above experience and expertise.

Rule 15 of the ICTY Rules sets out the relevant principle:

A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which the Judge has or has had any association which may affect his or her impartiality. The Judge shall in any such circumstances withdraw, and the President shall assign another Judge to the case.

Morrison suggests that it should follow from the rule that ‘justice should be seen to be done’³³ that the above subsection should be read as if after the second word ‘may’ in the first sentence the phrase ‘or might appear to any observer to...’ should be included in the text.³⁴ The principle has given rise to legal debate in the context of a few cases before the ICTY which will be discussed below. It has also led to various Motions to Disqualify being brought under Rule 15 (B).³⁵

³¹ Allain asks the question whether ‘high moral character’, ‘impartiality’ and ‘integrity’ are truly the constitutive elements of an independent judge. He asks whether there would necessarily be a link between independence and impartiality. See Allain (note 7) 7.

³² Article 13 (1) of ICTY Statute. The requirements that the persons must be of high moral character’ and ‘possess the qualifications required in their respective countries for appointment to the highest judicial offices’ were drawn from Article 2 of the Statute of the International Court of Justice.

³³ Lord Hewart stated ‘Justice should not only be done, but should manifestly and undoubtedly be seen to be done’ in the well known case *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256 at 259).

³⁴ H Morrison ‘Judicial Independence – Impartiality and Disqualification’ in R May (ed) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk MacDonald* (2001) 119.

³⁵ On 20 February 1998 the Defence in *Prosecutor v Dario Kordic and Mario Cerkez* IT-95-14/2-PT filed an ‘Accused’s Application Requesting Disqualification of Judges Jorda and Riad’ (Official Record at Registry Page (‘RP’) D2741-D2742) (‘Application’). In reply, on 3 March 1998 the Prosecutor filed a ‘Prosecutor’s Response to Accused’s Application Requesting Disqualification of Judges Jorda and Riad’ (RP D2754-D2759). In the Application, the Defence requested that Judges Jorda and Riad be disqualified, either voluntarily or by order of the Bureau, from participation in the Trial Chamber assigned to hear the case against them. Referring to Articles 20 and 21 of the Statute of the Tribunal

Judge Meron has been one of few Tribunal judges to address the question of his professional independence of his country of origin. He made the following statement in his capacity as President of the ICTY:

I have never, ever been exposed to any pressure from my government, and would I be exposed to any pressure from my government, I would tell them that I am an international judge elected by the United Nations General Assembly. I have been elected to presidency by my colleagues, the judges, and my objective is to serve this tribunal, and only this tribunal. In other words, to say that I would be more subject to pressure applied by the United States government because I am an American is something that is completely unacceptable.³⁶

4. The Politics of Election: The Election of ICTY and ICTR Judges

(i) Statutory requirements

How do ICTY and ICTR judges get elected? Both the Security Council and the General Assembly have a role in the election of the judges. Member states and non-member states with observer status are entitled to nominate up to two candidates from different countries. The Secretary General then forwards the nominations received to the Security Council.³⁷ The Security Council screens the nominations and prepares a list of twenty-two to thirty-three candidates for consideration by the General Assembly. The General Assembly selects sixteen judges from the list of candidates. The final selection by the General Assembly is considered consistent with the Assembly's character as the most representative organ of the UN.³⁸

The judges are elected for a four-year term after which they are eligible for re-election. Vacancies are filled by an expedited procedure: the Secretary General in consultation with the Presidents of the Security Council and the General Assembly appoints judges to fill vacancies.³⁹ This means that the process of election does not start afresh.

and Rule 15 of the Rules of Procedure and Evidence ("Rules"), the Application cited two grounds. First, the Defence submitted that the fact that both Judge Riad and Judge Jorda were currently sitting on the Trial Chamber hearing the case *Prosecutor v Blaskic* IT-95-14-T would result in the undue delay in the progress of the cases against Kordic and Cerkez. Secondly, the Defence submitted that the fact that Judges Jorda and Riad were hearing the *Blaskic* case jeopardised their ability to hear impartially the evidence presented in the case of *Kordic and Cerkez*, which involved many of the same events with which the *Blaskic* case was concerned.

³⁶ See Interview on www.freeb92.net/intervju/eng/2003/meron.

³⁷ Article 13 (2) (c) ICTY Statute.

³⁸ V Morris & M P Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (1995) 144.

³⁹ In contrast, Article 14 of the ICJ Statute provides that vacancies on the ICJ shall be filled by the same election procedure as used for the initial election.

Rule 14 provides that, upon election, each judge shall make a solemn oral declaration to perform the duties conferred by the Statute and exercise the powers so conferred honourably, faithfully, impartially and conscientiously. A similar declaration has to be made by ICJ judges.⁴⁰ Article 13(1) provides that in the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, international humanitarian law and human rights law. The Statute provides that the Chamber as a whole, rather than individual judges, should possess all of the above-mentioned experience and expertise. Article 13 (4) states that judges shall be elected for a term of four years, that the terms and conditions of service shall be those of the ICJ and that the judges shall be eligible for re-election.

The procedure for the election of the judges of the ICTR is set forth in Article 12 of the ICTR Statute. The statutory provisions on the appointment of the ICTR judges are almost identical to the provisions on the ICTY appointment process. The only significant difference relates to the number of judges. Whereas in the case of ICTY the Security Council compiles a list of twenty-two to thirty-three candidates, the ICTR Statute states that the Security Council shall establish a list of no less than twenty two and not more than twenty three candidates⁴¹ of which the General Assembly must elect sixteen judges.⁴² Another difference is that the time period within which nominations could be submitted for the ICTY judges was 60 days the ICTR Statute provides for a 30-day limit.⁴³

The necessary adjustments were made to take into account the common Appeals Chamber. Article 12 (2) of the ICTR Statute provides that the members of the Appeals Chamber of the ICTY shall also serve as members of the Appeals Chamber of the ICTR. This means that the first election of judges of the ICTR was limited to the election of the six trial Chamber judges since the five Appeals Chamber Judges were elected before the establishment of the ICTR.

The participation of states in the election process of the Tribunals is intended to provide every state with an equal opportunity to have one of its nationals serve on the ICTY and ICTR respectively⁴⁴ and is most probably intended to make the process more democratic and less political. The absence of the National Group system followed at the ICJ⁴⁵, makes the election process at the Tribunals less consultative. In practice however, as will be demonstrated below, the National

⁴⁰ ICJ Statute, Article 20 and Article 4 of the Rules of Court adopted on 14 April 1978.

⁴¹ Article 12 *bis* 1 (c) of the ICTR Statute.

⁴² Article 12 *bis* 1 (d) of the ICTR Statute.

⁴³ The reason for this difference, according to Morris and Scharf, is that the briefer period recognised the need to expedite the operation of the Rwanda Tribunal because of the thousands of suspects that had already been in custody. V Morris & M P Scharf *The International Criminal Tribunal for Rwanda* (1998) 368.

⁴⁴ *Ibid* 144.

⁴⁵ For a description of the National Group system at the ICJ see below.

Group system does not ensure that the ICJ process is objective and based on merit more than on national affiliation.

Ad litem judges

In addition to permanent judges elected shortly after the establishment of the Tribunals the *ad hoc* Tribunals have appointed a special group of judges called *ad litem* judges. The appointment of *ad litem* judges at the ICTY was part of the reforms undertaken during the Presidency of Judge Jorda in response to criticism that the ICTY was not concluding cases fast enough. On 30 March 2000 the Security Council adopted Resolution 1329 which approved the appointment of a pool of *ad litem* judges for the ICTY. Judge Jorda said that the implementation of the *ad litem* judges system would allow the Tribunal to conclude its work sooner than expected which would lead to significant savings for the United Nations.⁴⁶ *Ad litem* judges are assigned to Trial Chambers along with the permanent judges and, with some exceptions, they have the same status. The general terms and conditions that apply to their terms of office are the same as those applying to ICTY, ICTR and ICJ judges. They are also elected by the General Assembly of the United Nations but are not eligible for re-election. These judges sit on one or several specific trials for a period of up to three years.⁴⁷

Resolution 1329 stated that the new composition of the ICTY Chambers will look as follows: The Chambers shall be composed of sixteen permanent independent judges and a maximum at any one time of nine *ad litem* judges appointed in accordance with article 13 para 2 of the Statute. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Only permanent judges may be members of the Appeals Chamber.

Resolution 1329 amended Article 13 to allow for the election of *ad litem* judges. The procedure is largely similar to the procedure for electing permanent judges. Article 13 *ter* states that the Secretary General shall invite nominations for *ad litem* judges from both state and non-state members of the UN. Within sixty days of the date of invitation of the Secretary General each state may nominate up to four candidates and the nominations are forwarded to the Security Council. The Security Council then compiles a list of at least fifty-four candidates of which the General Assembly elects the twenty-seven *ad litem* judges of the ICTY.

⁴⁶ See the opening address of Judge Jorda, The Hague, 23 March 2001. See www.un.org/icty/pressreal/p580e.htm

⁴⁷ See the statement by the ICTY Registrar, Hans Holthuis, *ibid.* Article 13*ter* (a) of the ICTY Statute states however that *ad litem* judges shall not be eligible for election as, or to vote in the election of the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to Article 14 of the Statute. Article 13 *ter* (b) states that *ad litem* judges shall not have the power to adopt rules of procedure and evidence, to review an indictment pursuant to Article 19, to consult with the president in relation to the assignment of judges or to adjudicate in pre-trial proceedings.

Security Council Resolution 1431 approved the appointment of a pool of *ad litem* judges for the ICTR.⁴⁸ It was decided that at any one time a maximum of four *ad litem* judges shall be members of each Trial Chamber. On 25 June 2003 the General Assembly elected eighteen *ad litem* judges to the ICTR.⁴⁹ According to the Article 12*ter*,⁵⁰ each state may nominate up to four candidates, the Security Council compiles a list of not less than 36 candidates and the General Assembly elects the eighteen *ad litem* judges of the ICTR.

(ii) On Electoral Politics, Suitability and Independence

The statutory requirements for judgeship of the ICTY and ICTR are intended to ensure that only judges of the highest calibre, who may be presumed to respect the principle of independence and impartiality, are appointed. At the Tribunals, however, it appears as if considerations such as the nature of the appointment process and international politics influence appointments. Some doubt has been expressed about the suitability and quality of the judges appointed. These questions will now be considered.

Many believe it is inevitable that politics or other considerations may enter into the nomination and election processes. According to Geoffrey Nice it is not realistic to think that all judges are selected for nomination or voted on by the UN *simply* on the basis of ability and suitability for the particular job.⁵¹ Allegations have been made that some of the appointments made at the ICTY have been the result of excessive lobbying and political pressure from various UN member states.⁵² It is simply not true that judges who are nominated or even elected are necessarily suitable candidates for the position of international judge. Many Tribunal judges, who might have many years of relevant *judicial* experience, lack knowledge of humanitarian law and human rights law. Conversely, experts in international humanitarian law and human rights law may lack judicial experience.

In electing the ICTY judges it was required that the judges should be impartial to the 'Yugoslav situation'.⁵³ There are no judges from the Balkans at the ICTY and no judges from the countries involved in the Rwandan conflict have been appointed to the ICTR. There have also not been any legal officers from the

⁴⁸ Security Council Resolution 1431 amended Articles 11, 12 and 13 of the ICTR Statute and replaced them with Annex 1. Annex 1 (1) states: 'The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four *ad litem* independent judges appointed in accordance with article 12*ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State. Annex 1(2) states: Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber.'

⁴⁹ Press Release, ICTR/INFO-9-2-349.EN, www.ictor.org/ENGLISH/PRESSREL/2003/349.htm

⁵⁰ Article 12 of the ICTR Statute was amended by Resolution 1431.

⁵¹ G Nice 'Trials of Imperfection' (2001) 14 *LJIL* 391.

⁵² Lauren Etter 'Call for ICC to Learn ICTY Election Lessons', *Global Policy Forum*, November 26, 2004, available at www.globalpolicy.org/intjustice/icc/2004/1126icclessons.htm

⁵³ Morris & Scharf (note 38) 143.

Balkans working in the Chambers of the ICTY or from Rwanda in the Chambers of the ICTR.

In the context of the *Eichmann* trial it was the view of Defence Counsel, Dr Servatius, that no Jew was qualified to sit in judgment on the implementers of the Final Solution. Some argued that the Jewish judges as citizens of the Jewish state were judging their own case.⁵⁴ According to Arendt the argument concerning the partiality of the Jewish judges was unfounded. She writes that it is difficult to see how the Jewish judges differed in this respect from their colleagues in any of the other Successor Trials where Polish judges, for example, pronounced sentences for crimes against the Polish people.⁵⁵ It is difficult not to agree with Arendt. The Holocaust affected a vast number of victims. Especially in the context of a trial conducted in Israel, it is not realistic (and may lead to artificial results) to disqualify all those with an association with the victims from acting as judges.

But the institutional character of the Tribunals may require more diverse Chambers. The ICTY and ICTR are *international* Tribunals. This means that the composition of the judiciary should be reflective of the international community in both a geographical and philosophical sense.

The Special Court for Sierra Leone, being established not by the Security Council but by Special Agreement, is staffed by international judges as well as 'local' judges elected by the Government of Sierra Leone. It can be argued that impartiality is such an inherent, fundamental requirement for a judge that it can almost be presupposed and that one should not question the impartiality of a judge just because he or she hails from a country that was involved in the relevant conflict. A mixed Bench should then, in principle, be as impartial as a 'purely international' one.

5. Election of ICJ Judges

Since the ICTY, ICTR and ICJ are all *judicial* organs of the UN, it might be fitting to compare the independence and performance and process of election of the ICTY judges with that of the ICJ. Many of the sections in the Statutes of the Tribunals and the ICC pertaining to judicial election procedures, qualifications and representivity closely resemble the provisions of the ICJ Statute.

Article 3 of the ICJ Statute states that the court shall consist of fifteen independent judges, no two of whom may be nationals of the same state. For the purposes of hearing a particular case, the court may also appoint one or more *ad hoc* judges.⁵⁶ At the San Francisco Conference it was explained that the judges of

⁵⁴ H Arendt *Eichmann in Jerusalem, A Report on the Banality of Evil* (1994) 208, 209.

⁵⁵ *Ibid* 260.

⁵⁶ Article 31 ICJ Statute.

the ICJ 'should be not only impartial but also independent of control by their own countries or the United Nations Organization.'⁵⁷

The fifteen ICJ judges are elected by both the General Assembly and the Security Council of the United Nations from a list of persons nominated not by governments but by National Groups.⁵⁸ The National Groups typically consist of four individuals selected by their governments. The National Groups are usually extensions of their governments and are usually not independent of government control.⁵⁹

The involvement of National Groups is intended to make the process more consultative and assure good distributive representation. Article 6 of the ICJ Statute requires that 'each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies devoted to the study of law'. According to Damrosch the National Group should act as a collegial body and should exercise professional judgment.⁶⁰

Articles 4, 5 and 6 of the ICJ Statute govern the nomination procedure. Article 5 paragraph 1 reads:

At least three months before the date of the election, the Secretary General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4 paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

Upon receiving these nominations the Secretary General arranges a list of candidates in alphabetical order and submits it to the Security Council and the General Assembly.⁶¹ Judges are elected both by the General Assembly and the Security Council. The elections are held by secret ballot in separate public meetings. To be elected a candidate has to receive a majority in each of these organs.⁶² The results of the two meetings are then communicated to each other. If after the first meeting places still have to be filled, the process continues for a second

⁵⁷ See *Documents of the United Nations Conference on International Organization* Vol. 13 (1945) 174

⁵⁸ Article 4.1 of the ICJ Statute states that nominations are made by 'the national groups in the permanent Court of Arbitration.' This means that the nomination is made by groups of four persons designated by their respective governments pursuant to the 1907 Hague Convention for the Pacific Settlement of International Disputes. The framers of the ICJ followed the same procedure established by the Permanent Court. L F Damrosch 'The Election of Thomas Buergenthal to the International Court of Justice' (2000) 94 *AJIL* 579.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* 581.

⁶¹ S Rosenne *The Law and Practice of the International Court 1920 -1996* Vol 1 (1997) 377.

⁶² S Rosenne *The World Court, What It is and How It Works* 4th ed (1989) 62.

and third meeting of each organ.⁶³ The judges are elected for a period of nine years.

ICJ judges are required to have certain personal characteristics. These characteristics are set forth in Article 2 of the Statute. The ICJ shall be composed of 'a body of independent judges elected regardless of their nationality from among persons of high moral character who possess the qualifications required in their respective countries or appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.'⁶⁴

Article 9 of the ICJ Statute states that 'in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.' Rosenne points out that this article is a refined version of the principle of 'equitable geographical distribution' which the UN Charter lays down as the governing principle for the allocation of elective seats in most UN organs.⁶⁵ According to Rosenne the element of 'principal' legal system is losing ground to the element of regional distribution expressed in the term 'main forms of civilization.'⁶⁶ With regard to the political nature of the ICJ elections, Robinson writes that while Article 9 of the ICJ Statute stipulates that 'the many forms of civilization and the principal legal systems of the world' should be represented, the words of the text are 'trumped by political interests in membership distribution'.⁶⁷

In practice, however, the National Group system does not prevent the fact that five permanent members of the Security Council are automatically represented.⁶⁸ The National Groups system does also not prevent the overrepresentation of Europe (occupying a third of the seats). According to Chemillier-Gendreau, certain judges of the nationality of the permanent members of the Security Council, have often acted, sometimes without restraint, as if they were captives of the political positions of their own governments.⁶⁹ He argues that these judges have confused the role of a judiciary - which implies the independence of the judges and the

⁶³ Ibid 63.

⁶⁴ Rosenne points out that these two qualifications are not in logical order. He writes that the ICJ is international not only because it is composed of Members of different nationalities but also because it is a court applying international law. According to Rosenne the value of its pronouncements and the weight of its authority 'stands in direct ratio to the recognized competence as international lawyers of the judges.' Rosenne (note 61) 367.

⁶⁵Rosenne (note 62) 53.

⁶⁶ Ibid.

⁶⁷ D R Robinson 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' *ASIL Proceedings* (2003) 279.

⁶⁸ Even though the ICJ Statute is silent in this regard, the tradition has been for each of the five permanent member states of the Security Council to have a seat on the court. The other ten members of the ICJ are chosen on a long-standing negotiated compromise consisting of three members from African states, two from Latin American states, two from Asian states and three from European states. Ibid 278.

⁶⁹ M Chemillier-Gendreau 'The International Court of Justice between politics and law' *Le Monde diplomatique*, November 1996 available at www.globalpolicy.org/wldcourt.

authority of the court - with that of an arbiter, which represents the parties concerned and is concerned with satisfying their interests.⁷⁰ In her opinion the most independent judges come from small or medium-sized countries, those not involved in the disputes of greater powers. At the same time a judge such as the US Judge Schwebel has been credited for deciding against the interests of his own government.⁷¹

Abi-Saab, later appointed ICTY judge, sees the ICJ election process as inherently political. What is important, he says, is not to eliminate politics from elections but to improve and widen the range of nominations so that political choice can be exerted from among a sufficient number of highly qualified candidates.⁷²

Similar to the position at the ICTY, the election process at the ICJ is not free from political influence. In discussing the selection procedure of the judges of the ICJ, Rosenne observed that the political nature of the election process should not be surprising to those who understand that judicial selection in the national systems of virtually every nation is inevitably political.⁷³ Franck agrees and calls the ICJ election process 'openly political'.⁷⁴ The ICJ Statute provides that a candidate is elected on obtaining an absolute majority in both the UN General Assembly and Security Council. Five of the fifteen judgeships are up for election or re-election every three years. Critics of the election process object to the fact that candidates campaign openly in the halls of the United Nations. It has been alleged that the elections result in a form of 'political horse trading' that does not promote the selection of the most highly qualified candidates.⁷⁵ According to Lee, 'it is inevitable that political bargaining occurs as the election of the candidate to the Court is traded off for support of another candidate to another body'.⁷⁶ Franck writes that the charge that ICJ judges are biased or politicised is probably true to some degree.⁷⁷ The appointment process seems inevitably political. One should distinguish between 'political' in a negative sense and political in a more benign sense. It is clear that election politics in the form of horse trading should be avoided. But the fact that a strong national affiliation could render a judge less independent is not the sort of political consideration which threatens to upset the appellation of judicial independence. It is inevitable fact that a judge is a product of a certain national and legal background.

⁷⁰ Ibid.

⁷¹ See for example his dissent in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgement of 27 June, ICJ Reports 1986.

⁷² See his chapter 'Ensuring the Best Bench: Ways of Selecting Judges' in C Peck & R S Lee (eds) *Increasing the Effectiveness of the International Court of Justice* (1997) 184.

⁷³ Franck (note 2) 6.

⁷⁴ Ibid.

⁷⁵ Ibid 7. There is nothing in the ICJ statute which ensures the election of judges from the states occupying the permanent positions on the Security Council.

⁷⁶ Peck & Lee (note 72) 36.

⁷⁷ Ibid.

6. Election of ICC Judges

The first eighteen ICC judges were sworn in on 18 March 2003. The Rome Statute for the ICC has created a system in which judges are selected by the governments of state parties, without any independent screening process.

Judges will have a large measure of control over the fundamental decision of who is to be prosecuted, an area normally reserved for the prosecutor. There are legitimate fears that this system will fail to provide the necessary safeguards to ensure judicial independence.⁷⁸

The nomination and voting procedure work as follows: Only candidates who are nationals of ratifying countries (or 'State Parties') can be nominated as ICC judges. Candidates may be nominated at the national level entirely by their government or by their 'national groups'.⁷⁹ National groups consist of four jurists acting as arbitrators in the Permanent Court of Arbitration.⁸⁰

Article 36 (5) stipulates that in the election of judges each state shall have one vote. There shall be two lists of candidates. List A contains candidates qualified in criminal law and procedure and list B contains candidates qualified in international law. The Statute indicates that there will be one ballot and the persons elected 'shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.'⁸¹ At least nine judges are elected from list A and five judges from list B.

The Statute requires a degree of expertise in the subject matter of the court.⁸² The requirement of criminal experience is to be understood as including experience as judge, advocate or prosecutor in criminal cases.⁸³ Specific reference is made to international humanitarian law and the law of human rights. A nominee from the court may choose the list on which he or she will appear. At the first election of judges a minimum of nine judges must have a criminal law profile and minimum of five an international law profile. Subsequent elections are to be organised to keep the same proportion. The Trial Chambers shall be composed 'predominantly by judges with criminal trial experience'.⁸⁴

⁷⁸ S de Bertodano 'Judicial Independence in the International Criminal Court' (2002) 15 *LJIL* 409.

⁷⁹ 'Election of Judges to the International Criminal Court' Coalition of the International Criminal Court Factsheet, available at www.iccnw.org/pressroom/factsheets/FS-CICC-ELECTIONOFJUDGES-En.pdf

See also W A Schabas *An Introduction to the ICC* 2 ed (2004) 177-180.

⁸⁰ *Ibid.*

⁸¹ Article 36 (6) ICC Statute.

⁸² Schabas (note 79) 152.

⁸³ M R Rwelamira 'Composition and Administration of the Court' in R S Lee. (ed) *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 159.

⁸⁴ Article 39 (1) Rome Statute.

ICC judges can be excused from their function by the presidency. They can also be disqualified from sitting in cases in which there can be reasonable doubt as to their impartiality.⁸⁵ It is also obvious that they cannot sit in matters in which they have previously been involved at the national level. All eighteen ICC judges have been elected as full-time members of the court. It was decided that initially only the three judges of the presidency would serve on a full time basis - largely as a cost-cutting measure. Article 35 (3) provides that the president may, on the basis of the court's workload, decide from time to time to what extent judges will be required to serve full-time. No two judges may be nationals of the same state.

The Trial and Pre-Trial divisions should be occupied by judges with primarily criminal law experience, and though not stated as such in the Statute, there is a suggestion that international law judges will lean towards the Appeals Division. Schabas writes that if one reads between the lines of the Statute, it seems to be saying that the more practically oriented criminal law specialists should focus on trials whereas their more professorial colleagues in the international law field should focus on appeals.⁸⁶ During the Rome Conference, the UK delegation felt very strongly that it was essential to emphasise professional legal practice as a requirement to ensure that the court be in a position to fulfill all of its functions at the pre-trial, trial and appeals phases.⁸⁷ The proponents of this approach were in favour of a court which would be predominantly constituted by judges with criminal trial experience particularly in the pre-trial or trial stages where competence in the handling and evaluation of evidence was of greater importance than knowledge of international law.⁸⁸

The question of whether representation of the main forms of civilisation should be specifically mentioned in the Statute was debated. While the ICJ Statute recognises this consideration in the selection of judges it was thought that this element was already covered by the requirement of geographical representation and representation of major legal systems of the world.⁸⁹

According to Robertson, the viability of the ICC will ultimately depend more on the calibre and experience of its judges than on the fine print of the Statute.⁹⁰ In his opinion international appointment systems are prone 'to throw up mediocrities trusted to toe the line of their nominating government: usually they are appointed from within government departments or are in other ways beholden to the State.'⁹¹ He writes that persons of real independence and imagination are often

⁸⁵ Rome Statute Article 41, ICC RPE, Rules 23-29.

⁸⁶ Schabas (note 79) 154.

⁸⁷ Rwelamira (note 83) 160.

⁸⁸ Ibid.

⁸⁹ Ibid 165.

⁹⁰ G Robertson *Crimes Against Humanity – The Struggle for Global Justice* (2002) 351.

⁹¹ Ibid. See ICC Prep Com discussion.

missing. He criticises the ICC appointment system: the judges are to be elected by an assembly of state parties which in his view is a recipe for 'political caucusing'.⁹²

Similar to the requirements set for ICJ and ICTY judges, ICC judges must be of 'a high moral character, impartiality and integrity'.⁹³ They must be qualified for appointment to the highest judicial offices in their respective States and should have an excellent working knowledge of French and English.

Article 36 (8) commits the State Parties to take into account 'the need to ensure representation of the principal legal systems of the world, equitable geographic representation', a 'fair representation of female and male judges', and (uniquely for an international court) legal expertise on specific issues such as violence against women and children. Draft provisions however spoke of 'gender balance'.⁹⁴ Schabas writes that the requirement of fair gender representation reflects concerns that the ICC might resemble the ICJ, a court where only one woman, Rosalyn Higgins, has ever been elected in its eighty-year history. The *ad hoc* Tribunals have shown some improvement on this. Both have elected a woman to the Presidency of the Tribunals (Judges MacDonald and Pillay).⁹⁵ The ICC represents the biggest achievement in this regard. Out of the first group of eighteen judges, eight judges are female and ten judges are male.⁹⁶

Judges who are required to serve on a full time basis at the seat of the court are not allowed to engage in any other occupation of a professional nature. All judges, including those who do not work full time, are forbidden from activities 'likely to interfere with their judicial functions or to affect confidence in their independence'.⁹⁷

⁹² According to Robertson, one of the reasons for the success of Nuremberg was that the English, French and American judges had experience as criminal *defenders* and not merely as prosecutors - a sense of fairness developed from that experience which infused the proceedings. Robertson (note 90) 351.

⁹³ Rome Statute (Article 36) (3), see Article 2, ICJ Statute.

⁹⁴ See F Jarasch 'Establishment, Organization and Financing of the International Criminal Court' (1998) 6 *EJIL* 21.

⁹⁵ Judge Pillay was elected as president of the ICTR in June 1999 and re-elected in June 2001. ICTR Press Release ICTR/INFO-9-2-268.EN Arusha (1 June 2001). Judge McDonald was elected as president of the ICTY and ICTR on 19 November 1997. Press Release No. 197-E on the election of ICTY judges (21 May 1997); *ICTY Yearbook* (1997) 20. On 26 January 2006 the following women were elected to the ICC

during the 4th Assembly of States Parties: Ekaterina Trendafilova of Bulgaria and Anita Usacka of Latvia.

⁹⁶ The eight female judges are Maureen Harding Clark (Ireland), Akua Kuenyehia (Ghana), Elizabeth Odio Benito (Costa Rica), Navanethem Pillay (South Africa), Sylvia H de Figueiredo Steiner (Brazil) and Anita Usacka (Latvia), Ekaterina Trendafilova (Bulgaria) and Fatoumata Dembele Diarra. See www.wfa.org/issues/wicc

⁹⁷ ICC Statute Article 40.

7. The Race for Re-election

Nice writes that the work of judges should be done without seeking gratitude or fame.⁹⁸ The work should also be done without the aim of seeking re-election.

The principle that life tenure advances judicial independence is well-established. In England, the Act of Settlement of 1701 enshrined the principle that judges should be appointed for life, allowing only for their removal on the grounds of serious offences.⁹⁹ English judges however no longer enjoy life tenure. Today the retirement age for judges in the UK is 75.¹⁰⁰ In America judges are still appointed for life. The US Constitution grants federal judges life-tenure.¹⁰¹ The *ad hoc* nature of the Tribunals does not render life tenure feasible; the ICC seems to have followed an approach more conducive to advancing the perception of independence. This approach is discussed below.

At the ICTY, as judges are elected for a period of four years with the possibility of re-election. As in the case of the ICJ, it has been feared that the possibility of re-election could make judges more susceptible to political influence.

The Statute provides that the terms and conditions of service shall be those of the ICJ.¹⁰² *Ad-litem* judges are also appointed for a period of four years but are not eligible for re-election. It could be argued that it is more important for judges to prove their independence from the states which elected them than from the United Nations. It is, after all, states which will re-nominate the judges. It is unlikely that judges who wish to be re-elected would take decisions which would be unpopular with their own governments, or with the UN. But this concern should not be overemphasised. It is very unlikely that governments will be affected significantly by the decisions of the Tribunals regarding the former Yugoslavia. Tribunal decisions, unlike the decisions of the ICJ, affect individuals rather than states.

ICC judges are elected for a period of nine years and, with a few minor and transitional exceptions, they are not eligible for re-election.¹⁰³ This promotes both actual and perceived impartiality as judges who must campaign for re-election with their own and other governments, might, in the words of Schabas, find it difficult 'to exercise their functions in a dynamic and vigorous manner'.¹⁰⁴ According to Rwelamira, the question of the terms of office and security of tenure of judges are

⁹⁸ Nice writes: 'The work is so important and the real difficulties are so great that only the very best people should be recruited to do the work.' Nice (note 41) 394.

⁹⁹ Morrison (note 34) 112.

⁹⁹ ICTY Statute Article 13 (4).

¹⁰⁰ Judicial Pensions and Retirement Act (1993) Ch. 8, section 26 (5).

¹⁰¹ United States Constitution, Article III, section 1.

¹⁰² *Ibid.*

¹⁰³ Rome Statute Article 36 (9).

¹⁰⁴ Schabas (note 79) 153.

fundamental to the independence of the judiciary.¹⁰⁵ The prevailing view at the Rome Conference was that judges should be appointed for a term of nine years - as in the case of the ICJ. Many delegations did not, however, endorse the analogy with the ICJ on the ground that the ICC was essentially a criminal court and therefore required a unique composition.¹⁰⁶ The final agreement was that judges should not be eligible for re-election although allowance was made for judges elected for a three-year term who would be eligible for re-election to a full term.¹⁰⁷

8. Independence: the cases of Judges Mumba, Odio-Benito and the 'NATO Judges'

i) The 'NATO judges'

The issue of the independence of ICTY judges and the political nature of the ICTY became critical in the *Milosevic* trial.¹⁰⁸ Scharf writes that given the fact that the pool of Tribunal judges that were available for the *Milosevic* trial included citizens from several countries that had no stake in the Balkan conflict, the three judges assigned by Chief Justice Jorda to preside over the case represented 'a most unfortunate selection'.¹⁰⁹ He criticises the fact that Judge Richard May, the judge selected to head the panel, was from the United Kingdom, one of the NATO countries that led the 1999 Kosovo intervention against the Serbs. Scharf is of the view that May's partner of the Bench, the Jamaican Judge, Judge Patrick Robinson can also not be said to hail from a neutral country since Jamaica has very close political and economical ties to the US and UK.¹¹⁰ He served with Judge May on other trials and might have been said to be too deferential to his British associate on the Bench.¹¹¹ According to Scharf only the third judge, O-Gon Kwan of South Korea, who replaced the judge originally assigned to the trial, Mohamed El Habib Fassi Fihri of Morocco, hails from an 'unquestionably neutral country'.¹¹²

Although Scharf suggests that it would have been appropriate for the judges to have recused themselves, he writes that these jurists could not be expected to recuse themselves from participating on the *Milosevic* bench because this would be an admission of bias and would subvert the credibility of the Tribunal as a whole.

¹⁰⁵ Rwelamira (note 83) 15.

¹⁰⁶ Ibid.

¹⁰⁷ See Rome Statute Article 36 (9). This is, of course, unusual since under most existing international courts and tribunals, judges are eligible for re-election.

¹⁰⁸ See also Robertson (note 66) 323. Robertson mentions that Milosevic could object to being tried by any judge from a NATO country. Robertson writes that it will take a Milosevic trial 'to put fledgling international criminal law to a test it still needs to pass, by sloughing off the rebuke of victor's justice and delivering verdicts which depend on evidence rather than the national allegiances of judges.' Ibid.

¹⁰⁹ M Scharf 'The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?' (2002) Spring *ILSA Journal of International and Comparative Law* 398.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

It can be asked whether Scharf is reasonable with regard to his criticism of the NATO judges. Accusing a judge of bias is a serious allegation requiring weighty substantiation.¹¹³ In deciding on the composition of chambers, the tribunal would appear to be attempting to ensure ‘universal representation’ in each chamber, and that, in general, the composition of the chambers reflect a fair distribution of nationalities, with two geographical regions represented on each bench.¹¹⁴ In addition Scharf does not seem to appreciate that judges get assigned to specific cases according to a roster and that it is highly improbable that there would be any sinister intent behind the allocation of specific judges to a case. The assignment of judges to cases is designed to be an objective process. Judges are allocated to specific Trial Chambers when they commence their work at the Tribunals and do not move between Trial Chambers.¹¹⁵ In addition it is submitted that the judges should act as *professional* judges and not be influenced by considerations such as national allegiance.

Although the suggestion that Judges May and Robinson should have recused themselves is probably unjustified, one can ask whether the extensive media coverage of the case and the importance of the judges *appearing* impartial did not require the selection of a more ‘neutral’ bench.¹¹⁶

Scharf believes that however fair and impartial these trials may turn out to be, it is understandable that some would perceive their outcome to be a foregone conclusion. Scharf quotes Professor Michael Mandel who maintains that ‘Milosevic has about as much chance of getting a fair trial from this court as he had of defeating NATO in the war’.¹¹⁷

On 31 May 2004, Judge May resigned because of illness. He died on 1 July 2004. He was replaced by the Scottish judge, Lord Bonomy. Lord Bonomy was sworn in on 7 June 2004. What are the consequences of replacing a judge mid-trial? The appointment of a new judge was expected to cause delays in a trial that was already becoming the lengthiest Tribunal trial. In common law jurisdictions the resignation of a presiding judge would generally result in a mistrial. The Rules of Procedure provides that a new judge cannot be assigned to a case unless the accused consents to such a measure. Milosevic refused to accept the change of judge and the two remaining trial chamber judges, Judge Robinson and Judge

¹¹³ See E Grant ‘Pinochet 2: The questions of jurisdiction and bias’ in D Woodhouse (ed) *The Pinochet Case, A legal and constitutional analysis* (2000) 48.

¹¹⁴ Interview with Senior Legal Officer in Chambers, ICTY, 1 April 2003.

¹¹⁵ Interview with lawyer in Office of the Prosecutor, 19 May 2004.

¹¹⁶ Scharf (note 109) 398.

¹¹⁷ *Ibid.*

O-gon Kwon had to make the decision whether replacing Judge May and continuing with the trial was ‘in the best interest of justice’.¹¹⁸ In circumstances such as these, political expediency will probably always require the continuation of a trial. Like his predecessor Bonomy hails from United Kingdom. In the eyes of Scharf and others, his appointment will not have made the *Milosevic* Bench more ‘neutral’.

Any new judge must certify that he or she is familiar with the record before sitting on the case.¹¹⁹ A new judge has to read the record in its entirety. By the time Bonomy took over, the evidence in the *Milosevic* case already consisted of 33 000 pages of transcripts (not including maps, audio and video tapes).¹²⁰ The question to be asked is whether a new judge could ever be completely familiar with a record of such a scale.

On 12 March 2006 all questions of this nature with regard to the *Milosevic* trial became academic. On this day Milosevic was found dead in his cell.¹²¹

ii) The Case of Elizabeth Odio Benito

The Costa Rican ICTY Judge, Judge Odio Benito seems to have violated one of the most fundamental rules of judicial independence: after accepting the position of vice-president of Costa Rica she continued to sit on the bench of the *Celibici* trial.¹²² She appears to have violated both conventional and customary norms of international law along with general principles of law precluding an international judge from holding a domestic executive post.¹²³

Before becoming an ICTY Judge, Judge Benito was a professor of law at the University of Costa Rica and twice held the position of Minister of Justice of Costa Rica. She was elected to her first four-year judicial term of the ICTY by UN General Assembly in September 1993. She also served as vice-president of the ICTY. The conflict of interest arose in the following manner: by the end of Judge Odio Benito's mandate she was one of the trial chamber judges hearing the *Celibici* case. Her term of office however expired during in the course of the trial. In May 1997 the General Assembly had elected eleven judges for the second mandate of the ICTY. Among the eight ICTY judges vying for the eleven positions, five had their judicial terms renewed whereas three judges, the judges on the *Celibici* bench, did not.¹²⁴ This meant that Judges Odio Benito, Karibi-Whyte and Jan were to end

¹¹⁸ See ‘Milosevic defiant over judge swap’, BBC News, Thursday 25 March 2004 available at www.news.bbc.co.uk

¹¹⁹ C Schütz ‘Presiding Judge in Milosevic Trial resigns’, Catherine Schütz interviews Canadian lawyer Tiphaine Dickson, 26 February 2004 www.globalresearch.ca/articles/DIC402A.html.

¹²⁰ Ibid.

¹²¹ See <http://news.bbc.co.uk/1/hi/world/europe/4798702.stm>

¹²² Allain (note 23) 2.

¹²³ Ibid.

¹²⁴ See ‘The Judges’ New Term Commences’ (1997) 17 *Bulletin of the International Criminal Tribunal for the former Yugoslavia* 1.

their mandates in November 1997. The legal question arose whether these three judges would be able to remain to hear the *Celibici* case beyond their judicial terms.¹²⁵ The ICTY Statute, unlike the ICJ which allows judges to ‘finish any cases which they may have begun’,¹²⁶ did not make provision for this kind of situation. The problem was resolved on 27 August 1997 by Security Council Resolution 1126 which stated that the three judges could ‘finish the *Celibici* case which they have begun before expiry of their terms of office’.¹²⁷ Since she was not re-elected to the ICTY Judge Odio Benito decided to pursue a career in domestic politics in Costa Rica and stood as one of two vice-presidential candidates of the *Partido Unidad Social Cristiana*.¹²⁸ On 1 February 1998 the Presidential Candidate of the United Social Christian Party, Miguel Angel Rodriguez, won the election and on 8 May 1998, Judge Odio Benito became the Vice-President of the Republic of Costa Rica.¹²⁹

Allain examines the statutory provisions, state practice and *opinio juris* to establish whether there are international legal norms which prohibit judges from sitting once they have become members of their respective state’s executive organs. The relevant international norms will be discussed in some detail since they are also relevant in the case of assessing the independence of other judges such as Judge Mumba below.

According to the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato'Param Cumaraswamy, ‘the requirements of independent and impartial justice are universal and are rooted in both natural and positive law’.¹³⁰ At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.

The ICTY Statute does not contain an *express* provision prohibiting the holding of a position within the executive branch of a municipal government while also sitting as an ICTY judge. Article 12 of the ICTY Statute states however that the ‘Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State’.¹³¹ The notion of independence is however not

¹²⁵ Allain (note 23) 3.

¹²⁶ ICJ Statute Article 13 (4) .

¹²⁷ United Nations Security Council Resolution 1126, 27 August 1997, UN Doc S/RES 1126.

¹²⁸ Allain (note 23) 4.

¹²⁹ Ibid. On 21 October 1996 Costa Rica was elected to a two-year term as a non-permanent member of the UN Security Council. As the holder of the second highest executive office in Costa Rica, Judge Benito was superior in rank to her state’s permanent representative to the United Nations, *ibid*.

¹³⁰ Report of the Special Rapporteur, Dato'Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41, 6 Feb 1995, UN Doc E/CN 4/1995/39, para 32. Cumaraswamy was referring, of course to the sources of international law set out in Article 38 of the Statute of the ICJ.

¹³¹ With regard to the question of double nationality, Article 3 para 2 of the ICJ Statute states that if a person could be regarded as a national of more than one state, he or she shall be deemed to be a national of the country in which he or she ordinarily exercises civil and political rights.

defined in the Statute or RPE. According to Allain one can infer from the requirement contained in Article 13 (1) of the Statute that judges must 'be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices' that judges should not hold executive positions while being judges. He argues that if 'high moral character, impartiality and independence' are the qualities of an independent judge, then one can make a case that Judge Odio Benito should have resigned, based on the constitutive elements of the ICTY.¹³² A further argument can be made based on the statutory provisions of the ICTY. Had Judge Odio Benito been Vice President of Costa Rica in 1993, she could not have been elected in September 1993 unless she first resigned as Vice President. The reason for this is that Article 13(1) of the ICTY Statute requires that its judges 'possess the qualifications required in their respective countries for appointment to the highest judicial offices'. As Vice-President of Costa Rica, Odio Benito would have been disqualified from holding the highest of judicial offices.¹³³

As evidence of State Practice, Allain cites Article 16 (1) of the ICJ Statute which provides that 'no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature'.¹³⁴

Opinio juris on the issue of judicial independence has been expressed recently as a by-product of the movement to establish the ICC.¹³⁵ The International Law Commission completed a draft Statute for an International Criminal Court that included a provision which reads, *inter alia*, that 'Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular they shall not when holding the office of judge be a member of the legislative or executive branches of the Government of a state [...]'.¹³⁶

The fact that there is both state practice and *opinio juris* precluding an international judge from being a member of a municipal executive organ, points to the existence of an international custom which would preclude Judge Benito from remaining as

¹³² Allain (note 23) 6.

¹³³ Article 132 of the Constitution of Costa Rica makes it clear that an individual may not hold positions within judicial and executive branches at the same time. Allain *ibid* 7.

¹³⁴ Allain (note 23) 8. The International Tribunal for the Law of the Sea incorporates verbatim the provision of Article 16 (1) of the ICJ Statute. It denies the issue further by stating: 'no member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration of the resources of the sea or the sea-bed or other commercial use of the sea or the sea-bed'. See Article 7, United Nations Convention on the Law of the Sea.

¹³⁵ Allain (note 23) 10.

¹³⁶ *Ibid*. See Article 10 (1) and (2) of the International Law Commission draft Statute on the International Criminal Court contained in *Yearbook of the International Law Commission* Vol II (Part 2) (1994) 32. In its Commentary to this article, the ILC amplifies on its understanding that a judge is not to be 'a member of the legislative or executive branches'.

a judge on the ICTY. ¹³⁷ Special Rapporteur Kumaraswamy stated in his Report in 1985:

the concepts of impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence lead to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.¹³⁸

Apart from the requirement that an international judge should not hold office within the executive organ of a state, Judge Odio Benito's election as Vice President of Costa Rica seems to create an additional conflict of interest. It is the President and cabinet of Costa Rica who are 'responsible to direct the international relations of the Republic'.¹³⁹ By virtue of her position as Vice President, Judge Benito would have a large say in guiding the foreign policy of that Republic. The conflict which emerges at the international level is that, in theory, Judge Benito, in her capacity as vice president, could influence the functioning of the ICTY and could potentially adversely affect the rights of the accused in the *Celibici* case. Although it was unlikely that the judge would have used her influence in such a way, it should be stressed that the mere existence of a possible conflict of interest should lead to a judge recusing herself. The test for impartiality is, once again, not actual bias but the appearance of bias.

The ability to affect the functioning of the Tribunal by influencing the life-span of the Tribunal might be justification enough for not allowing the Vice President of a state holding a seat on the Security Council to remain as an ICTY judge. The Security Council has, however, gone beyond the recommendations of the UN Secretary General and has interfered with the functioning of the Tribunal. Security Council Resolution 1126 involves itself directly with the *Celibici* case and directly refers to Judge Benito. The resolution:

[e]ndorses the recommendation of the Secretary General that Judges Karibi-Whyte, Odio-Benito and Jan, once replaced as members of the Tribunal, finish the *Celibici* case which they have begun before expiry of their terms of office; and takes note of the intention of the International Tribunal to finish the case before November 1998.¹⁴⁰

Allain concludes that this means that the Security Council has used its ability and demonstrated its willingness to use that competence to legislate over the ICTY. Since a judiciary is typically self-regulating it is up to the judges themselves to determine if a peer is in a situation of conflict of interest or if the independence of

¹³⁷ Allain (note 23) 12.

¹³⁸ Report of Special Rapporteur submitted in accordance with Commission on Human Rights Resolution 1994/4 6 Feb 1995 UN Doc E/CN 4/1995/39 para 35.

¹³⁹ Article 14 (2) of the Constitution of the Republic of Costa Rica.

¹⁴⁰ UN Doc S/RES/1126 (1997).

the judiciary might be threatened.¹⁴¹ In the context of the Odio Benito case, Morrison writes that self-disqualification sends out a clear signal of independent integrity.¹⁴² Simply the appearance that a judge may be in violation of conventional and customary norms of the law governing judicial independence should be enough to have an international judge step aside.

(iii) Judge Robertson

In 2004 the Special Court for Sierra Leone heard a motion for the recusal of the President of the Court, Judge Geoffrey Robertson.¹⁴³ Defence Counsel for the accused, Issa Hassan Sesay, sought the permanent removal of Robertson from the Special Court on the basis of comments made by Robertson about the Revolutionary United Front (RUF) in his book *Crimes Against Humanity*.¹⁴⁴ In his book Robertson accused the RUF of committing such crimes as torture,¹⁴⁵ pillage, rape, looting, amputation and mutilation.¹⁴⁶ The application of the Defence Counsel claimed that the statements in *Crimes Against Humanity* demonstrated grave bias or gave rise to the appearance of bias.¹⁴⁷ The Defence demanded that Judge Robertson must either withdraw under Rule 15 (A) or, failing withdrawal, the Appeals Chamber must disqualify him.¹⁴⁸ Subsequently, Robertson was not only removed from the RUF cases on 13 March 2004 but he was removed as President of the Court. The manner in which he was removed was by an amendment to Rule 18 of the Rules of Procedure and Evidence. This amendment reduced the term of the President from three years to one year. The judges inserted a new sub-rule, Rule 18(E), which stated that the Rule shall be deemed to enter into force on 7 March 2003. This meant that Judge Robertson's term as judge was complete.

iii) Judge Mumba

Another ICTY judge whose independence was questioned because of her extra-judicial involvements was the Zambian judge, Florence Mumba. Judge Mumba was a member of Trial Chamber II and presided over the *Furundzija* trial. On 10 December 1998 Anto Furundzija was found guilty of two counts of violations of the laws or customs of war. Furundzija appealed the judgment and on 3 February 1999 submitted an application pursuant to *inter alia* Article 13 (1) of the Statute and Sub-rules 15(A), 15(B) and 15(F) of the Rules, requesting the disqualification of Judge Mumba. Counsel for the Defence claimed that Judge Mumba should be

¹⁴¹ Allain (note 23) 16.

¹⁴² Morrison (note 34) 120.

¹⁴³ Cockayne (note 3) 1154.

¹⁴⁴ Robertson (note 90). See Cockayne *ibid* 1155.

¹⁴⁵ Robertson *ibid* 466.

¹⁴⁶ In addition he described Charles Taylor as the RUF's 'sponsor' and Foday Sankoh as 'the nation's butcher'. *Ibid* 220. Robertson wrote that the RUF is 'guilty of atrocities on a scale that amounts to a crime against humanity [which] must never again be forgiven'. *Ibid* 469.

¹⁴⁷ *Prosecutor v Issa H. Sesay*, Decision on Defence Motion seeking the Disqualification of Judge Robertson from the Appeals Chamber SCSL-2004-15-AR15, 13 March 2004 para 2, 4

¹⁴⁸ *Ibid* para 2, 6.

disqualified because she had previously been a member of the United Nations Commission on the Status of Women (UNCSW).¹⁴⁹ The Appellant asserted that Judge Mumba had a personal interest in the case ‘and a number of associations concerning it’ which may have affected her impartiality.¹⁵⁰

The Bureau¹⁵¹ (the body which decides on matters of disqualification and which consists of the President, Vice President and Presiding Judges of the Trial Chambers) of the Tribunal found that it had no competence in the matter and therefore dismissed the application and the Motion without ruling on the merits. The Bureau found that an application for disqualification should be made during the trial up to the time the judgment is rendered. The Bureau did, however, consider that the issue of whether Judge Mumba should have disqualified herself for the trial of Anto Furundzija ‘would be relevant for the fairness of that trial’.

The question of Judge Mumba's alleged impartiality was addressed extensively in the *Furundzija* Appeals Chamber Decision. The Appellant submitted five grounds of appeal. The fourth ground of Appeal was that presiding Judge Mumba should be disqualified. In setting out the factual basis for the allegations made by the Appellant the Appeals Chamber stated that for a period prior to her election as judge, Judge Mumba was a representative of the Zambian government on the UNCSW.¹⁵² The Chamber stated that at no time was she a member of the UNCSW while at the same time serving as a judge of the ICTY.¹⁵³ This fact distinguishes her case from that of Judge Odio Benito who was Vice President of Costa Rica while being a judge in the *Celebici* case. During Judge Mumba's membership of the UNCSW, the war in Yugoslavia and specifically the allegations of mass and systematic rape was one of the concerns of the Commission.¹⁵⁴

¹⁴⁹ In the *Furundzija* Appeals Chamber decision, the section ‘Fourth Ground of Appeal’ (paras 164 - 215) deals with the question of recusal, namely whether or not Judge Mumba, the Presiding Judge in the trial, was impartial because of her former involvement with the UN Commission on the Status of Women. See *Prosecutor v Furundzija* IT-95-17/1-A, 21 July 2000.

¹⁵⁰ Decision on Post-Trial Application by Anto Furundzija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to vacate Conviction and Sentence, and Motion for a new Trial, 11 March 1999. Bureau Decision pursuant to Rule 15 stating (1) that a motion for disqualification of a Judge of a Trial Chamber must be submitted before the Trial Chamber has rendered its judgment, (2) that the issue is relevant to the fairness of the trial, and (3) that the Bureau has no competence in this issue.

¹⁵¹ The Bureau consisted of President Kirk McDonald, Judges Jorda, Rodriguez, Hunt and Bennouna. See ICTY Rule 23 for the definition of the ‘Bureau’.

¹⁵² *Furundzija* (note 149) para. 166.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* para 167. It is stated in the judgment that this concern was exhibited in resolutions which condemned the practices of mass and systematic rape and it urged the International Tribunal to give them priority by prosecuting those allegedly responsible. The resolutions referred to are ECOSOC Resolution 38/9, ECOSOC Resolution 37/3 and ECOSOC Resolution 39/4.

The matter becomes even more interesting because three authors of one of the *amicus curiae* briefs¹⁵⁵ later filed in the *Furundzija* case and one of the Prosecutors in the case, Patricia Sellers, attended the Expert Group Meeting following the UN Conference on Women held in Beijing and had been involved in the activities of the UNSCW.¹⁵⁶ The Appeals Chamber stated that the extent of contact the three authors and Prosecution lawyer might have had and its impact on the trial is disputed.¹⁵⁷ The Appellant submitted that because of Judge Mumba's personal interest in, and association with, the UNSCW and with the three authors and Prosecution lawyer she should have been disqualified under Rule 15 of the Rules. The Appellant argued that the test which should have been applied is whether 'a reasonable member of the public, knowing all the facts [would] have come to the conclusion that Judge Mumba has *or had* any associations which *might* affect her impartiality'.¹⁵⁸ The Appellant emphasised that he did not allege that Judge Mumba was actually biased.¹⁵⁹ The issue was whether a reasonable person could have an apprehension as to her impartiality.¹⁶⁰ The Appeals Chamber stated that the Appellant's contention that Judge Mumba was 'personally involved' in promoting the cause of the UNSCW had no basis since the Appeals Chamber was of the view that Judge Mumba acted as a representative of her country and therefore served in an official capacity.¹⁶¹ Representatives of the UNSCW are selected and nominated by their governments.¹⁶² In addition the founding Resolution of the UNSCW does not provide for its members to serve in such personal capacity. Judge Mumba's view presented before the UNSCW would be

¹⁵⁵ The identity of the authors of the brief is not stated in the *Furundzija* Appeals judgment (note 149). Para 167

¹⁵⁶ *Furundzija* (note 149) para 167, 168. Two organisations that were granted leave to file the same *amicus curiae* brief - the International Women's Human Rights Law Clinic and the International Centre for Human Rights and Democratic Development - were participants in the Beijing World Conference on Women that ratified the Platform for Action of the UNSCW in September 1995. As colleagues on the UNSCW and proponents of the Platform for Action, Judge Mumba and these organisations shared, or at least appear to have shared, the interest and goals of the UNSCW.

¹⁵⁷ *Ibid* para. 168.

¹⁵⁸ *Ibid* para 169.

¹⁵⁹ *Ibid* para 170 and Appellant's Reply 48.

¹⁶⁰ *Ibid* para 49. The Appeals Chamber quoted the 'reasonable apprehension' test used by the Supreme Court of South Africa in the *South African Rugby Football Union* case. The court in this case found: 'The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.' *President of the Republic of South Africa and others v South African Rugby Football Union and Others, Judgment on Recusal Application*, 1999 (7) BCLR 725 (CC), 3 June 1999, para 48. The court also referred to the *Webb* case in which the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a 'reasonable apprehension of bias'. *Webb* (note 16).

¹⁶¹ *Ibid* para 198.

¹⁶² *Ibid* para 199.

treated as the view of her government.¹⁶³ The Appeals Chamber found that there was no substance in the Appellant's allegation and this ground of appeal failed. What is the connection between the *Furundzija* case and Judge Mumba's membership of the UNSCW? The Trial Chamber convicted Furundzija, *inter alia*, of the crime of outrages upon personal dignity, including rape.¹⁶⁴ The appellant alleged that Judge Mumba's decision (in *Furundzija*) in fact promoted specific interests and goals of the commission.¹⁶⁵ He stated that Judge Mumba advocated the position that rape was a war crime, and encouraged the vigorous prosecution of persons charged with rape as a war crime. He claimed that the expanded definition of rape which emerged in the judgment, reflected the views of the Expert Group meeting at which Judge Mumba was present.¹⁶⁶

The matter of Judge Mumba's alleged lack of impartiality can be compared to Lord Hoffmann's conflict of interest in the *Pinochet*¹⁶⁷ case. One of the appeal judges, Lord Hope stated that in view of Lord Hoffman's links with Amnesty International as the chairperson and director of Amnesty International Charity Limited he could not be seen to be impartial.¹⁶⁸ Amnesty International was admitted to the proceedings in *Pinochet* as *amicus curiae*. Amnesty International campaigned strongly against Senator Pinochet and supported his extradition to face trials for his alleged crimes. Lord Hoffmann, it was held, had an interest in the outcome of the present proceedings because he had some involvement with Amnesty International Charity Limited which, in turn, had a close relationship with Amnesty International Limited. The Law Lords decided that the links between Lord Hoffmann who sat on the original panel that ruled to allow General Pinochet's extradition and the human rights group Amnesty International, which had campaigned strongly against Pinochet, were too close to allow the verdict to stand.¹⁶⁹ In spite of the fact that he had no financial or pecuniary interest in the outcome, his relationship with Amnesty International was such that he was acting as a judge in his own cause. Another Appellate Judge, Lord Hutton, said that the links between Lord Hoffman and Amnesty International were so strong 'that public confidence in the integrity of the administration of justice would be shaken if his decision was allowed to stand'.¹⁷⁰

¹⁶³ Ibid.

¹⁶⁴ Ibid para 275.

¹⁶⁵ Appellant's amended brief para 135. See *Furundzija* (note 139) para 206.

¹⁶⁶ Ibid para 116.

¹⁶⁷ *Pinochet (No 2)* (note 15) 291.

¹⁶⁸ Ibid 291. See also BBC News 'Pinochet Judge Under Pressure' 15 January 1999, www.news.bbc.co.uk/1/hi/uk-politics, website visited on 15 January 1999.

¹⁶⁹ *Pinochet (No 2)* (note 15) 294.

¹⁷⁰ See also the article by Dyer which stated that Lord Hoffman's failure to declare his links with Amnesty International damaged the standing of the House of Lords as a court in the eyes of the world. The paper stated: 'apart from revealing a serious and elementary error of judgment on the part of one of Britain's most senior judges, it exposed for the first time what had gone largely unnoticed: the extent to which justice is a lottery in Britain's highest court. Had Lord Hoffman disqualified himself and a different judge sat, the result could have gone the other way.' C Dyer 'Pinochet case sets international precedent' *The Guardian* 2 March 2000

Amnesty's interest in the case was not financial but lay in refuting Senator Pinochet's claim of immunity and securing his eventual trial for crimes against humanity. The principle against bias is not limited however to financial interests: 'the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties'.¹⁷¹ According to the House of Lords, the *Pinochet* case fell under the category of cases where a judge is to be automatically disqualified if there is an interest in the case.¹⁷² Interestingly, Jones is of the opinion that *Pinochet (No 2)* should not be interpreted as precluding judicial involvement in activities outside the courtroom and that the public may not want judges to inhabit a 'judicial Olympus'.¹⁷³ Because judicial decision making often involves taking community views into account, some measure of involvement in public activities may not be undesirable.

The first important difference between the cases of Judge Hoffmann and Judge Mumba is that whereas Lord Hoffmann was at the time of the Pinochet hearing a director of Amnesty International Charity Ltd, Judge Mumba's membership of the UNCSW was not contemporaneous with her tenure as judge in *Furundzija*. A second difference would be the argument that the close link between Lord Hoffmann and Amnesty International is absent in *Furundzija*. Lord Browne-Wilkinson stated that '[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to parties'.¹⁷⁴ Although Judge Mumba's connection to the UNSCW was weaker than Lord Hoffmann's to Amnesty International, it is important that the requirement of disclosure of interests in a case, and the appearance of impartiality be taken seriously.

A similar question regarding recusal arose in the context of the Special Court for Sierra Leone. A motion for the recusal of Judge Renate Winter was filed which argued that the appearance of bias was created from the fact that in hearing the child soldier recruitment issue, the Appeals Chamber received an *amicus curiae* brief from UNICEF. Judge Winter had previously acknowledged that she assisted in the preparation of UNICEF publications addressing the issue of child soldier recruitment. In addition Judge Winter refused to provide details of her relationship with UNICEF. In deciding the matter, the court referred to the presumption of judicial independence and that the burden for displacing that presumption is high. The court ruled that merely commenting on a draft document does not give rise to an apprehension of bias sufficient to displace that burden. The court stated that a professional interest in a matter will also not rebut

¹⁷¹ *Pinochet (No2)* (note 15) 289I per Lord Browne-Wilkinson.

¹⁷² Jones (note 13) 395.

¹⁷³ *Ibid* 398. See also G Henry 'Pinochet: In search of the perfect judge' (1999) 21 *Sydney Law Review* 676-8.

¹⁷⁴ *Pinochet (No 2)* (note 15) 284.

the presumption.¹⁷⁵ Interestingly, the court took the contrary view and said that such factors may even demonstrate that a judge is qualified for judicial office.¹⁷⁶

9. Conclusion

In the context of the ICTY, Morrison writes that if the perception of the public is important in national courts, how much greater, 'in the overall amalgam of jurisprudence and lay confidence', is the need for a positive international perception of an international tribunal.¹⁷⁷ Judicial impartiality will dispel any impression of arbitrary decision making. The Canadian Judge Jules Dechenes wrote that the independence of the judiciary might appear to be a worn-out subject but that it must be constantly affirmed and defended since independent courts constitute 'the last bulwark' against the arbitrary infringements of the state.¹⁷⁸ If the international community constitutes a *Rechtsstaat* without being a state, international judges should be guided by the law and not by personal preference.

Independence requires that judges separate themselves from the policies of countries they represent. Although Scharf is probably unjustifiably critical of the *Milosevic* Bench, the appearance of impartiality remains important. Since its inception the ICTY has been accused of Eurocentrism.¹⁷⁹ This means that the Tribunals should be sensitive to this charge when composing its benches. It can be argued that the special circumstances surrounding Judge Odio-Benito's position justified the decision to allow her to finish hearing *Celebici*. Any interference of the Security Council in the work of the judges should nevertheless be resisted and questioned. The *ad hoc* Tribunals can help establish appropriate international standards for the recusal of judges. It is troublesome that judges as senior as the President of the Special Court for Sierra Leone have had to recuse themselves.

The independence of the judges and the institutional independence of the *ad hoc* Tribunals are inextricably linked. It is much more probable that the goals of the Tribunals, including the primary goal of restoring and promoting peace and reconciliation in Rwanda and the Balkans, will be achieved if the judges are perceived to be fair and neutral. Judicial independence has crucial implications for

¹⁷⁵ *Prosecutor v Sam Hinga Norman* Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, SCSL-2004-14-PT-112, 5 April 2004.

¹⁷⁶ *Ibid.*

¹⁷⁷ Morrison (note 34) 115. In the context of sentencing, the Appeals Chamber in *Celebici* noted that: 'Public confidence in the integrity of the administration of the criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions that are responsible for that administration.' *Prosecutor v Delalic et al*, IT-96-21, 16 November 1998, para 756.

¹⁷⁸ J Dechenes 'Towards an International Judiciary: Canadian and International Perspectives' in Shetreet & Dechenes (eds) (note 9) 514.

¹⁷⁹ Michael Scharf 'The Politics of Establishing an International Criminal Court' (1996) 6 *Duke Journal of Comparative and International Law* 168.

the lawmaking activities of the judges. The substantive and procedural law made by the Tribunals will only be perceived as legitimate if the judges are independent and impartial. A perception that judges are biased can undermine states' trust in and cooperation with the international criminal justice system.¹⁸⁰

¹⁸⁰ Cockayne (note 3) 1162.

CHAPTER FOUR

THE INSTITUTIONAL CULTURE OF THE ICTY AND ICTR

1. Introduction

Thomas Franck writes that every bench creates its own ‘cultural environment’.¹ The chapter will discuss the Chambers of the ICTY and ICTR as collegial bodies. From reading Tribunal judgments it seems as if the Tribunals speak as institutions rather than individuals. One reason for this is that the drafting of judgments at the Tribunals is often a collective effort. When reading these judgments, one mostly seeks in vain for the distinctive voice of an Oliver Wendell Holmes or a Learned Hand.

Individual judges have left their mark. The character and work of the Tribunals have been dominated by prominent judicial personalities such as Judges Cassese, Wald and Meron. To Wald it is clear that a judge’s origins and politics will influence his or her judicial opinions. She writes that judges’ minds are not compartmentalized and their law-declaring function cannot be performed by some insulated, apolitical internal mechanism.² The institutional culture of the Chambers is influenced *inter alia* by the professional backgrounds of the judges. In the early days of the ICTY’s work Geoffrey Robertson commented that Tribunal judges are mainly academics or long-serving appellate judges.³ The current group of Tribunal judges have more diverse personal and professional backgrounds. It remains instructive to look at whether the judges have experience in trying criminal cases or whether the judges are diplomats or judges with a more academic background in international law. It is also important to look at whether a judge is from a civil or a common law background.

Piercing the judicial veil is difficult. Whereas more outspoken judges, such as Judges Cassese and Wald have written extensively on their experiences as ICTY judges, most Tribunal judges have remained more reticent.

In addition to looking at the professional backgrounds of the judges, the chapter will also examine questions such as the role of Tribunal presidents in shaping the institutions, the composition of the Appeals Chamber and the bureaucratic nature of the Tribunals. The drafting process and the language issue at the Tribunals will also receive attention.

¹ T Franck *Fairness in International Law and Institutions* (1995) 320.

² P Wald ‘Some Thoughts on Judging as Gleaned from One Hundred Years of the *Harvard Law Review* and Other Great Books’ (1987) 100 *Harvard Law Review* 895.

³ G Robertson *Crimes Against Humanity* (2002) 288.

2. The Role of the Presidents

The Presidents of the ICTY and ICTR have the task set out in the Statutes of presiding over the proceedings of the Appeals Chamber.⁴ In addition to their role as leaders of the Tribunals, the Presidents have both an administrative and supervisory function. Their administrative function includes such functions as overseeing the Chambers and the functions of the Registry, representing the Tribunal at all meetings and consultations with national governments and being responsible for presenting the Annual Report of the work of the Tribunal to the UN Secretary General.⁵ They also have the more ideological task of providing the Tribunals with a longer-term vision or perspective and of leading the institution in accordance with such vision. The fact that the President presides over the Appeals Chamber puts him or her in a position of influence. Like the captain of a ship the President can direct the course of the Tribunal.

Cassese points out that Article 33 of the Statute also gives the Presidents a non-judicial role which can be described as a 'political' role.⁶ This is different from the position in national jurisdictions where (outside her judicial function) the President of a court usually only has an administrative and managerial task. Article 33 provides that the President is to report annually to the General Assembly and the Security Council. Part of the political function of the President is to encourage state cooperation. The President may also have to contact senior members of cabinet of the various states to persuade them to cooperate with the Tribunal.⁷ A Tribunal President's most important political function, according to Cassese, may be to call on the Security Council to take whatever measures necessary to compel non-compliant states to cooperate with the Tribunal. This means that the President is vested with 'diplomatic' functions which do not usually attach to courts.⁸

Article 14 confers certain administrative responsibilities on the President. Apart from presiding over the Appeals Chamber, the President has the important responsibility of assigning the judges to the various chambers after consulting with the judges. The President also performs important functions relating to the organization and coordination of the work of the Chambers and supervises the performance of various functions of the Registry.⁹ The President is to be elected by a majority of the judges.¹⁰ Singling out a few important contributions made by Tribunal Presidents gives one an idea of the *kinds* of influence Tribunal Presidents can have. Although the process at the Tribunals is perhaps driven more by

⁴ This task is spelt out in Article 14 (2) of the ICTY Statute.

⁵ See Curriculum Vitae of Judge Pillay (provided by Judge Pillay's secretary).

⁶ A Cassese 'The ICTY: A Living and Vital Reality' (2004) 2 *JICJ* 588.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See ICTY Rule 19.

¹⁰ Article 18 of ICTY Statute states that the President shall be elected by a majority for the votes of the Judges composing the Tribunal.

prominent personalities than necessarily by the figure of the President the following significant contributions stand out:

As first ICTY President, Judge Cassese is often praised for his pioneering work in making the paper tribunal work in practice. He grappled with issues such as state cooperation, funding and acceptance by the international community. Cassese can also be described as one of the more *political* Tribunal presidents.¹¹

As part of the completion strategy developed by him, Judge Jorda steered the ICTY in a civil law direction. Many amendments were made to the Rules during his Presidency.¹² Most of these amendments were aimed at expediting trials and reflected a strong civil law approach. These amendments are examined in Chapter 7.

The South African judge, Navanethem Pillay, served as President of the ICTR for two terms.¹³ As President of the ICTR, she was complimented on her management ability, the better organisation during her Presidency and the fact that more trials took place during this period. During her Presidency of the ICTR Judge Pillay was strongly concerned with the advancement of women's rights and the prosecution of sexual offences.¹⁴

Judge Meron, the previous ICTY President, was elected as the fourth President of the ICTY on 27 February 2003.¹⁵ Meron has been concerned with designing a completion strategy for the Tribunals. In order to achieve the aim of completing trials by 2008 he has emphasised the need for state cooperation.¹⁶ The current pre-occupation with an exit strategy for the ICTY is the result of the possibility of national courts in Balkans conducting trials (particularly through the newly established War Crimes Chamber) and substantial costs of maintaining the ICTY.¹⁷

¹¹Cassese has, on occasion, argued for the reimposition of sanctions against Bosnian Serbs. And in February 1995 he issued a press release on behalf of the judges in which they 'wished to express their concern about the urgency with which appropriate indictments should be issued' and continued to state that the judges 'were anxious that a programme of indictments should effectively meet the expectations of the Security Council and of the world community at large.' F Megret 'The Politics of International Criminal Justice' (2002) 13 *EJIL* 1277, 1278.

¹² See the article by G Boas 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 *Criminal Law Forum* 41.

¹³ She was elected President of the ICTR by a Plenary of Judges for a 2 year period in May 1999 and re-elected for second 2-year term in June 2001.

¹⁴ Interview with Judge Pillay, 27 April 2005.

¹⁵ The permanent Judges of the ICTY held an Extraordinary Plenary Session to elect successors to Judge Jorda and Judge Shahabuddeen. Press Release, The Hague, 27 February 2003, CC/PIS/753.

¹⁶ For more on the completion strategy, see D Raab 'Evaluating the ICTY and its Completion Strategy' (2005) 3 *JICJ* 82.

¹⁷ D McGoldrick 'Criminal Trials before International Tribunals: Legality and Legitimacy' in D McGoldrick, P Rowe, E Donnelly (eds.) *The Permanent International Criminal Court* (2004) 'Criminal Trials before International Tribunals' 28.

3. Common/Civil Law Backgrounds of Judges

The institutional culture at the *ad hoc* Tribunals is strongly influenced by the legal system that dominates its procedures. The judges of the ICTY decided to follow the adversarial approach followed by the Nuremberg and Tokyo Tribunals.¹⁸ An important reason for the choice of the adversarial model was the intellectual and psychological appeal of the Nuremberg and Tokyo models.¹⁹ The judges were steered into the adversarial direction by a US Memorandum containing a proposal of draft Rules.²⁰ As first ICTY President, Cassese explained the reasons for the adoption of the adversarial process by stating that, based on the limited precedent of the Nuremberg and Tokyo Trials and in order for the judges to remain as impartial as possible they would adopt a largely adversarial approach to procedure.²¹ Lawyers from civil law countries are likely to challenge the perception that the accusatorial system is necessarily a more impartial system than the inquisitorial system. It is interesting that Cassese, a civil lawyer, emphasised the impartiality of the adversarial system.²² Cassese writes that the Tribunals' choice to follow the adversarial system might provide a better safeguard for the rights of the accused.²³

The Belgian, French and Dutch systems have been described as 'moderately inquisitorial'.²⁴ In examining the legal systems of various national jurisdictions it becomes clear that no purely adversarial or inquisitorial system exists today. Instead, one finds an increasing convergence of the two systems.²⁵ Cassese suggests that the two models should therefore be understood as 'abstract intellectual constructs'.²⁶

The adversarial model leaves the establishment of judicial truth to a contest between the parties (usually to be settled by a jury). It is also fundamental to the

¹⁸ The adversarial system is also called the common-law or Anglo-American system and the inquisitorial system is also called the civil-law system or continental European system.

¹⁹ A Cassese *International Criminal Law* (2003) 384.

²⁰ *Ibid.*

²¹ *Statement by the President of the International Tribunal*, U.N. Doc. IT/29 (1994), reprinted in V Morris & M P Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* Vol 2 (1995) 649, 651.

²² It is interesting that, whereas the Tribunals started to introduce inquisitorial elements into the Rules for greater efficiency, Italy 'faced with the staggering inefficiency' of the former system, introduced an adversarial trial into its judicial system. See O Kavran 'The *Sui Generis* Rules of Procedure and Evidence' in R Haveman, O Kavran, J Nicholls (eds.) *Supranational Criminal Law: A System Sui Generis* (2003) 164.

²³ Cassese (note 19) 384. Cassese also commended the decision of the IMT to follow the adversarial system. See *Ibid.* 381.

²⁴ P de Hert 'Legal Procedures at the International Criminal Court' in R Haveman, O Kavran, J Nicholls (eds.) *Supranational Criminal Law: A System Sui Generis* (2003) 94.

²⁵ See A Orié 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings' in Cassese (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1441.

²⁶ Cassese (note 19) 365.

adversarial system that the rights of the accused should be protected as much as possible by laying down a set of strict procedural safeguards that act as a safeguard against abuses by the judiciary.²⁷ The essence of the inquisitorial system lies in the strong emphasis on public interest in prosecuting and punishment. In an inquisitorial system public institutions such as investigating judges and prosecutors play a significant role in the administration of justice. This means that less emphasis is placed on the role and rights of the accused.²⁸

Judge Wald summarised the difference between the two systems as follows: common law systems rely on the parties to make their case with the judge or jury as umpire and is characterised by detailed rules governing the admissibility of evidence in court. The civil law system, on the other hand uses an investigating judge to supervise the compilation of a dossier that can include more wide-ranging evidence than permitted at common law, to which the defendant responds at trial. The judge actively controls the direction of the trial and often directs the questioning.²⁹

Tomlinson writes that the chief strength of the inquisitorial trial lies in the efficient and generally fair trial based on a comprehensive dossier which informs the judge in advance of all the evidence in the case.³⁰ It is however generally acknowledged that individual rights, when confronted with the state's investigatory authority, enjoy less protection than in a common-law system such as the United States.³¹

In *Celibici* it was stated that the ICTY and ICTR Statutes consist of a 'fusion and synthesis' of the common law and the civil law traditions.³² Although the legal system applied at the Tribunals is often described as a 'mixed system' it is more accurate to describe it as essentially an adversarial system with only *some* civil law elements which were introduced for the purpose of expedition of trials.³³ Cassese writes that the Statute of the ICTY embodies and contains the fundamental features of the adversarial system.³⁴

Orie writes that Rules of Procedure and Evidence adopted by the ICTY judges created a typical common-law structured law of procedure.³⁵ Even though civil law elements have been introduced by some of the judges this does not affect the

²⁷ Ibid 375.

²⁸ Ibid.

²⁹ M A Glendon *et al. Comparative Legal Traditions* (1994) 179-83. See also G Nice 'Trials of Imperfection' (2001) 14 2 LJIL 384.

³⁰ E A Tomlinson 'Nonadversarial Justice: The French Experience' (1983) 42 *Maryland Law Review* 132

³¹ Ibid 133.

³² *Prosecutor v. Mucic et al.* IT-96-21 'Celebici Camp', 16 November 1998, para. 158.

³³ Cassese (note 19) 398.

³⁴ Ibid 384.

³⁵ Orie (note 25) 1492.

common-law backbone of the law of procedure.³⁶ The effect of the civil law changes to the Rules will be discussed more extensively in Chapter 7.

The ICTY Rules provide for a typical accusatorial type of trial which proceeds as follows: The parties deliver opening statements and then present their respective cases in a traditional common law order.³⁷ The proceedings diverge from the accusatorial order in that the Trial Chamber has the power under Rule 89 to order the parties to present additional evidence and to summon witnesses. This means that judges are more actively engaged in the search for truth than in a traditional common law system. In typical accusatorial fashion a party who called a witness can examine the witness followed by cross-examination and re-examination. (Rule 85b). Another departure from the adversarial norm is that ICTY judges have the power to put questions to a witness not only at the end of the proceedings but at any stage.³⁸ The introduction of a pre-trial judge (by Rule 65 *ter*) to help with pre-trial preparation is a feature that resembles the inquisitorial system. The powers of the pre-trial judge (including ordering the parties to file briefs containing information about the nature of the case they intend to present) can however not be compared to the extensive investigative powers of the civil-law judge. At the ICTY the pre-trial judge has no powers of investigation.³⁹

President Cassese stated that, in order to make ‘a conscious effort to make good the flaws of Nuremberg and Tokyo’, considerable efforts have been made to put both the prosecution and the defense on the same footing, with full disclosure of documents and witnesses on both sides. It was hoped that this would help to safeguard the rights of the accused and ensure a fair trial. He stated that two important adaptations have been made to the adversarial system: firstly the judges will be solely responsible for weighing the probative value of the evidence before them. The President continued:

Secondly the Tribunal may order the production of additional or new evidence *proprio motu*. This will enable us to ensure that we are fully satisfied with the evidence on which we base our final decisions and to ensure that the charge has been proved beyond reasonable doubt.⁴⁰

Prominent Tribunal Presidents from civil law traditions, such as Judges Cassese and Jorda, have left their imprint on substantive and procedural developments at the Tribunals. The increased use of pleabargaining at the Tribunals reflects the influence of common law ideas. Cassese's civil law background can be discerned in his unfavourable attitude towards pleabargaining⁴¹ and favourable attitude toward

³⁶ Ibid

³⁷ Ibid 1464.

³⁸ Ibid

³⁹ Ibid 1465. For a discussion of the role and position of the pre-trial judges, see Chapter 7.

⁴⁰ V Morris & M Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* Vol. 1 (1995) 651.

⁴¹ Separate and Dissenting Opinion, *Prosecutor v Erdemovic* IT-96-22-A, 7 October 1997, para. 10.

duress as a complete defence.⁴² He has also not been hesitant about expressing his views on such questions as the usefulness of national law in international prosecutions and the recourse to policy considerations by international courts.⁴³ The *Erdemovic* case is a good example of how the judges' adherence to civil or common law position led to a split in opinion. *Erdemovic* is discussed in Chapter 6.

In spite of such partisan behaviour by the judges, Judge Wald writes that the ICTY has set a model for how international judges ought to behave and that tribunal judges view their role as transcending their national origins.⁴⁴ According to Megret international criminal tribunals allow an opportunity to symbolically test which of the Anglo-American or continental models of procedure will be most appropriate for adjudicating war crimes.⁴⁵ In his view the emergence of an 'international criminal procedure' will show which of the two systems is more faithful to the liberal idea of a rule of law.⁴⁶

At the ICC an attempt was made to strike a balance between the adversarial and inquisitorial systems. According to Orié the result of this compromise is that the basic elements of the procedure have lost their anchorage in a coherent system.⁴⁷ The drafters of the Statute have for example avoided the term 'guilty plea' and replaced it by admission of guilt. This means that the consequences of such an admission would be different from that of a guilty plea in common law. But it does not necessarily mean that a civil trial will follow. Significant powers are attributed to the judges. They can decide whether the interests of justice require a more complete presentation of the evidence. After making this assessment, the judges will decide on the type of trial that will follow.⁴⁸

4. Professional Backgrounds of Judges

In the early days of the Tribunals' work Geoffrey Robertson commented that judges elected to the ICTY and ICTR had inadequate judicial experience.⁴⁹ He said that 'none' had had any recent hands-on experience in criminal defence work. According to Robertson the eleven judges originally selected had a reasonable range of international law experience but lacked relevant human rights experience. In his opinion it was worrying that there was almost a total lack of any relevant experience or recent experience of defending accused persons which in

⁴² Ibid.

⁴³ On the question of the extent to which an international criminal law can rely on national law see paras. 1 – 6 of his Separate and Dissenting Opinion in *Erdemovic* *ibid.* On the question of policy considerations see paras. 47 – 49.

⁴⁴ P Wald 'An Appraisal from Within' (2004) 2 *JICJ* 473

⁴⁵ F Megret 'Three Dangers for the International Criminal Court. A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 244.

⁴⁶ Ibid.

⁴⁷ Orié (note 25) 1494.

⁴⁸ Ibid 1493. This is unusual in light of the fact that, in light of the the rulemaking power of the ICC judges has been curtailed. Ibid 1494.

⁴⁹ Robertson (note 3) 288.

Robertson's view, might be thought the most important qualification for a judge who has to decide factual issues based on identification evidence and witness credibility.⁵⁰

More recently however McGoldrick writes that the ICTY has been composed of experts in criminal law, human rights and civil liberties protection.⁵¹ Of the sixteen permanent judges and eight *ad litem* judges currently occupying the ICTY Chambers thirteen have significant judicial experience in their countries of origin.⁵² Some even have significant experience as *international* judges. Judge Shahabuddeen served as Senior Counsel in Guyana and as Judge of the International Court of Justice between 1988 and 1997.⁵³

The presence of judges with experience as diplomats has been criticised because trained diplomats have a tendency to reflect the views of their governments. The question of appearance of impartiality is particularly important in this context. What seems more problematic in practice is the fact that diplomat-trained judges lack court experience and might be unable to control parties in court. Those judges with courtroom experience are generally less easily fooled or tricked by the parties. Judges with extensive courtroom experience (such as Judges Hunt and Schomburg) have been said to be more firm with the parties and less flexible than the diplomats.⁵⁴

Although not formally required, judges who sit on Trial Chamber judgments should have previous trial experience. According to Judge Wald one cannot expect judges with backgrounds as law professors to make decisions on the admissibility of evidence and to decide on the relevance of evidence.⁵⁵ After her term at the ICTY ended she expressed her views on the need for academic requirements and judicial skill when she said: 'The court's image is that it is meant to develop

⁵⁰ Ibid

⁵¹ McGoldrick (note 17) 28.

⁵² The following permanent judges were judges in their various national jurisdictions before they came to the ICTY: Judge Camel A Agius (Malta); Judge Florence Mumba (Zambia); Judge Alphonsus Orie (The Netherlands); Judge Wolfgang Schomburg (Germany), Judge O-gon Kwon (South Korea); Judge Jean-Claude Antonetti (France), Judge Iain Bonomy (United Kingdom); Judge Kevin Parker (Australia); and Judge Andresia Vaz (Senegal). The following *ad litem* judges have had judicial experience: Judge Joaquin Canivell (Spain); Judge Krister Thelin (Sweden); Judge Hans Henrik Brydensholt (Denmark) and Judge Claude Hanoteau (France). This reflects the state of the Chambers at 16 July 2005.

⁵³ Biographical Note Judge Mohamed Shahabuddeen, www.un.org/icty/judges/shahabuddeen-e.htm.

⁵⁴ Interview with ICTY Prosecutor, August 2002.

⁵⁵ M Simons 'An American with Opinions Steps Down Vocally at War Crimes Court' *The New York Times*, 24 January 2002. However, by the start of 2002, out of 16 ICTY judges only three judges had little or no trial experience. One is Judge Wald's successor, Judge Theodor Meron who is an expert in international criminal and human rights law and Judge Liu Daqun who used to be China's ambassador to Jamaica and specializes in international law of the sea and thirdly, Mehmet Guney, also a former diplomat, from Turkey. See also the views of S Shetreet in *Judges on Trial* (1976) 58, 59.

notions of international laws and flesh them out. That's a very academic notion. But in the first place this is an international criminal court. You are dealing with putting people away for many years.⁵⁶ Judge Wald firmly believed that judges need to know how a courtroom functions and need to appreciate the basic elements of a crime and of evidence. In an article, written in 1987, she maintains that judges with no appellate experience should not sit in the Appeals Chamber which in turn reviews the decisions of experienced trial judges.⁵⁷ She emphasised that a fair trial by capable judges is indispensable to the Tribunal's reputation as a legitimate vehicle of international accountability. Wald believed that efficiency at the ICTY has been hampered by judges who are legal scholars or diplomats who are used to pondering fine points of international law but have little hands-on experience.⁵⁸

Provision has been made for representivity and diversity (both geographically and in terms of the experience required to serve on the court) in the Chambers of the ICC. As one of the requirements for judgeship, the Rome Statute requires a degree of expertise in the subject matter of the court. Two categories of candidates are created, those with criminal law experience and those with international law experience. Specific reference is made to international humanitarian law and the law of human rights.⁵⁹

Tribunal judges can be divided into three categories: academics, practitioners and civil servants. Judges who served as politicians or diplomats are categorised as civil servants. Some judges have straddled all three professions. Judge Shahabuddeen, for example, has had many years of judicial experience and has also served in the government of Guyana. The division is useful since it highlights the strengths (and weaknesses) of the judges. According to Steinitz the diversity among the judges is a way of claiming legitimacy through representivity.⁶⁰ Although a few prominent judges who sat as judges in the early years of the Tribunals' existence will be considered, the focus will be on the current incumbents.⁶¹

⁵⁶ She admits that a 'mix' is needed but that 'you would not take a professor of anatomy and put him into an operating theatre and say 'Now perform this brain surgery!'. Simons *ibid*.

⁵⁷ P Wald 'The International Criminal Tribunal Comes of Age' (2001) 5 *Journal of Law and Policy* 95.

⁵⁸ G Blewitt, Deputy Prosecutor of the ICTY, similarly complained that new Tribunal Judges lacked experience in criminal courts. Blewitt, an experienced Australian prosecutor, was subsequently reprimanded by the President of the ICTY, Claude Jorda. See Simons (note 55). Michail Wladimiroff- who served as defence counsel at the Tribunal, said the court required a mix. 'What is needed is know-how of criminal trials, knowledge of international law and overall management skills,' he said. 'Not all judges need to have the same experience.' Simons *ibid*.

⁵⁹ W Schabas *An Introduction to the ICC* (2nd ed 2004) 177. During an election there are two lists of candidates, one with a criminal law profile ('List A') and the other with an international law profile ('List B'). See the discussion in Chapter 3.

⁶⁰ *Ibid*.

⁶¹ This section will focus on Tribunal judges who held their positions in July 2005.

The academics

Judges Cassese, Li, Abi-Saab and Meron can be described as ‘Professor Judges’. Both in terms of his background and approach Cassese is one of the best examples of an *academic* Tribunal judge.⁶² Although Cassese was one of the most eminent Tribunal judges, he had no judicial experience before being appointed as the first President of the ICTY. He was well-known in Italy and internationally as an academic writer and international law professor. In addition to being an academic judge, Cassese is also an *international* judge. In his view it is important to appreciate that the Tribunals should apply and emphasise international law and not emphasise or show preference for the law of any one jurisdiction.⁶³

Judge Meron is another prominent academic judge. He is an internationally acknowledged expert in international criminal and human rights law and is one of the few judges on the ICTY who has very little trial experience. Before his appointment to the ICTY, he was the Charles L. Denison Professor of Law at New York University Law School.⁶⁴ He is widely regarded as a leading scholar in international criminal law, international humanitarian law and human rights.⁶⁵ Many believe that his published works served as a legal foundation for the international tribunals.⁶⁶

Judge Cassese is not the only Italian academic to have served on the ICTY. Judge Fausto Pocar was a Professor in International Law at the University of Milan, a position he held from 1976. He has a distinguished record in international human rights.⁶⁷

⁶² See *inter alia* his books *International Law in a Divided World* (Clarendon Press 1986); *Human Rights in a Changing World* (Temple University Press 1990); *Self-Determination of peoples: A legal Appraisal* (Cambridge University Press 1995); *Violence and Law in the Modern Age* (Princeton University Press 1988).

⁶³ Interview with Judge Cassese, 6 June 2003, Florence.

⁶⁴ Between 1991 and 1995 he was Professor of International Law at the Graduate Institute of International Studies in Geneva.

⁶⁵ See *Curricula Vitae of Candidates nominated by States Members of the United Nations*, UN Doc A/55/773.

⁶⁶ See *inter alia* ‘Extraterritoriality of human rights treaties’ (1995) 89 *AJIL*; ‘The time has come for the United States to ratify Geneva Protocol 1’ (1994) 88 *AJIL*; ‘The Martens Clause, principles of humanity, and dictates of public conscience’ (2000) 94 *AJIL*; ‘The Normative Impact on International Law of the International Tribunal for the Former Yugoslavia’ in Yoram Dinstein, Mala Taborg (eds.) *War Crimes in International Law* (1996); ‘The Humanization of Humanitarian Law’ (2000) 94 *AJIL*; ‘Convergence of International Humanitarian Law and Human Rights Law’ in *Human Rights and Humanitarian Law* (1997). See also his books *Henry’s Wars and Shakespeare’s Laws* (1993); *Bloody Constraint: War and Chivalry in Shakespeare* (1998).

⁶⁷ For more than a decade before joining the Tribunal, Pocar was a member of the Human Rights Committee, the treaty body responsible for implementing the International Covenant on Civil and Political Rights, Biographical Note, www.un.org/icty/officials/pocar-e.htm.

Ad litem Judge Christine van den Wyngaert is a good example of an academic judge. She was a Professor at the University of Antwerp in criminal law, criminal procedure and international criminal law from 1985 until taking up her position as *ad litem* Judge at the ICTY.⁶⁸ She served as *ad hoc* Judge at the International Court of Justice between 2000 and 2002.⁶⁹ Judge Albin Eser can similarly be described as an academic judge. Even though he spent sixteen years (1971 to 1988) as an Associate Judge of the Upper State Courts in Westphalia and Baden-Wurtemberg, his position as Director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg assures his standing as an academic judge.⁷⁰ In a similar fashion, *ad litem* Judge Bert Swart was for ten years a Judge of the Criminal Division in Amsterdam. He has held the position of Professor of Criminal Law at the University of Utrecht from 1980. He can therefore be described and a practitioner.⁷¹ Because of his prolific writing on international criminal law, he will be categorised as an academic judge here.

The practitioners

Some prominent judges from civil law jurisdictions have extensive courtroom experience. Most of the current Tribunal judges have been judges in their respective countries highest courts. A good example is the French Judge Jorda who served as ICTY President and as president of the Appeals Chamber who has had many years of courtroom experience as a magistrate and judge in France. Jorda is also a former prosecutor general at the Paris Court of Appeals.⁷²

Judge Schomburg, the first German judge to be appointed to the ICTY, also has extensive experience as a professional judge in Germany.⁷³ Judge Schomburg was a Public Prosecutor in West Berlin between 1974 and 1979, a judge in criminal matters before the Berlin Regional Court between 1984 -1986, a Senior Public Prosecutor in Berlin between 1986 and 1989 and a Judge at the Federal High Court in Karlsruhe between 1995 and 2000 The late Judge Richard May, had extensive courtroom experience and has a specific interest in evidence and procedure in criminal cases. He headed the Rules Committee, the committee which makes and amends Rules of Procedure and Evidence.⁷⁴

⁶⁸Judge van den Wyngaert was appointed as *ad litem* judge on 15 December 2003. She holds a PhD from the Free University of Brussels (1979). Biographical Note Ad Litem Judge Christine van den Wyngaert, www.un.org/icty/wyngaert-e.htm

⁶⁹ Judge van den Wyngaert was an *ad hoc* judge in the case *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* Preliminary Objections and Merits, Judgment, ICJ Reports 2002, 3. She was elected as a permanent ICTY judge in 2004 but only started in this position in November 2005.

⁷⁰ Biographical Note Ad Litem Judge Albin Eser, www.un.org/icty/officials/eser-e.htm

⁷¹ Biographical Note Ad Litem Judge Albert Swart, www.un.org/icty/officials/swart-e.htm

⁷² Biography of President Claude Jorda, www.un.org/icty/pressreal/biojorda.htm

⁷³See *Curricula Vitae* of candidates nominated by States Members of the United Nations, United Nations Document A/55/773.

⁷⁴ See www.fco.gov.uk

Judge Wald was one of the ICTY judges with the most extensive judicial experience.⁷⁵ In 1979 President Carter nominated her for a position on the U.S. Court of Appeals.⁷⁶ She was the first woman to sit on this bench and served as Chief Justice of this court from 1986 to 1991. Altogether she spent twenty years on the Court of Appeals. Between 1991 and her appointment to the ICTY in 1999 she was a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Wald is well known as a *criminal* lawyer. She was involved in policymaking in the field of criminal law and served on numerous commissions on issues relating to criminal justice.⁷⁷

Having served as an ICJ Judge between 1988 and 1997, Judge Shahabuddeen has significant international judicial experience. Judge Shahabuddeen has also held several important positions in the government of Guyana. He was Guyana's Minister of Legal Affairs between 1978 and 1987. He has also held the positions of First Deputy Prime Minister and Vice-President of Guyana.⁷⁸ One of Judge Shahabuddeen's most important contributions to international law is his book *Precedent in the World Court*.⁷⁹

The Korean Judge O-Gon Kwon was elected to the ICTY in 2001. Judge Kwon was a senior judge at the Taegu High Court. He has held a number of senior judicial positions within the Republic of Korea, specialising in criminal law.⁸⁰

Judge Kevin Parker hails from Australia and is one of the few Tribunal judges with significant experience as advocate and prosecutor. Parker served as Chief Crown Prosecutor for Western Australia after which he was appointed as judge to the Supreme Court of Western Australia.⁸¹ Judge Iain Bonomy from the United Kingdom is another judge with significant prosecutorial experience. As Queen's

⁷⁵Although prior to her appointment as ICTY judge she had no international *judicial* experience, her curriculum vitae testifies to extensive legal involvement beyond the borders of the U.S. Throughout the 1990's Judge Wald has been involved in Judicial Workshops and seminars in Eastern Europe. *Curriculum Vitae for Patricia McGowan Wald* (Addendum to UN Doc A/53/1042 Fifty third Session Agenda Item 166).

⁷⁶ Before this Judge Wald served as Circuit Judge in the United States Court of Appeals for the District of Columbia Circuit. Election of judges of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991. *Curriculum Vitae* *ibid*.

⁷⁷To highlight some of her many prolific positions: she was a member of the President's Commission on Crime in the District of Columbia between 1965 and 1966 and between 1966 and 1967 she was a Consultant on the President's Commission on Law Enforcement and Administration of Criminal Justice. In addition she was a Consultant for the National Advisory Committee on Civil Disorder in 1968, in 1969 she was a Consultant on the National Commission on the Causes and Prevention of Violence. Her involvement in social and policy issues is also illustrated by her position as Co-Director of the Ford Foundation Drug Abuse Research Project in 1970. *Curriculum Vitae* *ibid* 4, 5.

⁷⁸ See Curriculum Vitae, Judge Shahabuddeen, A/51/878.

⁷⁹ *Precedent in the World Court*, Cambridge University Press (1996).

⁸⁰ Biographical Note Judge O-Gon Kwon, www.un.org/icty/officials/kwon-e.htm

⁸¹ Biographical Note Judge Kevin Horace Parker, www.un.org/icty/officials/parker-e.htm

Counsel in the Crown Office he was involved in the presentation of the most serious criminal cases and represented the Crown in criminal appeals.⁸²

The civil servants

Judge Patrick Robinson (one of *the Milosevic* judges in Trial Chamber III) is a former deputy solicitor general in the Jamaican Attorney General's Department but has significant criminal law experience. He has also served as a member of the International Law Commission and the Haitian Commission on Truth and Justice. In 1991 he was President of the Inter-American Commission on Human Rights.⁸³

After having served as Judge of the High Court of Zambia between 1980 and 1989, Judge Florence Mumba held the position of Investigator-General (Ombudsman) for Zambia.⁸⁴ Before his appointment to the ICTY, Judge Liu Daquin was China's Ambassador in Jamaica. He also served in the Treaty and Law Department of the Foreign Ministry for many years. Mehmet Güney (the fifth member of the Milosevic bench) similarly spent many years in the Turkish Ministry of Foreign Affairs. Between 1989 and 1999 he was Turkey's Ambassador to Cuba, Singapore and Indonesia.⁸⁵

5. Composition of the Appeals Chamber

The absence of the right to appeal was one of the major shortcomings of the Nuremberg Trials. Article 26 of the Statute of the Nuremberg Tribunal clearly stated that the decisions were final and without the possibility for appeal.⁸⁶ At the ICTY this has been rectified and every accused, except for Slavko Dokmanovic who committed suicide in custody, has made use of this right.⁸⁷ In his Report the Secretary General described the right of appeal as a fundamental right.⁸⁸ Article 25 of the ICTY Statute affords both the convicted person and the prosecution a right to appeal on matters of fact and law. One can appeal against both conviction and

⁸² Biographical Note Judge Iain Bonomy, www.un.org/icty/officials/bonomy-e.htm

⁸³ Biographical Note Judge Patrick Robinson, www.un.org/icty/officials/robinson-e.htm

⁸⁴ Biographical Note Judge Florence Ndepele Mwachande Mumba, www.un.org/icty/officials/mumba-e.htm

⁸⁵ But Mehmet Güney is also an international lawyer who has served on the International Law Commission for many years. Biographical Note Judge Mehmet Güney, www.un.org/icty/officials/guney-e.htm

⁸⁶ After the establishment of the Nuremberg Tribunal the right of convicted persons to a review of the declaration of guilt or of conviction by a higher level of jurisdiction has been recognized in different international instruments, inter alia art 14 (5) of the ICCPR of 19 December 1966 and art. 2(1) of Protocol n. 7 annexed to the European Convention on Human Rights adopted on 4 November 1950. See the text of protocol n.7 in *ILM* (1985) 435. See P de Cesari 'Observations on the Appeal before the International Criminal Court' M Politi, G Nesi (eds.) *The Rome Statute of the International Criminal Court, A challenge to impunity* (2001) 226.

⁸⁷ See *Prosecutor v. Slavko Dokmanovic* IT-95-13. Dokmanovic committed suicide in custody on 28 June 1998.

⁸⁸ Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993) (S/25704), presented 3 May 1993, para. 116.

sentence and against final judgment and interlocutory decisions. This generous right to appeal is in the spirit of the civil law.⁸⁹

The ICTY and ICTY share an Appeal Chamber, an institutional feature which promotes consistency and continuity between the jurisprudence of the two Tribunals. Because the Appeals Chamber is concerned with legal questions that are generally of a more academic (and less factual) nature this is the obvious forum for the making of Tribunal law. To be suited for this task the judges selected for the Appeals Chamber are generally the most senior judges with firm academic backgrounds in international law. The absence of any 'outside' review or supervisory body exercising an appeal function adds to the prominence and influence of the Appeals Chamber. An important flaw in the ICTY system, however, is the fact that judges are not 'permanently' assigned to either a Trial Chamber or the Appeals Chamber. This means that it is possible that judges who sat on the bench of a Trial Chamber in a specific case can sit on the Appeal or Interlocutory appeal in that same case. This could clearly influence the independence and impartiality of a judge. It is unlikely that a judge would be impartial when reviewing his or her own decision.

Judge Wald writes that different members of the same tribunal, occupying the same corridor, sit both as trial judges and as appeal judges. In her view this affects the atmosphere or camaraderie between the judges. She writes that, no matter how modest or humble a judge may be, it may be difficult to be on perfect terms with those who has to correct your errors. She believes that knowing that one's decision may be overturned by the judge in the next room makes the task of judging even more difficult and also 'makes it near impossible for a sense of collegiate solidarity to develop as it would if first instance judges were structurally separated from the Appeals Chamber'.⁹⁰

According to Judge Wald the major constraint on appellate discretion is judicial collegiality, which involves the criticism by one judge of another judge's perceptions, values and logic.⁹¹ Wald made this statement in the context of the US system but it also holds true in the context of appellate decisionmaking at the Tribunals.

According to Hammond Judge Wald's 'remarkable appellate handiwork' calls to mind one of the fundamental deficiencies of the structure of the Tribunals.⁹² This

⁸⁹ Orié (note 25) 1474. However the appeal proceedings resemble common-law proceedings since an appeal is not a trial *de novo* and there are limited opportunities for presenting new evidence. Ibid.

⁹⁰ Wald (note 57) 391. Wald comments on 'the slightly awkward situation of a relatively small number of judges sitting both as trial and appellate jurists and ruling on each other's cases.' See her article 'Judging War Crimes' (2000) 1 *Chinese Journal of International Law* 195.

⁹¹ Wald (note 2) 905.

⁹²Hammond Testimony of Larry A. Hammond before the House International Relations Committee, February 28, 2002, 7. See www.house.gov/international_relations/107/hamm0228.htm

shortcoming is the absence of a separate and independent appellate court. In his view it is unrealistic that judges who must interact and cooperate with their trial and appellate colleagues on a daily basis would have the courage displayed by Judge Wald to reverse the decision of her colleagues in the Trial Chamber.⁹³

According to the Rome Statute the Appeals Division of the ICC will consist of the president and four other judges. Members of the Appeals Division are to serve their entire nine-year term in the Division. This arrangement is reflective of widespread dissatisfaction with the practice at the ICTY where judges move from one chamber to another during their terms. Judges assigned to the Trial and Pre-Trial Division may be rotated while those assigned to the Appeals Division will serve in that Division for the entire term of their office. The rationale for this is, of course, to avoid the possibility of a judge who had presided over a matter in the Pre-Trial or Trial Chamber, presiding over an appeal in the same matter in the Appeals Division.⁹⁴ All ICC judges (appellate and non-appellate judges) will share the same building and interact in the same environment.

6. On Bureaucracy and Remoteness

The expense of establishing and running the *ad hoc* Tribunals has caused commentators such as Zacklin to describe the tribunals as ‘extremely costly bureaucratic machines’.⁹⁵ The Tribunals have grown and grown. By 2005 the Tribunals reached elephantine proportions, with the total number of posts now exceeding 2 200 and their combined budget exceeding \$250 million.⁹⁶ As a result many donors have become fatigued and dissatisfied. The perception exists that this expenditure is not justified in attaining the principal task of bringing to justice those responsible for the most serious crimes in a timely and expeditious manner.⁹⁷ It can be asked whether the delays in bringing detainees to trial do not constitute a violation by the Tribunals of the human rights guarantees (particularly the right to a fair trial) contained in the ICCPR.

The International Crisis Group has commented on the slowness of trials at the ICTR in the following terms:

The poor output of the Tribunal is linked to the mediocre productivity of the judges, some of whom are incapable of running criminal trials...the selection of judges should be

⁹³ Ibid. Hammond believes that the ICTY would have been a better court, a court in which the accused could have had greater confidence if errors at trial received evenhanded appellate review. Ibid 7.

⁹⁴ M Rwelamira ‘Composition and Administration of the Court’ in R S Lee (ed) *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 158. See Art 39 (4) Rome Statute which provides for the rotation of judges.

⁹⁵ R Zacklin ‘The Failings of Ad Hoc International Criminal Tribunals’ (2004) 2 *JCIJ* 543.

⁹⁶ Ibid. See Chapter 1 on the funding of the Tribunals.

⁹⁷ Ibid.

more rigorously organised and that candidates who have not had solid experience as a judge in criminal affairs should be rejected.⁹⁸

Closely related to the bureaucratic nature of the Tribunals is their remoteness from the scenes of the crimes. The fact that the tribunals are situated far from the jurisdictions for which they were created means that victims and their families do not have access to the trials and impacts on the Tribunals' ability to bring about reconciliation.⁹⁹ The physical distance also leads to emotional or psychological distance.

Zacklin comes to the bold conclusion that the Tribunals have been 'too costly, too inefficient and too ineffective.'¹⁰⁰ As a result the international community is now looking for alternative methods of dispensing international justice such as mixed Tribunals.

7. Courtroom Aesthetics

This thesis is strongly concerned with accountability and legitimacy of the Tribunals. As in most domestic and international courts, the physical and aesthetic space in which the proceedings take place and the ritual and rhetoric employed by the Tribunals contribute to an atmosphere of authority and legitimacy. Elements such as the interior design of the court, the dress code and the particular rhetoric employed can add to the oracular value of judgments.¹⁰¹

The ICTY's modern UN-blue courtroom consists of a single large space in the centre of which three crimson robed Trial Chamber judges sit on an elevated platform. The judges are segregated from the audience by bullet-proof glass partition. In the back 'region' (behind the judges) are the holding room for the accused, robing rooms for the judges and a waiting area for the witnesses.¹⁰² Steinitz writes 'the judges reside in a forbidden city, from which they emerge at the commencement of the proceedings and into which they fade away at its adjournment'¹⁰³ The prosecution and the *amici* generally wear black robes. On occasion, English barristers have insisted on wearing wigs. The lack of uniformity in apparel and the multi-cultural Bench serves as a reminder of the diversity of legal systems represented in the Tribunal.¹⁰⁴ The judges represent not only the Tribunal but the entire international community.

⁹⁸See 'International Criminal Tribunal for Rwanda: Justice Delayed, An International Crisis Group Report', 7 June 2001, 11.

⁹⁹ Ibid 544.

¹⁰⁰ Ibid 545.

¹⁰¹ M Steinitz 'The Milošević Trial – Live!' (2005) 3 *JICJ* 109, 110.

¹⁰² See M P Scharf *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (1997) 84.

¹⁰³ Steinitz (note 101) 112. See also A Feldman 'The Sirens' Song: Discourse and Space in the Court of Justice' 1 *Theory and Critique* (1991) 143.

¹⁰⁴ Steinitz *ibid* 110.

As in Western courts generally, the verbal interaction enhance the authoritativeness of the judges' pronouncements. The speech patterns include use of the royal 'we', referring to themselves as 'the Chamber' and to each other as 'Judge' or 'President'.

The fact that Legal Officers and judges from Chambers and the Prosecution not only share a building but regularly fraternise at Tribunal parties and other social occasions could cast doubt on their independence.¹⁰⁵ The fact that the registry serves both the judges and the prosecutor has been described as the main organisational problem of the ICTY.¹⁰⁶ Sensitivity to the idea that justice should be seen to be done and fairness to the defence calls for a complete separation of the judicial from the prosecutorial function.

8. Babylonian Confusion? The Language Issue at the Tribunals

Judge Wald writes that the judges of the ICTY 'speak a dozen languages more fluently than the official French and English of the Tribunal.'¹⁰⁷ According to Article 33 of the ICTY Statute and Rule 3 of the Rules of Procedure and Evidence of the ICTY, the working languages of the Tribunal are English and French. This means that in the nomination process almost every judge from a common law background will qualify whereas few from civil law countries would be similarly qualified. This has influenced the selection of judges. Some argue that the language requirement places a limit on those who are eligible to be elected as judges and explains why some highly qualified judges from civil law jurisdictions are not considered for Tribunal judgeships.¹⁰⁸

Whereas most judges from common law countries have English as their mother tongue, it is difficult to find *judges* from civil law backgrounds who are proficient in English. Candidates from civil law countries who are proficient in English or French tend to be diplomats or academics. There are many important exceptions to this rule such as the French Judge Jorda and the German Judge Schomburg who are proficient in the languages of the Tribunals and both have practical experience. As illustrated in the section on 'professional backgrounds' they have both had many years of extensive courtroom experience. Because of this language barrier candidates from common law countries tend to have more judicial experience. Because of the difficulty in finding Chinese judges or prosecutors who are fluent in English, Chinese ICTY judges for example have always been diplomats. This lack of judicial experience amongst judges tends to be more problematic at the Trial stage than at the Appeals stage.

¹⁰⁵ This is reminiscent of the situation in Nuremberg where judges and prosecutors fraternised to the exclusion of German defense lawyers. Robertson (note 3) 300.

¹⁰⁶ Ibid.

¹⁰⁷ Wald (note 57) 92.

¹⁰⁸ Interview with ICTY Prosecutor, 2002.

Some such as Geoffrey Nice believe that the fact that the judges are required to be proficient in either English or French may amount to a form of 'cultural imperialism'.¹⁰⁹ It can be argued that because of its exclusionary nature, the language barrier makes the Tribunal less 'international'. Judge Wald's criticism is of a different kind: she believes that the lack of fluency in English and French and to an extent in the native languages of the witnesses and defendants at the Tribunal has turned out to be a greater obstacle that she would have anticipated.¹¹⁰ In her view the lack of a common language makes out-of-court communication less spontaneous and memorialising the proceedings more difficult. All internal memoranda have to be translated in French and English. Sending a document for official translation is time-consuming. According to her '[t]he translations of decisions and other documents prepared by the judges...[is] a major problem'¹¹¹ The translation of documents caused sufficient delays in ICTR trials that the Tribunal recently amended its rules to allow defendants to use outside translation services instead of relying on the ICTR translation section. Language difficulties can also impede the speedy issuance of judgments because the judges are not all fluent in English and French and prefer to work in the language in which they are proficient. Judges must wait for drafts of the Tribunals' lengthy judgments to be translated before they can be discussed.¹¹²

The *Akayesu* judgment shows how the ICTR judges had to wrestle with the subtleties in the way Rwandans expressed themselves.¹¹³ These subtleties made it difficult to tell whether witnesses had actually witnessed acts that they were reporting or whether they were reporting what others had seen and told them.¹¹⁴ Thus it is difficult to know whether the judges come to the correct conclusions concerning such culturally sensitive questions.¹¹⁵ The Trial Chamber in *Akayesu* noted that the interpretation of oral testimony of witnesses from Kinyarwanda

¹⁰⁹ Nice points out that the cultural base of English-speaking judges is narrower than the bases of those who have to work with a foreign culture. He believes that the development of the ICC, ICTY and ICTR may reflect a cultural imperialism not just of language. G Nice 'Trials of Imperfection' (2001) 14 *LJIL* 386.

¹¹⁰ An example of this is the fact that the defendant and his counsel may speak Serbo Croatian and the prosecution and their counsel speak French or English.

¹¹¹ See Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of neighbouring States between 1 January and 31 December 1994, U.N. ICTY, 56th sess, at para. 5 U.N. Doc. A/56/351-S/2001/863 (2001) (ICTR 2001 Annual Report) at para. 58 acknowledging that although the written judgment in the *Kayishema* appeal was ready in June 2001, 'it has not been made available for distribution, due to translation difficulties.'

¹¹² N A Combs 'Copping a Plea to Genocide: the Plea Bargaining of International Crimes' (2002) 151 *University of Pennsylvania Law Review* 101, 102. See also Cassese 'The ICTY: A Living and Vital Reality' (2004) 2 *JICJ* 595.

¹¹³ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, paras. 145-154.

¹¹⁴ J E Alvarez 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 404.

¹¹⁵ *Ibid.*

into one of the official languages of the Tribunal has been a great challenge since the syntax and everyday mode of expression in the Kinyarwanda language are complex and difficult to translate.¹¹⁶

Although the *ad hoc* tribunals have only two official languages, as a general rule they have been unable to issue judgments in both languages simultaneously. During ICTY trials interpreters provide simultaneous audio interpretations in English, French and Serbo-Croatian.

Nijboer points to the untranslatability of certain legal terms.¹¹⁷ How does one, for instance, translate a multifaceted term such as *due process*? It is difficult to translate a term that has both procedural and substantive connotations (such as *due process*) into a language other than English.¹¹⁸ Language problems such as these reflect differences in criminal law culture.

The language barrier at the ICTY and ICTR also affects the style, and possibly the quality of judgments. Cassese calls the difficulties inherent in having different working languages one of the inherent problems in international criminal justice.¹¹⁹

International criminal courts and tribunals are usually multilingual and have sought to regulate their language regimes in their Statutes or Rules. Rule 3 (A) of the Special Court for Sierra Leone states that the working language of the Court will be English. Rule 3 (C) makes provision for any person appearing before the court who is not proficient in English to use his or her own language.¹²⁰

The ICC has two working languages, English and French. According to the Statute the Tribunal may however designate other working languages on a case-by-case basis.¹²¹ In addition the court has six official languages: Arabic, Chinese, English, French, Russian and Spanish. The Rules provide that ICC judgments and decisions ‘resolving fundamental issues before the Court’ are to be published in the official languages.¹²² According to Schabas this requirement is consistent with United Nations practice but may become cumbersome in the case of judgments running into several hundreds of pages, as has been the custom of the *ad hoc* tribunals.

¹¹⁶ *Akayesu* (note 113) para. 145. For a discussion of the expressions used in Kinyarwanda for ‘rape’ see paras. 145 – 154.

¹¹⁷ Nijboer argues for the development of an artificial language. See Johannes F. Nijboer *Een verkenning in het vergelijkend straf- en procesrecht* (1994) 31.

¹¹⁸ De Hert (note 24) 92. De Hert states that French attempts to translate *due process* (including descriptions such as ‘*garanties légales suffisantes*’ or ‘*conformément au droit*’) do not do justice to the meaning of *due process*. *Ibid.*

¹¹⁹ Cassese (note 6) 593, 594.

¹²⁰ See Rules of Procedure and Evidence on the website www.sc-sl.org.

¹²¹ Rome Statute Art. 50 (2) See Schabas (note 60) 184.

¹²² Rules 40 and 43.

Article 39 of the ICJ Statute determines that the official languages of the ICJ shall be French and English. The parties are free to agree on whether the case shall be conducted in English or French. If the parties agree that a case shall be conducted in a certain language, the judgment shall be delivered in that same language. Article 39 (3) provides that the Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

9. Ghost-written Judgements? The Drafting Process

US courts have ‘stoutly defended themselves’ against charges that law clerks carry too much responsibility for preparing opinions.¹²³ It is said that contemporary US Supreme Court judges are merely ‘editor-Justices’. According to Edward Lazarus, a former Supreme Court clerk, judgments are ‘ghostwritten’ by the clerks and the judges merely edit the judgments and often display ‘excessive deference to the author.’¹²⁴ As a result some argue that contemporary Supreme Court Justices lack the distinctive voice of Holmes, Brandeis or Cardozo whose published opinions each bore the unique stamp of their great legal minds.¹²⁵ Drafting of this kind deprives commentators and the public from discovering how a judge reasons and comes to terms with the hidden complexities of a case. In his controversial book on the US Supreme Court, former Supreme Court clerk Edward Lazarus writes:

And it is here, in wielding the enormous power of the first draft and, specifically, in the selection of words, structure and materials, that clerks exercise their greatest influence. For while everything they write passes through the filter of the Judges’ scrutiny, this scrutiny is directed at an essentially complete product and often amounts to little more than a surface polish.¹²⁶

The idea of substituting the judgments of law clerks for those of judges makes many feel uncomfortable. Ideally a judge should retain responsibility for decisionmaking but the clerk must ‘carry the adversary process into the chambers’, forcing the judges to justify each step of the decision-making process.¹²⁷

¹²³ Wald (note 57) 93.

¹²⁴ E Lazarus *Closed Chambers, The first Eyewitness Account of the Epic Struggles Inside the Supreme Court* (1998) 272.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* 273.

¹²⁷ See J Bilyeu Oakley & R S Thompson *Law Clerks and the Judicial process, Perceptions of the Qualities and Functions of Law Clerks in American Courts* (1980) 37. Oakley and Thompson write that the traditional model of the relationship between law clerk and judge is expressed in the case *Fredonia Broadcasting Corp v. RCA Corp.*, 569 F. 2d 251, 255-56 (5th Cir. 1978):

A judicial clerkship provides the fledgling lawyer insight into the law, the judicial process, and the legal practice. The association with law clerks is as valuable to the judge; in addition to relieving him of many clerical and administrative chores, law clerks may serve as sounding boards for ideas, often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions.

At the ICTY the task of initially drafting the Chambers' judgments to a very considerable degree is frequently delegated to a pool of legal assistants who are commonly selected by the Presiding Judge or the Senior Legal Officers. There are two reasons for this: firstly, the fact that ICTY trials are long and often procedurally complex and secondly the fact that legal assistants are often assigned to Chambers as a whole, with only one junior legal assistant assigned to any individual judge.¹²⁸ Because of the magnitude of cases currently before the ICTY it may be argued that it would be impossible for a judge to do all the work herself or himself. More importantly, the vast amount of paperwork in each ICTY case might make it impossible for a judge to work without assistance. Tribunal judges have to consider thousands of pages of transcripts, affidavits, exhibits etc. The decision of the Croatian government, for example, to open and give the Tribunals access to the Croatian archives has led to an avalanche of new documentation being submitted as additional evidence in the *Blaskic* and other cases.

According to Judge Wald, if one reads some of the 'several-hundred-pages-long, format-stylized judgments' of the ICTY one can guess that many of the judgments are the work of a committee rather than an individual judge or judges.¹²⁹ Sometimes the staff assistants prepare first drafts with guidance from the judges who then review, revise and approve the judgment. But Judge Wald's experience has been that ICTY judgments are not the individualised one-on-one opinions of a federal trial or appellate judge in the United States. She makes her preference clear for such individualised judgments but writes that she recognizes the need for a division of responsibility in 'large-scale productions'. She believes that even though it is not necessary for a judge to write every word of a judgment herself, she sees the risk of losing control of the process if the judge does not monitor the process closely. The judge should define the issues and work out the reasoning and responsibility in advance with law clerks. In addition a judge should meticulously analyze, revise, and edit every draft presented to her.¹³⁰

Cassese is of the view that the Tribunal has reached a stage in its existence where judgments may be less lengthy and detailed.¹³¹ The reason for this is that the law laid down in the Statute has by now been sufficiently clarified and fleshed out by the various Chambers.¹³² He believes that the time has come for facts to be summed up more concisely and for the appraisal of evidence to be set forth more stringently.¹³³

Wald believes the purpose and format of a judgment is influenced by judicial culture. Whereas in the US the emphasis is on telling the parties why the judges

¹²⁸ Wald (note 57) 93.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Cassese (note 6) 596.

¹³² Ibid.

¹³³ Ibid.

came to a particular result in light of the relevant facts and law, in the culture of 'some of my new colleagues' (presumably those representing the civil legal systems) seems to accept a format which is more 'ritualistic' and seems to place less of a premium on putting forth the judges' reasoning as to how the law applies to the facts and making this transparent. The author of the judgment is not identified in the judgments and it is signed by the presiding judge or by three judges. Except in the case of Dissenting Opinions, it is therefore left to the *cognoscenti* around the Tribunal to make informed guesses. For these reasons ICTY judgments are often criticised for being stilted, bureaucratic, and insufficiently reasoned, making them largely inaccessible to the reader and frustrating to the press and legal scholars trying to analyse them. Judge Wald suggests that legal officers should be assigned to individual judges and that judges should be given specific responsibility for drafting the entire or at least a significant part of the judgment and that judgments would profit from being shorter than their current length.¹³⁴

According to a Senior Legal Officer at the ICTY, the drafting practice varies from Chamber to Chamber. In Trial Chamber 3,¹³⁵ for example, no staff is involved in the deliberations. But in another Chamber staff is involved in the deliberations. The degree of personal involvement will also tend to depend on the judges themselves and the presiding judge of a Chamber. In some Chambers there is an open discussion with staff members and the staff members will work as a team. There seems to be no uniform practice of drafting judgments. In Trial Chamber 2 the idea is that during each pre-trial case one Associate Legal Officer is primarily responsible for keeping an eye on developments. Whereas a Senior Legal Officer can have an impact on the distribution of the pre-trial work there is less involvement by Senior Legal Officers in the actual trial stage. During the trial the Judge, Associate Legal Officer and Legal Officer work as a team. The drafting of judgments proceed in two phases: a factual analysis and a legal analysis. In terms of the distribution of work it does not seem that the legal analysis 'carries more weight.' The relationship between the judge and the chamber depends very much upon the personality of the judge. Some judges, such as Judge Hunt, seems to have a very hands-on approach and seem to be more directly involved in the drafting process. Other judges rely more on their staff.

Judge Wald has written much on the subject of judicial writing. She emphasises the need for providing reasoned decisions as one of the ways in which judges justify their power over citizens.¹³⁶ She also emphasises the 'quest for credibility and consistency' as a reason why judges should write opinions. She has been critical of the practice of US courts to dispose of opinions because of the pressure of accelerating caseloads. US courts are turning out more and more unpublished

¹³⁴Wald (note 57) 94.

¹³⁵ Interview with Senior Legal Officer, ICTY, 8 April 2003. This comment reflects the state of Chambers on this date.

¹³⁶P Wald 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 *University of Chicago Law Review* 1372.

cases. The need for a court to rationalise its results becomes more important the higher a court's place in the judicial hierarchy.¹³⁷ Cassese believes it is good if one judge drafts the whole judgement taking into account the views of other judges.¹³⁸

With regard to her personal drafting style, Judge Pillay says that she wrote most of the *Akayesu*¹³⁹ and the '*Media*'¹⁴⁰ cases, two of the judgments she feels most proud of. In the *Media* case her Senior Legal Officer and a Registry Consultant contributed to the writing. On occasion the research done by some legal officers is presented or written in such a focused way that it may be incorporated into the judgment. On a three judge bench, however the views of all three judges are influential.¹⁴¹ The Presiding judge uses the ideas, deliberation and the words of other judges in her judgment.

Although the drafting process at the ICTY is often dominated by one judge (most commonly the presiding judge) ICTY judgments seem to reflect more the voice of an *institution* than the views or voices of individual judges. Other international courts such as the European Court of Human Rights also have a more technocratic drafting style. The language of the judgments of the European Court are moderate and understated and perhaps influenced more by civil law. The European Court's judgments are drafted by drafting committees consisting of three judges. The style of the Inter American Court of Human Rights, on the other hand, is grander and more colourful even though it still speaks as a *court*.¹⁴²

It has been argued that the drafting of international judgments, because they are still fairly limited in number compared to domestic judgments, is more important than the drafting of domestic judgments.¹⁴³ Judgments of the ICJ are first drafted by a Committee and the Judgment is the result of the 'prolonged collective effort' of the Court as a whole. Because the ICJ decides fewer cases than national courts the judges enjoy the luxury of having more time for reflection. This method of drafting provides a means of reconciling the diversities of judicial opinion present in an international court.¹⁴⁴ It therefore does not seem that the fact that international courts speak as institutions necessitates a technocratic style of drafting.

¹³⁷ Ibid 1375.

¹³⁸ Interview, June 2003, Florence.

¹³⁹ *Akayesu* (note 113).

¹⁴⁰ *Prosecutor v. Nabimana et al.* ICTR-99-52-T, 3 December 2003.

¹⁴¹ Interview with Judge Pillay, 27 April 2005.

¹⁴² See for example *Velázquez Rodríguez v. Honduras*, Inter-American Court of Human Rights (series C), July 29, 1988, No. 4.

¹⁴³ E Hambro 'The Drafting Procedure of the International Court of Justice' (1968) Vol. XII Part III *The Yearbook of the School of Law and Economic Science* 341.

¹⁴⁴ See H Lauterpacht *The Development of International Law by the International Court* (1958) 65.

10. Obiter Statements

On the question of whether courts should limit themselves to simply laying out their view on a matter or whether courts should provide reasons for their judicial findings, Cassese believes that too many international courts take an oracular approach by stating their legal views ‘through propositions written as if they were enunciating necessary and absolute truths’, without explaining the foundations upon which their views are grounded.¹⁴⁵ Cassese highlights an important reason why international courts have more reason to engage in *obiter dicta*. Because of the lack of an international lawmaker international courts need to spell out the contents of rules - one way of doing this is through *obiter dicta*.¹⁴⁶

Cassese has addressed the interesting question of whether the Tribunals should exercise judicial restraint and confine themselves to passing judgement solely on the legal issues raised by the parties or whether, through *obiter dicta*, they should also address issues which are incidental to the main questions of law but the clarification of which might have value for the future development of international criminal law.¹⁴⁷ He believes that *obiter dicta* can be good for development of new law.¹⁴⁸ But he is aware that there may be a point at which Tribunal judges could be described as of being *too* creative.¹⁴⁹

Like Judge Cassese, Wald has strong views on the role of *obiter* statements or ‘dicta’. Wald’s comments in this regard were made in the context of her experience in US courts but can be applied to the context of international adjudication. She writes that dicta are useful for the development of law because one judge’s dicta may be another judge’s coherent rationale. Everything in an opinion which does not strictly involve the application of a legal principle to the critical facts is dicta.¹⁵⁰

11. Conclusion

The Appeals Chamber is the arena of Tribunal lawmaking. From an international lawmaking point of view it is the appellate judges who are the most interesting and influential. A balance exists between academic heavyweights such as Cassese and judges with substantial and longstanding domestic court experience such as Wald. Whereas Judges Cassese, Meron and Shahabuddeen (who can be described as

¹⁴⁵Cassese (note 6) 590.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 589.

¹⁴⁸ A subheading in an article in which he discusses this phenomenon reads: ‘Judicial Restraint versus Profusion of *Obiter Dicta*: Too Much Judicial Creativity?’.

¹⁴⁹ Ibid. Cassese mentions the following examples of lengthy and elaborate *obiter dicta* by the Tribunals: the *Furundžija* Trial Chamber decision (paras. 159-164) considered at length the notion of torture and its legal implications, in the *Kupreskić* case (paras. 134-164) the Trial Chamber discussed the issue of *tu quoque* and other defences (paras. 515-520), in *Blaskić* the Appeals Chamber examined the question of the immunity of state officials (paras. 39-43).

¹⁵⁰ Wald (note 136) 1410

modern day ‘fathers of international criminal law’) focus on the humanitarian function of the Tribunals and have grappled with the questions surrounding the legitimacy and place of lawmaking in the international arena, Judges Wald and Pillay have taken a more pragmatic approach and have focused on procedurally correct outcomes and the best solutions considering the available evidence and law.

When reading ICTY judgments one rarely recognises the distinctive voice of an individual judge. ICTY judgments seem to reflect the voice of the institution more than the voices of individual judges. Perhaps as a result of this, ICTY judgments have been criticised for being stilted, bureaucratic and impersonal.¹⁵¹ There have been very few instances of dramatic dissenting opinions – opinions which challenge the substance or pith of a judgment or contentious issue in international law. Instead, dissenting opinions often focus on procedural issues or issues which are not central to the majority decision. Reluctance to dissent has unfortunate results. One result is that jurisprudence becomes blander. Another result is that the judges may miss opportunities to develop international law. As discussed in the previous chapter, dissenting opinions reflect independence of mind.

According to Cassese ‘amalgamating’ judges from different cultural and legal backgrounds is one of the main problems of international criminal proceedings.¹⁵² It is also what gives international adjudication its distinct flavour. The Tribunals have ambitiously undertaken the amalgamation of judges from civil law and criminal law traditions, various professional and personal backgrounds, creeds and convictions. The challenges this presents are reflected and concretised not only in the lawmaking activities of the judges but also in the constitution, composition and institutional culture of the Chambers. A proper assessment of individual judicial performances should ideally be made when the Tribunals finish their work. The question of the competence of individual Tribunal judges remains delicate but important.

¹⁵¹ Wald (note 57) 94.

¹⁵² Cassese (note 19) 442.

CHAPTER FIVE

THE PRINCIPLE OF LEGALITY

1. Introduction¹

If it is accepted that Tribunal judges do make law, respect for the principle of legality should act as an inhibitor. This principle, a general principle of international law, was raised by the defence at Nuremberg² and in almost every subsequent prominent national prosecution of individuals for war crimes or violations of international humanitarian law.³

The specific nature, application and applicability of the principle of legality in international criminal law could be described as one of the features which distinguish this branch of the law from municipal law and even international law. The principle of legality, expressed in the formulation *nullum crimen, nulla poena sine praevia lege poenali*,⁴ no crime and no punishment without previous law, is one of the leading principles of criminal law and has been described by the European Court of Human Rights as an ‘essential element of the rule of law’.⁵ From the practice of the Tribunals and from the writings of important scholars in this field there seems to be general consensus that the context of international criminal law calls for a more lenient and flexible approach to the application of this principle than would be the case in municipal systems. Some go as far as to argue that the principle should not apply at all in international criminal law.⁶ Others, such as Triffterer think differently. According to Triffterer the core of the principle of legality should be that, in order to prevent arbitrariness, every state infringement

¹ I am indebted to Machteld Boot for the inspiration I derived from her book *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002). In writing this chapter I was especially influenced by the structure and approach of Chapters 1 and 2 of Part 2 of her book.

² *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, Published at Nuremberg, Germany* (1948) (‘International Military Tribunal’) Vol. 22, 461.

³ See in particular *In Re Goering and Others* Annual Digest 13 (1946) 203. *Alstötter and Others* (Justice case) US Military Tribunal sitting at Nuremberg, Judgment of 4 December 1947; *Ohlendorf and others* (*Einsatzgruppen* case) US Military Tribunal sitting at Nuremberg, Judgment of 10 April 1948; *Krupp and Others*, US Military Tribunal sitting at Nuremberg, Judgment of 30 July 1948; *Streletz, Kessler and Krenz v Germany* ECHR Judgment of 22 March 2001; *Attorney-General of Israel v Eichmann*, District Court of Jerusalem (1961) 36 ILR 18; *Attorney General of Israel v Eichmann*, Israel Supreme Court (1968) 36 ILR 277, *R v Finta* [1994] 1 SCR 701; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; 91 ILR 1; *Bouterse*, Amsterdam Court of Appeal (Hof Amsterdam) 3 March 2000 NJ 2000, 266; *Bouterse*, Hoge Raad, Criminal Chamber, Judgment of 18 September 2001, nr 00749/01.

⁴ The German scholar and criminal lawyer, Anselm von Feuerbach gave this rule its Latin wording. Von Feuerbach *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (1847) para 20.

⁵ *SW v United Kingdom*, ECHR, Judgment of 22 November 1995, Ser A-335-B (1995) para 34.

⁶ See the views of H Kelsen in ‘Will the Judgement of the Nuremberg Tribunals constitute a Precedent in International Law?’ (1947) 1 *International Law Quarterly* 153, 165.

on individual liberty must be bound to an existing norm.⁷ Some argue that only this core needs to be preserved and that extracting the core and freeing the principle of requirements of form, if done with sufficient sensitivity to the legal values the principle was meant to protect, would not necessarily weaken the principle.

The principle of legality is a close cousin of the rule of law.⁸ According to Raz it is one of the principles derived from the rule of law that the law should conform to standards designed to enable it to effectively guide action.⁹ Laws should be relatively stable. If they are changed too often people may find it difficult to be guided by law in their decisions.¹⁰ The question of whether frequent changes to the Rules of Procedure and Evidence violate the principle of legality will be addressed in Chapter 7.

Although Bassiouni refers to principles of legality (referring to *nullum crimen sine lege* and *nulla poena sine lege*)¹¹ this chapter will refer to the principle of legality in the singular. The *nullum crimen* and *nulla poena* formulations both give expression to the same underlying principle or doctrine: no retroactive criminalization or punishment. The principle of legality is a collective term which includes the requirements of certainty, written law and the prohibition against analogous application.¹² Many prominent authors have referred to the principle in the singular.¹³ Different articulations of the principle of legality (in national and international fora) will be discussed.

In the search for the conception of the principle of legality that would best suit international criminal law and specifically the law of the *ad hoc* Tribunals, attention will be paid to the history, position and elements of the principle in German law. Because of Germany's particular history and the abuse of the law during the Nazi era the principle of legality is now a foundation of German criminal law. The requirements of specificity, written law and the prohibition of analogous application which form part of the German *Gesetzlichkeitsprinzip* of principle of legality are also features of the principle of legality in other jurisdictions. Because

⁷ O Triffterer 'Die völkerrechtlichen Verbrechen und das staatliche Strafrecht' (1989) 30 *Zeitschrift für Rechtsvergleichung* 83-128, 218.

⁸ The ideal of the Rule of Law has been thoroughly examined by Lon Fuller. Fuller considers the condition that rules must not be retroactive or *ex post facto* as one of the conditions that will make it possible for men to guide their actions (and that constitute "the morality that makes law possible"). L Fuller *The Morality of Law* 2ed (1964) 33 - 39.

⁹ J Raz *The Authority of Law* (1979) 213.

¹⁰ *Ibid.*

¹¹ M C Bassiouni & P Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 265.

¹² Bassiouni writes: "That the principles of legality constitute a general principle of legality is beyond question." MC Bassiouni "The Sources and Content of International Criminal Law: A theoretical framework" in K Koufa (ed.) *The New International Criminal Law* (2003) 74.

¹³ See the Von Feuerbach formulation in note 3 above. Cassese similarly refers to the principle in the singular. See A Cassese *International Criminal Law* (2003) 139.

the German principle has wide relevance it is instructive to look at the development of the principle in this jurisdiction.

The role of the principle in international human rights instruments and the way the principle has been interpreted by the European Court of Human Rights will be examined. The chapter will look at the way the principle has been applied at the *ad hoc* Tribunals and ask whether the approach taken in the Secretary General's Report - to circumscribe the subject-matter jurisdiction with regard to crimes against humanity by customary international law - shows adequate consideration for the values protected by the principle of legality.

The principle of legality has an important political function: that of protecting the citizen against the state. Many believe that it is in the sphere of criminal law that the hand of the state is most pervasive and intrusive. With the development and growing importance of the notion of individual criminal responsibility in international law, the 'hand of states' seems to interfere more and more in the lives of individual citizens (or in the fate of individual criminals against humanity). According to Allen the legality ideal faces its sternest test in the field of criminal justice. He points out that the severity of the sanctions administered by criminal law (together with the freedom-depriving and status-degrading potential of criminal proceedings) on the one hand and the outrage produced by crime on the other hand could lead public officials to be careless towards the principle of legality.¹⁴ In the context of the serious crimes of which the accused before the *ad hoc* International Criminal Tribunals are accused this problem is magnified. This raises an important question: should adherence to the principle be absolute? Should the severity of the crimes and the context in which they were committed justify viewing the principle as merely discretionary? It will be argued that the Nuremberg Tribunal, by referring to the principle as a 'maxim' and by appealing to 'natural justice' to justify infringing the principle, did not set the correct precedent for subsequent generations of prosecutions.¹⁵

This chapter will explore different conceptions of the principle of legality. It will distinguish between the application of the principle in common law and civil law and in municipal law and international law. The *criminal* nature of the Tribunals cannot be stressed enough. It is of crucial importance that the guarantees of a fair trial and due process are respected as well as the relevant guarantees included in international human rights instruments. The Tribunals are *international* Tribunals. Considering the way the principle has been interpreted in international human rights instruments which reflect the consensus of the international community is therefore more instructive than considering its role in national systems.

¹⁴ F Allen *The Habits of Legality* (1996) 5.

¹⁵International Military Tribunal (note 2) 461 – 62.

2. Origins

The principle of legality should be understood as a corollary of the rule of law. In *De l'esprit des lois* Montesquieu reacted to the arbitrary exercise of power during the Ancien Regime.¹⁶ In 1764 the Italian criminal jurist Beccaria applied Montesquieu's ideas to criminal law.¹⁷ According to Beccaria, it should be the legislative branch that decides what conduct is punishable. The principle of legality is therefore often seen as a consequence of the theory of the separation of powers. The most important German formulation was the formulation of Von Feuerbach in the Bavarian StGB of 1813. Feuerbach explained the phrase *nullum crimen sine lege* as follows:

Jede Zufügung einer Strafe setzt ein Strafgesetz voraus (nulla poena sine lege), denn lediglich die Androhung des Übels durch das Gesetz begründet den Begriff und die rechtliche Möglichkeit der Strafe.¹⁸

According to Von Feuerbach punishment is only justifiable if the threat of punishment has preceded the act. The fact of punishment has to be known before the conduct is committed.

An important rationale behind the principle of legality is its possible deterrent effect.¹⁹ The greater the familiarity of citizens with criminal law, it is believed, the greater its deterrent effect. Autonomous human beings should be placed in a position to foresee the implications of their actions.

It is important to distinguish between retroactivity and retrospectivity. These terms are often used interchangeably but have distinct meanings. A retroactive statute is one which is proclaimed to have effect as of a time prior to its enactment. The statute operates backward and changes the law as of some date prior to its proclamation. A retrospective statute is one which proclaims that the consequences of an act done prior to proclamation are to be given a different legal effect after proclamation as a result of the enactment of the statute.²⁰

3. German Law and the Principle of Legality

The German legal system has the oldest and most consistent tradition of recognising the principle of legality.²¹ During the nineteenth and early twentieth century the principle was applied strictly in Germany and other parts of Continental Europe. Subsequent to the initial Feuerbach formulation, the

¹⁶ *De l'esprit des lois* (1748) book XI, Chapter 6 (1950).

¹⁷ R A Cosgrove *Scholars of the Law* (1996) 5. See Bassiouni *Introduction to International Criminal Law* (2003) 183. See also C Beccaria *Over Misdaden & Straffen* (2nd ed) (1971)55-58.

¹⁸ Von Feuerbach (note 4) para 20.

¹⁹ R Haveman "The Principle of Legality" in R Haveman, O Kavran, J Nicholls (eds.) *Supranational Criminal Law: A System Sui Generis* (2003) 51.

²⁰ This distinction was drawn by D H Doherty in 26 CR (3d) 121 at 125. *R v Finta* 72 CCC (3d) 127.

²¹ Bassiouni & Manikas (note 11) 275.

principle appeared in Article 2 of the German Penal Code of 1871. It also featured in the Weimar Constitution of 1919. Article 116 of the Weimar Constitution stated:

Punishment can be inflicted for only such acts as the law had declared punishable before the act was committed.²²

With the rise of National Socialism in the 1920's and 1930's strict adherence to *nullum crimen sine lege* was considered not reconcilable with the 'juridical sense of the German nation'.²³

(i) *nullum crimen* and the Nazi era

The perversion of justice and abuse of judicial power during the Third Reich shows the dangers of abolishing or disrespecting the principle of legality and helps to explain the present importance of the principle in German law. All aspects of the principle of legality were abolished and perverted during the Third Reich. Retroactive punishment became possible with the Law on the Imposition and Implementation of the Death Penalty.²⁴ This law was also called the 'Lex van der Lubbe' and introduced the death penalty for arson *after* the Reichstag fire.²⁵ More than twenty other statutes and ordinances during this era contained provisions for retroactive penalties.²⁶ A possibility for sanctions outside the criminal courts was created by the institution of 'preventative detention' over which the police had sole control. It has been said that Nazi law was not designed to protect the individual against the state but to protect the state against the individual.²⁷ Laws were purposely formulated in vague wording and legal certainty was lost. According to Freisler '[g]eneral provisos, admission of analogy, recognition of healthy popular opinion as a source of law, and admission of direct and immediate recognition of what is just ... are criteria of Nationalist Socialist criminal law'.²⁸ Schmitt wrote in support of this policy: 'In the decisive case of political crime, the

²² *Der Verfassung des Deutschen Reiches vom 11.8.1919*. In this regard see P C Caldwell *Popular Sovereignty and the Crisis of German Constitutional Law, The Theory & Practice of Weimar Constitutionalism* (1997). The 'will of the people' became the foundation of the constitutional system. According to Kelsen the 'will of the people' was a retroactive construct. Ibid 85, 86.

²³ The term 'nach gesundem Volksempfinden' was found in the Law of 28 June 1935, entered into force 1 September 1935, RGBI, 839, Article 1.

²⁴ I Müller *Hitler's Justice* (1991) 74.

²⁵ 'Lex van der Lubbe' 29 March 1933, RGBI 1, 1951.

²⁶ W Naucke *Die Aufhebung des strafrechtliche Analogieverbots, NS Rechts in historischer Perspektive: Kolloquien des Instituts für Zeitgeschichte* (1981) 87.

²⁷ H Gerland 'Neues Strafrecht' (1933) 38 *Deutsche Juristen-Zeitung* 860.

²⁸ National Socialist criminal law was 'less concerned with the clarity of statutory provisions than with material justice'. R Freisler 'Der Wandel der politischen Grundanschauungen in Deutschland und sein Einfluss auf die Erneuerung von Strafrecht, Strafprozess und Strafvollzug' (1935) *Deutsche Justiz* 1251.

use of norms and procedures merely means that the Fuhrer's hands are tied, to the advantage of the disobedient.²⁹

The drafters of the Nazi Law of 28 June 1935 which repealed Article 2 of the 1871 law were aware of the German attachment to the principle of legality. They preserved the principle but extended it at the same time by stating:

Whoever commits an action which the law declares punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished, if no determinable penal law is directly applicable to the crime, it shall be punished according to the law, the basic idea of which fits it best.³⁰

Analogy was therefore permissible if the judicially created crime was within the scope of the penal law and foreseeable because it was based on the 'sound perception of the people'. The prohibition of the application of analogy, as will be explained below, is however one of the central elements of the principle of legality. The Nationalist Socialist notion of the 'sound perception of the people' also appeared in a proposed decree adopted by the Senate of the Free City of Danzig in 1935. The City of Danzig case is discussed below.

(ii) Modern German Criminal Law

In reaction to the perversion of justice and to the atrocities that flowed from it during the Third Reich, the post-war German legal order not only showed great respect for the principle of legality but the principle came to be regarded as the foundation of the new German criminal law.³¹ Jescheck writes that the constitutionalisation of the *Gesetzlichkeitsprinzip* is proof of its fundamental importance to the modern German state.³² In modern German law the principle of legality reflects both the function of criminal law as protecting citizens against arbitrary state power as well as the guarantee that it is the legislature that decides on punishability.³³ The principle of legal certainty together with the ban on retroactive laws has become one of the five most important principles of the German rule of law.³⁴

²⁹ C Schmitt *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (1933) 41. There was even some discussion of whether a criminal code could not be dispensed with entirely – the fact that it would then become impossible for an individual to 'comprehend the law and to calculate its consequences' was expressly welcomed by Henkel, a Professor of Criminal Law, as a desirable aim, since uncertainty about the possible repercussions of an act would increase the pressure to conform. H Henkel *Strafrichter und Gesetz im neuen Staat* (1934) 37.

³⁰The German wording is: 'nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden.' Gesetz zur Änderung des Strafgesetzbuchs vom 28 Juni 1935, *Reichsgesetzblatt* (1935) 1 839.

³¹ Boot (note 1) para 76.

³² H-H Jescheck *Lehrbuch des Strafrechts, Allgemeiner Teil* (1982) 104. Jescheck writes that the principle now has *Grundrechtsrang*, the status of a constitutional norm. *Ibid.*

³³ Boot (note 1) para 79.

³⁴ S Michalowski, L Woods *German Constitutional Law* (1999) 25, 26.

(iii) Art. 103 (2): *Gesetzlichkeitsprinzip*

The *Gesetzlichkeitsprinzip* in the German Basic Law is included in Article 1 of the German Criminal Code (Article 103(2) GG and Article 1 StGB). According to the *Gesetzlichkeitsprinzip* conduct can only be punished if the conduct as well as the accompanying penalty were determined before the offence was committed. The principle is generally considered to include three separate elements. First, the criminal conduct and penalty have to be captured in written law (*lex scripta*). As a second requirement, the statutes have to be clear and certain (*lex certa*) and thirdly, the statutes may not be applied by analogy (*lex stricta*).³⁵

The requirement of written law

Does certainty require *written* statutes? Certainty of the law is required to protect citizens against judicial arbitrariness. In German law it is expected that conduct is declared punishable in *statutes*. ‘Statutes’ include not only ‘formal statutes’ but all written norms emerging from a source of law that has been constitutionally recognised.³⁶ Moreover Article 104 (1) GG requires a formal statute (*förmliches Gesetz*) in the case of deprivation of freedom.³⁷

Because the common law is often described as ‘judge-made’ law it is not required that law be written, at least not written by the legislator. In the *Sunday Times* case, the European Court of Human Rights stated that, in the UK, the word ‘law’ covers

not only statute but also unwritten law. It would clearly be contrary to the intention of the drafters of the Convention [for the Protection of Human Rights and Fundamental freedoms] to hold that a restriction imposed by virtue of the common law is not prescribed by law on the sole ground that it is not enunciated in legislation...³⁸

In common law jurisdictions the role of the judiciary in determining that certain conduct is criminal cannot, however, be excluded completely because of the continuing existence of common law crimes besides statutory crimes and because of common law methods of legal reasoning. It is generally believed that there are no, and can be no, federal common law crimes. This was decided in an early Supreme Court judgment, *United States v Hudson and Goodwin*.³⁹ In *Liporata v United States*, a more recent judgment, it was decided: ‘The definition of the elements of a

³⁵Jescheck (note 32) 106, 107. See Haveman (note 18) 40. See also Susan Lamb “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law” in *The Rome Statute of the ICC* A Cassese, P Gaeta & J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* Vol 1, 734. Lamb writes that the nullum crimen principle is founded on the following four attributes: (a) the concept of written law; (b) the value of legal certainty; (c) the prohibition on analogy; and (d) non-retroactivity.

³⁶ Boot (note 1) para. 95.

³⁷ Jescheck (note 32) 105.

³⁸ *Sunday Times v United Kingdom* ECHR, Judgment of 26 April 1979, Ser A-30 (1979) para 47.

³⁹ 11 US 32 (1812).

criminal offence is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute.⁴⁰

Principle of specificity

The *lex certa* requirement is also understood as the principle of specificity (*Bestimmtheitsgebot*). A penal statute has to define the punishable conduct and the penalty with sufficient certainty. Certainty is required to protect the citizen against judicial arbitrariness.

In common law one can speak of a softening of the *lex certa* aspect. The *lex certa* requirement is not only satisfied by statutory law but also by case law. It is, however, still required that the rule is reflected in *written* law in order for it to be foreseeable and accessible. What is important is not the form in which the law is couched but the certainty. It is critical that

the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.⁴¹

In *Sunday Times v United Kingdom*, the European Court of Human Rights emphasised that law must be adequately accessible and that a law must be formulated with sufficient precision to enable a citizen to regulate his conduct and to foresee, to a reasonable degree, the consequences of his actions.⁴²

In American law the *lex certa* requirement is reflected in the *void-for-vagueness* doctrine. An important criterium in deciding on vagueness is 'the impact of indefinite laws on constitutionally protected rights'.⁴³ The consequences of vagueness in American law will be discussed in more detail below.

Analogous application

This element of the principle of legality prohibits the analogous application of law. This applies especially to civil law. Many jurists believe that the acceptance or non-acceptance of analogous application is a fundamental difference between the way the principle of legality is applied in codified systems and case law based legal systems. Bassiouni writes that even in those systems which reject analogy in judicial interpretation, there are still exceptions *within* systems which profess to reject the application of analogy.⁴⁴

It is important that German Law prohibits the use of analogy only in instances of where analogy is used to base or establish or aggravate punishment (Article 103 (2)

⁴⁰471 US 419 (1985). It also follows from the rule of 'lenity', requiring courts to construe ambiguous criminal statutes narrowly that there are no federal common law crimes.

⁴¹ *Kokkianis v Greece* ECHR 25 May 1993, para 52.

⁴² *Sunday Times* (note 38) para 49.

⁴³ See *International Harvester Co v Kentucky* 234 US 216 (1914).

⁴⁴ M C Bassiouni *Crimes Against Humanity in International Criminal Law* (1999) 103, 104.

GG and Article 1 StGB concerns the prohibition of *strafbegründender* or *strafschärfender* analogy).⁴⁵ It is not prohibited to apply criminal law by analogy in *favour* of an individual defendant.

Where to draw the line between extensive interpretation and application by analogy is of course very difficult. It might be consistent to argue that extensive interpretation (interpretation which goes beyond what a law could reasonably be foreseen to mean) also violates a strict conception of the principle of legality. Cassese writes that questions regarding the extension of rules of law to cover matters previously unregulated by law are often framed as questions of interpretation rather than analogy.⁴⁶ One such question involves the phenomenon of international courts and tribunals relying on general principles of international criminal law to establish whether an international rule covers a specific matter. Cassese writes that ‘whatever the terminology employed’ gaps or lacunae have been filled by resorting to these principles.⁴⁷

In common law judicial interpretation by analogy is not only permissible but has been described as the basis for development and evolution of the common law. Common law textbooks which discuss the legality principle are generally silent on the prohibition on analogous application. The application of crime definitions by analogy is seen as part of the ‘discovery’ process of common law and ‘the basis for the development and evolution of the common law’.⁴⁸ In common law systems analogous reasoning is the technique for applying the *ratio decidendi* of a precedent to a new case.⁴⁹ Because of the belief that international law resembles the common law in its developing character, application by analogy is more accepted in international law than in civil law jurisdictions.

4. City of Danzig case

The question of legality arose only once in the history of the PCIJ, namely in the court’s Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City.

On 29 August 1935 the Senate of the Free City of Danzig adopted two decrees which were promulgated on 31 August and came into force on 1 September 1935. These decrees became the subject of a constitutional storm. On 4 September 1935 the National German Party, the Centre Party and the Social-Democrat Party at Danzig presented a petition to the High Commissioner of the League of Nations

⁴⁵ BVerfGE 25, 269 ff, (NJW 1969, 1059). Jescheck writes: ‘Doch bestehen gegen den Gebrauch des Ausdrucks kein Bedenken, wenn man sich darüber klar ist, dass mit dem Analogieverbot Analogie *zum Zwecke der Rechtsneuschöpfung* gemeint ist.’ (emphasis in original) Jescheck (note 32) 106.

⁴⁶ A Cassese *International Criminal Law* (2003) 155.

⁴⁷ Ibid.

⁴⁸ Bassiouni & Manikas (note 11) 278.

⁴⁹ See Atiyah and Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987) 118-127.

contending that amendments made to the Penal Code by the decrees of 29 August 1935 altered the whole system of the administration of justice in criminal cases fundamentally and ‘opened the doors wide to arbitrary decisions’.⁵⁰ The Council of the League of Nations requested the PCIJ to give an advisory opinion on the question of whether these decrees are consistent with the Constitution of the Free City of Danzig.⁵¹

The first article of this decree amended certain provisions of the Penal Code of Danzig and read as follows:

Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applied most nearly to the said act.⁵²

Prior to September 1935 part 1 of Article 2 of the Penal Code applying to Danzig read:

An act is only punishable if the penalty applicable to it has been prescribed by a law in force before the commission of the act.⁵³

The PCIJ looked at the consistency of the contents of the decrees with those clauses of the Constitution conferring fundamental rights upon the Free City. The object of the new provisions was said to be to enable the judge to create law to fill up gaps in the penal legislation.⁵⁴ This can be seen in the title of Article 1 of the decree: ‘Creation of law [*Rechtsschöpfung*] by the application of penal laws by analogy’ and in the words ‘wider latitude accorded to judges’ in the title of Article I of the second decree.⁵⁵

The PCIJ considered the ‘sound popular feeling’ to be a very elusive standard.⁵⁶ An alleged test of ‘sound popular feeling’ even when coupled with the condition providing for the application of the fundamental idea of a penal law, could not afford to individuals any sufficient indications of the limits beyond which their

⁵⁰ *Consistency of Certain Danzig Legislative Decrees with the constitution of the Free City* Advisory Opinion, PCIJ reports, 4 December 1935, Series A/B No. 65, 48.

⁵¹ The Secretary-General of the League of Nations in pursuance of the Council Resolution of 23 September 1935 transmitted a Request to the Court for the advisory opinion. Ibid 42. It was pointed out in the Opinion that the Constitution of the Free City of Danzig occupies a special position with regard to the League of Nations. The Constitution was drawn up by ‘duly appointed representatives’ of the Free City in agreement with a High Commissioner appointed by the League of Nations. Secondly, the Constitution was placed under the guarantee of the League which meant that the Constitution had to obtain the approval of the League of Nations and that the Constitution could only be changed with the League’s permission. Ibid 49.

⁵² Ibid.

⁵³ Ibid 45.

⁵⁴ Bassiouni & Manikas (note 11) 284.

⁵⁵ *Consistency of Certain Danzig Legislative Decrees* (note 50) 52.

⁵⁶ Ibid 53.

acts are punishable. The court stated that legislation is necessary ‘to lay down the precise limits between *morale* and law.’⁵⁷ The court acknowledged that a judge’s opinion of what is condemned by sound popular feeling is a matter of individual appreciation.⁵⁸ Accepting such a standard would leave too wide a discretion to the judge and would not be compatible with the principle *nullum crimen sine lege*.⁵⁹ The court held that the fundamental rights of individuals may be restricted:

in the general interest and only in virtue of a law which must itself specify the conditions of such a restriction, and in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offense.⁶⁰

Under the criminal law previously in force in Danzig the penal law was equally clear to the judge and the accused party. Under the new decrees there was a possibility that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence.⁶¹ The principle of legality requires that an individual should be in a position to know *beforehand* whether his acts are lawful or liable to punishment. The court acknowledged that it may be difficult to determine the point beyond which a judge’s application of the criminal law comes into conflict with the principle that fundamental rights can only be restricted by law.⁶² In the opinion of the court the discretionary power left to the judge in this case was too wide to allow of any doubt that it exceeded its limits.⁶³ The decrees of August 1935 were found to be inconsistent with the constitutional guarantees in Danzig providing for fundamental rights.⁶⁴

5. Legality at Nuremberg

The way in which the International Military Tribunal at Nuremberg treated the principle of legality had profound implications for the way the principle was treated in subsequent trials. It is indeed one of the most important criticisms of the process at Nuremberg that it infringed upon the principle of legality.⁶⁵

Concerning the jurisdiction of the Tribunal, the Nuremberg judgment stated that the Nuremberg Charter was created by the signatory powers in the exercise of their sovereign legislative power under international law. The Tribunal anticipated the objection regarding legality when it stated in the judgment that:

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid 56.

⁶³ Ibid.

⁶⁴ Ibid 57.

⁶⁵ See for example Q Wright ‘The Law of the Nuremberg Trial’ (1947) 41 *AJIL* 45; D Luban ‘The Legacies of Nuremberg’ (1987) 54 *Social Research* 797 and H von Hebel ‘An International Criminal Court - A Historical Perspective’ in H von Hebel, J G Lammers, J Schukking (eds) *Reflections on the International Criminal Court* (1999) 20.

The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.⁶⁶

The Nuremberg Charter contained many innovative provisions and it was argued that these provisions were not the expression of international law existing at the time and might be seen (both at the time of the trials and in retrospect) as violating the principle of legality. The critical Charter Articles containing the most significant innovations were Articles 6, 7 and 8. Article 6 set out the crimes over which the Tribunal had jurisdiction. These were: (a) Crimes against the Peace (b) War Crimes and (c) Crimes against Humanity. Article 7 stated that the official position of officials shall not free them from responsibility. Article 8 stated that the fact that a defendant acted pursuant to an order of his Government or of a superior should not free him from responsibility. The crimes contained in Article 6 were international crimes for which there would be individual criminal responsibility. These formed the core of the Charter and represented a sharp departure from customary law or conventions existing at the time which emphasised the duties of states.⁶⁷

The IMT described *nullum crimen sine lege* as merely a ‘maxim’, suggesting that the Tribunal was not bound by this principle.⁶⁸ The Tribunal stated: ‘In the first place it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice.’⁶⁹ According to Wright this statement meant that the Tribunal treated the *ex post facto* issue as one of substantive law and not of procedure or jurisdiction.⁷⁰

The Nuremberg Charter constituted the source of law applied by the IMT.⁷¹ Whether the Charter drew sufficiently or substantially on previously recognized sources is a matter of debate. The Tribunal emphasised that it did not have to draw on written law only. It stated that the law of war was not only to be found in treaties but also in the practice and custom of states and from the general principles of justice applied by jurists. The court stated: ‘This law is not static but by continual adaptation follows the needs of a changing world.’⁷²

One of the most significant features of Nuremberg is the fact that the defendant was not the German state but those leaders of the German State considered to be the major war criminals. The IMT’s finding that individuals could be the subjects

⁶⁶ International Military Tribunal (note 2) 461.

⁶⁷ H Steiner & P Alston *International Human Rights in Context* 2nd ed (2000) 114.

⁶⁸ International Military Tribunal (note 2) 461 - 462.

⁶⁹ Ibid 462.

⁷⁰ Wright (note 65) 53.

⁷¹ Boot (note 1) 189.

⁷² International Military Tribunal (note 2) 463.

and bearers of obligations under international law and even be held criminally responsible under international law was the first nail in the coffin of the doctrine that only states possessed legal personality under international law.⁷³ Shortly after the Nuremberg trial Kelsen wrote that the IMT infringed upon *nullum crimen sine lege* in one respect only: holding individuals accountable for the Charter crimes.⁷⁴ But since the acts for which the London Agreement established individual criminal responsibility were also morally objectionable Kelsen believes that the retroactivity of the law could not be absolutely incompatible with justice.⁷⁵ The question of whether the international law existing at the time provided for individual criminal responsibility arose in the context of all three categories of crimes.

The two categories of crimes which were the most controversial in terms of their compliance with the principle of legality were Crimes against the Peace and Crimes against Humanity. These two categories will therefore receive the most attention.

(a) Crimes against the Peace

According to the US Prosecution everything else was ‘incidental, or subordinate to the supreme crime against peace’.⁷⁶ The Tribunal itself stated that initiating a war of aggression was the ‘supreme international crime’.⁷⁷ According to Article 6 (a) of the Nuremberg Charter crimes against the peace were defined as ‘planning, preparing, initiation or waging a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’.

It was argued that by criminalising the ‘starting of a war or engaging in war’ the Tribunal was applying *ex post facto* law. It was argued on behalf of the defendants that ‘no sovereign power had made aggressive war a crime at the time the alleged crimes were committed, that no state had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders’.⁷⁸ The Tribunal rejected, and to some extent evaded, this argument. It stated: ‘in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished...’.⁷⁹ The Tribunal stated that the defendants, by virtue of occupying certain positions in the German Government,

⁷³ H-H Jescheck ‘The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’ (2002) 2 *Journal of International Criminal Justice* 43.

⁷⁴ Kelsen (note 6) *ibid*.

⁷⁵ *Ibid*.

⁷⁶ Judge Jackson ‘Summary Review of the Indictment and the Charter and Their Legal Foundations’ in *The Trial of Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (1946) 143.

⁷⁷ International Military Tribunal (note 2) Vol. 1, 186.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, Vol. 22, 461.

must have known of the treaties signed by Germany which outlawed recourse to war and must have known that they were defying international law when they carried out their 'designs of invasion and aggression'.⁸⁰ The Tribunal stated that on this view of the case the maxim had no application to the present facts.⁸¹

The Allied Powers made repeated efforts to prove that the law of the Charter was declaratory of existing rules of general international law.⁸² The Tribunal looked at the state of international law in 1939 with regard to aggressive war and referred specifically to the General Treaty for the Renunciation of War (Kellogg-Briand Pact) which was binding on 63 parties, including Germany, and renounced war as an instrument of national policy. In the opinion of the Tribunal the renunciation of war necessarily meant that such a war was illegal in international law.⁸³ In response to the argument that the Kellogg-Briand Pact did not *expressly* make such wars crimes the Tribunal referred to the Hague Convention of 1907 which prohibited resort to certain methods of waging war.⁸⁴ Whereas the Hague Conventions did not expressly criminalise such practices the prohibitions contained in the conventions were 'certainly' crimes since 1907.⁸⁵ Because neither the Hague Convention of 1907 nor the Kellogg-Briand Pact expressly criminalised war or contained any sanction many commentators have argued that the IMT could not ground the criminalisation of crimes against the peace in existing customary law.⁸⁶ In Cassese's view the reasoning resorted to by the IMT to prove that aggression amounted to an international crime as early as 1939 is unconvincing.⁸⁷

How did the Tribunal explain the nexus between the obligation of states not to resort to aggressive war and the criminal liability of individuals? It has been argued that if an individual act is of a criminal character that is *mala in se* and in violation of the state's international obligation, it is also a crime against the law of nations.⁸⁸ Lord Wright pointed out that the Pact of Paris converted the principle that aggressive war is illegal from a rule of 'natural law' to a rule of 'positive law'.⁸⁹ Jackson stated:

The principle of personal liability is a necessary as well as a logical one if International Law is to render real help to maintenance of peace...Only sanctions which reach individuals can peacefully and effectively be enforced...Of course the idea that a state, any more than

⁸⁰ Ibid 462.

⁸¹ Ibid.

⁸² F B Schick 'The Nuremberg Trial and the International Law of the Future' (1947) 1 *AJIL* 770.

⁸³ International Military Tribunal (note 2) 463. The Tribunal also referred to the draft of a Treaty of Mutual Assistance of 1923 which declared 'that aggressive war is an international crime'. Ibid 464.

⁸⁴ Ibid.

⁸⁵ International Military Tribunal (note 2) 463.

⁸⁶ Jescheck (note 73) 42.

⁸⁷ Cassese (note 46) 148.

⁸⁸ Wright (note 65) 63.

⁸⁹ Ibid.

a corporation, commits crime, is a fiction. Crimes are always committed only by persons.⁹⁰

(b) War Crimes

The inclusion and definition of 'war crimes' in the Charter was less controversial.⁹¹ No one seriously questioned the fact that war crimes were crimes long before the acts charged against the defendants were committed.⁹² Article 6(b) of the Charter defined war crimes as 'violations of the laws or customs of war'. The Tribunal stated that the Hague Convention on land warfare was declaratory of customary international law binding on all the belligerents and that it bound Germany in all the territories it had occupied.⁹³ Because of the acceptability of war crimes the Tribunal was careful to find defendants guilty not only of the new, legally precarious crimes against humanity but of war crimes as well.

(c) Crimes Against Humanity

The drafters of the Nuremberg Charter created a new category of crimes: 'Crimes against humanity'.⁹⁴ The reason for the creation of this category of offences was to cover atrocities committed by members of the German government against their own nationals.⁹⁵ The term crimes against humanity was however not entirely new. The term appeared for the first time in the 1915 Declaration by the governments of France, Great Britain and Russia denouncing the massacre of the Armenians.⁹⁶

⁹⁰*Record* (Daily Record of the Trial) 70-71 as cited by Wright (note 65) 64.

⁹¹ The Tribunal stated: 'The truth remains that war crimes were committed on a vast scale, never before seen in the history of war.' International Military Tribunal (note 2) 224. As examples of the cruelty and horror of such crimes the Tribunal mentions the ill-treatment and torture of prisoners of war, the fact that whole civilian populations were deported to Germany for the purpose of slave labour and the taking and shooting of hostages from the civilian populations of all the occupied territories. Ibid 225.

⁹² Wright (note 65) 59.

⁹³ Ibid 60. Even though some belligerents in the war were not parties to the Hague Convention on Land Warfare the Tribunal considered it unnecessary to consider the effect of the 'general participation clause' in this convention because 'by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war'. International Military Tribunal (note 2) 248.

⁹⁴ Crimes against humanity were defined in Article 6 (c) as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'. Morgan has described the phrase 'crimes against humanity' as 'the major contribution of the Nuremberg Charter to the modern legal lexicon'. E M Morgan 'Retributory Theatre' (1988) 3 *American University Journal of International Law and Policy* 39.

⁹⁵ Boot (note 1) 187.

⁹⁶ Cassese (note 46) 67.

The Tribunal only commented directly on the *ex post facto* problem in relation to crimes against the peace and failed to address it explicitly in the context of crimes against humanity. However when the content of the Charter was negotiated the International Conference on Military Trials showed an awareness of the importance of the *nullum crimen* principle. As a result, as part of the definition of this category of crimes, it was required that crimes against humanity (atrocities beyond the scope of traditional war crimes) would have to have occurred in connection with war.⁹⁷ The definition of crimes against humanity therefore linked crimes against humanity to the other two categories of offences. The IMT also preferred to find defendants guilty of both war crimes and crimes against humanity – a fact which indicates the Tribunal’s awareness of the novelty of this category of crimes.

The Tribunal also referred to national laws which often provided for punishment for the crimes enumerated under crimes against humanity. In the absence of national laws⁹⁸ the Tribunal could resort to the express exclusion of the principle of non-retroactivity at the end of Article 6 (c): ‘whether or not in violation of the domestic law’.⁹⁹

Bassiouni describes the Charter’s extension by analogy of certain prohibited conduct which constituted ‘war crimes’ to the newly defined ‘crimes against humanity’ as ‘a logical and necessary step’.¹⁰⁰ The IMT held that Article 6 (c) crystallised or codified a nascent rule of general international law that prohibits crimes against humanity. According to Lamb this is a difficult argument to sustain and it would seem more correct to contend that this provision constituted new law.¹⁰¹ The justification offered by the IMT that the specific crimes contained in Article 6(c) were also crimes according to the general principles of law recognised by civilised nations, also fails to convince. Not all the specific crimes listed in this article are universally found in the world’s major criminal justice systems. In addition ‘general principles’ have never been relied upon as a source for international criminalisation.¹⁰²

The argument that the law of the Charter should be applied because it was ‘the expression of international law existing at the time of its creation’ did not convince as far as crimes against humanity were concerned. Cassese comments that it is striking that the Tribunal did not set out a general view with regard to the

⁹⁷ See Article 6 (c) of the Nuremberg Charter.

⁹⁸ One such example was the persecution of Jews in the case of *Streicher* International Military Tribunal (note 2) 296.

⁹⁹ Jescheck (note 73) 42.

¹⁰⁰ Bassiouni (note 44) 521.

¹⁰¹ Lamb ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in Cassese (ed). Vol. 1 *The Rome Statute of the International Criminal Court: A Commentary* (2002) 736.

¹⁰² Raz (note 9) *ibid*.

legality of this category of offences.¹⁰³ The IMT addressed the issue of retrospectivity only with regard to crimes against the peace and did not pronounce on the question of whether crimes against humanity constituted a new category of offences.

Cassese argues that the IMT would have been wise not to impose the harshest penalty, the death penalty on defendants guilty only of the 'new crimes' ie crimes against humanity.¹⁰⁴ The IMT did however find two of the accused, Streicher and von Schirarch, guilty exclusively of crimes against humanity.¹⁰⁵ This was the view defended by Judge Röling in his dissenting opinion in the Tokyo judgment.¹⁰⁶

Suggested Solutions

The drafters of the Charter and the judges of the IMT suggested a few possible solutions to the *nullum crimen* problem. Almost all fail to convince.

First, it was argued that the principle of legality is a non-binding principle of national criminal justice. It was argued that, since *nullum crimen* is an ethical principle, rather than a rule of law, it may be set aside if considerations of justice demand it. To use the language of Radbruch, it was argued that the principle of *Rechtssicherheit* must yield to *Gerechtigkeit*.¹⁰⁷ Shortly after Nuremberg Kelsen wrote that *nullum crimen sine lege* was a principle of justice and that justice demanded the punishment of the Nazi criminals.¹⁰⁸ As a principle of justice, the principle of legality has to have general application and has to be respected at all times.

Secondly, the IMT argued that the Tribunal was bound by its own law and could not inquire into the legality of this law. This argument is clearly tautological and self-serving. Bassiouni writes that the principal reason why the Charter was self-legitimising, was to avoid protracted defence arguments on legitimacy and compliance of the Charter with existing international law.¹⁰⁹ Implicit in this consideration must have been the drafter's concern that existing international law was vague and ambiguous and contained many lacunae all of which could have been argued (possibly with some success) at length by the defense.¹¹⁰ The novel and political character of the IMT and its fragile institutional nature prevented the

¹⁰³ A Cassese *International Law* (2001) 249. Cassese suggests that the reason for this could be that in their Joint Motion of 19 November 1945, Defence Counsel only insisted on crimes against the peace being contrary to the principle of legality and passed over crimes against humanity in silence. See the Motion adopted by all Defence Counsel on 19 November 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 – 1 October 1946, Nuremberg I*, 168-9.

¹⁰⁴ Cassese *ibid.*

¹⁰⁵ Cassese (note 46) 71.

¹⁰⁶ B V A Röling & C F Ruter (eds) *The Tokyo Judgment* Vol 2 (1977) 1048ff.

¹⁰⁷ R Woetzel *The Nuremberg Trials in International Law* (1962) 111-12.

¹⁰⁸ Kelsen (note 6) 165.

¹⁰⁹ Bassiouni (note 44) 546.

¹¹⁰ *Ibid.*

Tribunal from inquiring into its own legitimacy. Bassiouni believes that the delays caused by such ‘technical legal questions’ could have diverted world opinion from the horrendous crimes committed.¹¹¹

Their third suggested solution was that the Charter was an expression of international law existing at the time. Some argue that the Nuremberg trials were given a ‘sufficient patina of legality’ and that the ‘unconventional’ charges had valid foundations in international law and were binding even during Hitler’s rule in Germany.¹¹² This is a stronger argument but not altogether convincing in the case of the ‘new crimes’ of crimes against the peace and crimes against humanity.

A fourth solution put forward was the appeal to a ‘higher law’ and an ‘inner sense of justice’ as a justification for not relying on strict legal principles. But reliance on an unarticulated ‘higher law’ is arbitrary in itself and subject to abuse. Many of the defendants before the IMT indeed argued that their ‘higher law’ was obedience to the *Fuhrer*.¹¹³

Bassiouni acknowledges that the Charter did not intend to facilitate a clear guide of conduct. In his view it appears from the insufficiency of the general requirements and the specific proscriptions of the Charter that it was not an instrument intended to provide the public with a framework for permissible behaviour as would be required by the principles of legality of the world’s major criminal justice systems.¹¹⁴ He argues that selective and occasional enforcement of rules does not contribute to a viable and equitable international criminal justice policy.¹¹⁵

It is difficult not to agree with Bassiouni who argues that the outcome of the discussion relating to the *nullum crimen* obstacle at the IMT was far from satisfactory and that one would have expected that such ‘distinguished drafters’ as the drafters of the Charter and the IMT judges would have addressed the question in a more scholarly or convincing way.¹¹⁶ It is submitted that, far from ‘taking care’ of the problem of legality (as Schabas suggests)¹¹⁷ the Nuremberg judges failed to take the principle seriously.

¹¹¹ Ibid.

¹¹² See B D Meltzer ‘A Note on Some Aspects of the Nuremberg Debate’ (1947) 15 *University of Chicago Law Review* 455; Q Wright ‘Legal Positivism and the Nuremberg Judgment’ (1948) 42 *AJIL* 405.

¹¹³ See Bassiouni (note 44) 114.

¹¹⁴ Ibid 563.

¹¹⁵ Ibid.

¹¹⁶ According to Bassiouni ‘the drafters knew that the issue of legality was a major weakness of the undertaking’. Although the IMT judgment shows that the issue was consistently raised by the defence, the judgment dealt with the question only superficially. See Bassiouni (note 44) 290, 291.

¹¹⁷ W A Schabas ‘Perverse Effects of the *Nulla Poena* Principle: National Practice and the *Ad Hoc* Tribunals’ (2000) 11 *EJIL* 538.

6. National Prosecutions and the Principle of Legality

(i) *Attorney General of Israel v Eichmann*

The prosecution of Adolf Eichmann is the most famous example of a post World War II national prosecution of crimes against humanity and war crimes. Schwarzenberger described the trial as ‘one of the greatest dramas of legal history’.¹¹⁸ Eichmann was prosecuted in Israel under the Nazi and Nazi Collaborators (Punishment) Law and it was argued that this law constituted *ex post facto* penal legislation since it prescribed as offences acts committed before the State of Israel came into existence.¹¹⁹

The District Court of Jerusalem stated that it would be difficult to find a more convincing instance of a just retroactive law than the legislation providing for the punishment of war criminals and perpetrators of crimes against humanity and against the Jewish people. The court asked: ‘Can anyone in his right mind doubt the absolute criminality of such acts?’¹²⁰ According to the court all the reasons justifying the Nuremberg judgments justified *eo ipse* the retroactive legislation of the Israel legislator.¹²¹ The court referred to the Netherlands Law of July 1947 which in the opinion of the court served as an example of municipal retroactive legislation.¹²² On the strength of this retroactive legislation a special tribunal in the Netherlands sentenced Rauter, the Senior Commander of the SS in Holland, to death.¹²³

The District Court addressed a second aspect of the retroactivity dilemma - namely the retroactive application of the Nazi and Nazi Collaborators (Punishment) Law to a period prior to the establishment of the State of Israel - which it held was not a problem different from that of the ‘usual retrospectivity’.¹²⁴ The court relied on an article by Goodhart to support this proposition:

Many of the national courts now functioning in the liberated countries have been established recently, but no one has argued that they are not competent to try the cases

¹¹⁸ G Schwarzenberger ‘The Eichmann Judgment: An Essay in Censorial Jurisprudence’ (1962) 15 *Current Legal Problems* 248.

¹¹⁹ *Eichmann* District Court of Jerusalem (note 3) 10.

¹²⁰ *Ibid.*

¹²¹ *Ibid* para 27.

¹²² Article 27A of the Law of 10 July 1947 states: ‘Any person who, during the present war, while in the military service of the enemy is guilty of a war crime or any crime against humanity as defined in Article 6, subsection (b) and (c), of the Charter annexed to the London Agreement of August 8, 1945... shall, if such crime contains at the same time the elements of an act punishable according to the Netherlands law, receive the punishment laid down for such act.’ *Ibid.*

¹²³ The accused appealed the decision but the appeal was dismissed by the Special Court of Cassation. *Ibid.*

¹²⁴ *Ibid* para 37.

that arose before their establishment... No defendant can complain that he is being tried by a court which did not exist when he committed the act.¹²⁵

The court emphasised that the crimes of which Eichmann was accused were universal in character, relying on the ICJ's Advisory Opinion on *Reservations to the Genocide Convention* which stated that the Convention was intended to be 'universal in scope'.¹²⁶ The court stated: 'there was therefore no doubt that genocide was recognised as a crime under international law, *ex tunc*, and therefore jurisdiction over it was universal'.¹²⁷ In making this argument the court reflected the approach followed at Nuremberg, invoking the judgment of the IMT which stated that crimes against humanity and war crimes were 'the expression of international law existing at the time of its [the Tribunal's] creation.'¹²⁸

The Israeli Supreme Court discussed the question of whether the principle of legality formed part of international law.¹²⁹ According to the court the principle in so far as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law.¹³⁰ The court relied on Kelsen for the proposition that:

There is no rule of general customary international law forbidding the enactment of norms with retrospective force, so called *ex post facto* laws.¹³¹

The court acknowledged the respect the principle enjoys in the criminal codes and Constitutions of many states 'because of the considerable moral value inherent in it',¹³² but pointed out that in the United Kingdom there is no constitutional limitation of the power of the Legislature to vest its criminal law with retrospective effect.¹³³ Whereas English law recognises the salutary aspects of the principle including the moral value of the principle and the value of the principle as a rule for statutory interpretation the principle is not adhered to in an absolute sense.¹³⁴ The court emphasised that one's sense of justice should recoil from the non-punishment of a person who participated in outrages such as the odious crimes committed by the appellant¹³⁵ and held that in such a case the maxim 'loses

¹²⁵ A Goodhart 'The Legality of the Nuremberg Trial' (April 1946) *Juridical Review* 8.

¹²⁶ *Eichmann* District Court of Jerusalem (note 3) 11 citing *Reservations to the Convention on the Prevention and Punishment of Genocide*, [Advisory Opinion of 28 May 1951](#), *ICJ Reports* (1951) 15.

¹²⁷ *Ibid.*

¹²⁸ *In re Goering* (note 3) 203, 207 as quoted in the *Eichmann* District Court case (note 3) *ibid.*

¹²⁹ *Eichmann* Supreme Court Judgment (note 3) 277.

¹³⁰ *Ibid* 278.

¹³¹ Kelsen (note 6) 87 as quoted at para 8 of the judgment.

¹³² *Ibid* para 8.

¹³³ *Ibid.*

¹³⁴ Note that, similar to the IMT at Nuremberg, the court describes the principle as a 'maxim'. *Ibid* para 8.

¹³⁵ *Ibid.*

its moral value and is deprived of its ethical foundation'.¹³⁶ With regard to the question of retroactivity the court concluded:

In the absence therefore of a positive rule of international law prohibiting criminal legislation with retroactive effect, and in the absence also of a moral justification for preventing the application of such legislation to the offences ... it follows that the second part of the argument of counsel for appellant – that the State of Israel did not exist when these offences were committed and its competence to impose punishment therefore is limited to its own citizens – is equally unfounded.¹³⁷

According to the court the deeds for which the appellant were convicted must be regarded as having been prohibited by the law of nations 'since time immemorial'.¹³⁸ The Supreme Court dismissed the appeal and affirmed the judgment of the District Court.

In his assessment of the case Professor Green argued that because the dates mentioned in the Nazi and Nazi Collaborator Law all related to the period before the establishment of the State of Israel it could not be denied that this law was *prima facie* retroactive.¹³⁹ Green referred to the case of *Honigman v Attorney General*¹⁴⁰ which justified the retroactivity of the act by stating that the circumstances in which the crimes were committed were 'extraordinary' and therefore it was right and proper that the purpose and application of the law should also be extraordinary.¹⁴¹ Green argued that the Nazi and Nazi Collaborators Law did not create new offences but 'introduced a new nomenclature for long recognised offences'.¹⁴² He referred to the Nuremberg Tribunal's description of *nullum crimen sine lege* as a 'principle of justice' and stated that as such the principle must be balanced against other principles.¹⁴³ The principle of legality, according to Green is one principle among many.

Green makes the interesting point that even if the laws under which Eichmann purported to have acted were lawful and if the Nazi and Nazi Collaborators Act did therefore amount to retroactive legislation this would only be true of actions committed in the territory of the German Reich and against German nationals.¹⁴⁴ With regard to Eichmann's activities outside of Germany or the activities directed

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ L C Green 'The Maxim *Nullum Crimen Sine Lege* and the Eichmann Trial' (1962) 38 *British Yearbook of International Law* 458, 459.

¹⁴⁰ *International Law Reports* (1951) 542.

¹⁴¹ Green (note 139) 459.

¹⁴² Ibid 461. In this regard Green quotes the Netherlands case of Cassation in the case of *In re Rauter*: 'However there is nothing absolute about that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice.' *In re Rauter, Annual Digest* (1949) 526. Ibid.

¹⁴³ Ibid 461.

¹⁴⁴ Ibid 470.

against the nationals of occupied states within Germany his actions had to conform with the international law of military occupation as expressed in the Hague Regulations and customary law.¹⁴⁵

(ii) *R v Finta*

The prohibition on retrospective punishment was discussed in one of the most prominent post-war national war crime prosecutions, the Canadian case *R v Finta*.¹⁴⁶ In this case the respondent, a Hungarian member of the SS, was charged pursuant to section 7 (3. 71) of the Criminal Code of Canada with crimes against humanity and war crimes (enslavement and deportation of Jews) committed in Hungary in 1944. In terms of this provision a person who had committed an act or omission constituting a war crime or a crime against humanity outside of Canada which, if committed in Canada, would have constituted an offence against the laws of Canada in force at the time would, subject to certain conditions, be deemed to have committed that act or omission in Canada.¹⁴⁷ Without this deeming provision the acts or omissions alleged to have been committed abroad by the respondent would not be culpable in Canada.

It was argued on behalf of Finta that although he had participated in certain of the acts alleged, he had not been in a position of authority but had been subject to the command of the German SS and that he acted pursuant to orders. The respondent submitted that section 7 (3.71) of the Criminal Code contravened section 7 of the Canadian Charter of Rights because it ‘retroactively’ created criminal liability in respect of acts or omissions which were lawful at the time and place of their occurrence.¹⁴⁸

The Supreme Court responded to the retroactivity charge by looking at the sources of international law and emphasised that international law need not be codified. It pointed out that the definition of ‘war crime’ and ‘crime against humanity’ requires that the act ‘at the time and ...place, constitutes a contravention of customary international law or conventional international law’. The definition of ‘crime against humanity’ allows for a third alternative, namely that the act be ‘criminal according to the general principles of law recognised by the community of nations.’¹⁴⁹

¹⁴⁵ Ibid 470, 471.

¹⁴⁶ *Finta* (note 3) 701.

¹⁴⁷ See the challenge to the constitutional validity of legislation, *ibid* 659, 660. It was decided that the legislation in question does not contravene section 7 of the Charter merely because it gives retrospective extraterritorial operation to Canadian criminal law in existence at the time the relevant acts took place. *Ibid* 575. Section 7 (3.74) provided that an accused could be convicted of an offence with respect to an act or omission referred to in section 7 (3.71) even if the act or omission had been committed in obedience, or in conformity with, the law in force at the time and in the place of its commission.

¹⁴⁸ *Finta* (note 3) 709.

¹⁴⁹ *Ibid* 782.

The Supreme Court found that international law in this area did not violate the Canadian Charter of Rights on the ground of vagueness. It stated that it is in the nature of the decentralized international system that international law cannot be conveniently codified in some sort of transnational code.¹⁵⁰ According to the court even on the basis of international convention or custom there were many individual documents that signaled the broadening prohibitions against war crimes and crimes against humanity.¹⁵¹ International law before 1944 provided fair notice to the accused of the consequences of breaching the still evolving international law offences. The court stated: "The legislation is not made uncertain because the entire body of international law is not codified and that reference must be made to opinions and legal writing in interpreting it."¹⁵²

The court considered the views of both Bassiouni and Schwarzenberger in reaching its decision. It quoted Bassiouni who stated that arguments challenging the Charter's enunciation of 'crimes against humanity', whether they were raised at Nuremberg, Tokyo or in the *Eichmann* or *Barbie* trials, have always been rejected.¹⁵³ Judge La Forest preferred the view of Schwarzenberger who emphasised that the strongest source in international law for crimes against humanity was the common domestic prohibitions of civilized nations.¹⁵⁴

The court emphasised the fact that the internationally illegal acts for which individual criminal responsibility had been established were the most morally objectionable and seemed to take a natural law position when it stated that everyone has inherent knowledge that certain actions are wrong whether this knowledge arises out of a moral, psychological or religious stance.¹⁵⁵ According to the court the persons who committed these crimes were *certainly aware* of their immoral character and for this reason the retroactivity of the law applied to them could not be considered as incompatible with justice. Justice required the punishment of those committing such acts in spite of the fact that under positive law they were not punishable at the time they were performed.¹⁵⁶ The Supreme Court also stressed that there was near-universal agreement about the punishability of crimes against humanity. It stated that the strongest source in international law for crimes against humanity were the 'common domestic

¹⁵⁰ Ibid.

¹⁵¹ The court spoke of the 'numerous conventions' that indicated that there were international rules on the conduct of war and individual responsibility for them. The court referred to Christian codes of conduct, rules of chivalry and the great international writers such as Grotius. The court also referred to the Hague Conventions of 1899 and 1907. Ibid.

¹⁵² Ibid 709.

¹⁵³ The court stated that Bassiouni continued to have concerns about the 'somewhat uncertain status' of crimes against humanity and believed that a separate international court and elaborate international code is required. Ibid 783.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 709.

¹⁵⁶ Ibid 710.

prohibitions of civilised nations'.¹⁵⁷ According to the court no modern civilized nation was able to sanction the conduct listed under crimes against humanity.¹⁵⁸ The court stated that it was therefore appropriate that the acts were made punishable with retroactive force. The *Finta* court therefore acknowledged that section 7 operated retroactively but that the retroactivity of the law was *not incompatible with justice*.¹⁵⁹ The application was however dismissed and Finta was acquitted because of the Prosecution's inability to prove that Finta had the requisite *mens rea*.

(iii) *Polyukhovich v The Commonwealth*

Another national case in which an accused was unsuccessfully prosecuted for war crimes was the *Polyukhovich* trial.¹⁶⁰ The facts in the *Polyukhovich* case were the following: the plaintiff, who had become an Australian citizen after the Second World War was charged with having committed war crimes while serving in the German army in the Ukraine between 1941 and 1943. Charges were brought under the War Crimes Act 1945 (as amended in 1988) which provided for the trial and punishment of persons who had committed serious war crimes in Europe during World War II and had entered Australia and became Australian citizens after 1945. The Act dealt with acts which had taken place outside of Australia and that had been committed by persons who were not at the time citizens or residents of Australia. The Act thus makes acts performed by a person who at the relevant time had no connection with Australia a criminal offence under Australian law.

The plaintiff challenged the constitutional validity of provisions of the Act,¹⁶¹ submitting in particular that section 9 which made war crimes an offence under the Act, was beyond the legislative powers conferred upon the Commonwealth Parliament by sections 5 (vi) and (xxix) of the Australian Constitution. The plaintiff also contended that at the time the alleged offences were committed there had been no Australian legislation in force which made it a criminal offence for someone who was not then an Australian citizen to commit such acts in the Ukraine. He therefore contended that section 9 of the Act involved retrospective criminal legislation and was an invalid attempt to usurp the power of the courts.

The plaintiff's submission was that one of the central elements in the exercise of judicial power is the determination by a court of the issue whether the accused infringed a rule of conduct *prescribed in advance*.¹⁶² It was contended by plaintiff that the power of Parliament to enact a retrospective or retroactive law dealing with

¹⁵⁷ Ibid 716.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid 710.

¹⁶⁰ *Polyukhovich* (note 3).

¹⁶¹ 91 ILR 3

¹⁶² Ibid 14 (my emphasis).

substantive rights or liabilities does not extend to a law which makes past conduct a criminal offence.¹⁶³

The High Court upheld the constitutionality of the Act and held that, although the Act was retrospective and applied to people who had no connection with Australia, it was still law with respect to 'external affairs'.¹⁶⁴ The court also held that the Act was not retrospective in operation because it only criminalised acts which were war crimes under international law as well as 'ordinary crimes' under Australian law at the time they were committed. Whereas there was no obligation under customary international law to prosecute individuals, there was a right to exercise universal jurisdiction and the War Crimes Act facilitates this right. Justice Dawson stated that 'the *ex post facto* creation of war crimes may be seen as justifiable in a way that is not possible with other *ex post facto* criminal laws ... the wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law...'.¹⁶⁵

Justice Brennan dissented, holding that the Commonwealth was not entitled to enact laws governing affairs outside Australia with which Australia had no connection.¹⁶⁶ The plaintiff had not been an Australian citizen when the alleged acts were committed and the alleged acts took place in the Ukraine and 'had not involved Australian victims or interests in any way'.¹⁶⁷ He stated further that there was no evidence of any rule of international law which required Australia in 1988 to enact legislation for the prosecution of war crimes allegedly committed outside Australia during World War II. The statutory offence created by section 9 of the Act did not correspond with international law definitions of war crimes and crimes against humanity.¹⁶⁸ He concluded that crimes which were created by retrospective municipal law and which differed from international crimes could not be tried under universal jurisdiction.¹⁶⁹

(iv) East German Border Guard Cases (*Mauerschützenprozesse*)

The trials of the East German wall guards stand as a symbol of the German judiciary's response to state-sponsored violence. They also provide a good illustration of how national law and international courts interpreted the principle of legality. The approach of the German federal courts with regard to the principle

¹⁶³ Ibid 160.

¹⁶⁴ Ibid 161-164.

¹⁶⁵ Ibid 105.

¹⁶⁶ Ibid 5.

¹⁶⁷ Ibid.

¹⁶⁸ Justice Brennan came to the conclusion that there was a 'disconformity' between the provisions of the Act defining a war crime falling within section 7 (1) of the Act and international law. Brennan stated: 'so far as s. 7(3) furnishes an element of the statutory offence created by s. 9, it is not consonant with pre-1945 international law.' 91 ILR 52.

¹⁶⁹ Ibid.

of legality will first be discussed after which the view of the European Court of Human Rights will receive attention.

One of the ways in which the German courts tried to resolve the problem of retroactivity was by employing a formula developed by the philosopher Gustav Radbruch, the *Radbruchschen Formel*. According to this formula the laws of the Nazi period were null and void if they constituted serious violations of fundamental principles of justice and humanity which must be respected by any state. If laws infringe on these principles positive law must yield to justice.¹⁷⁰ The violation in question must be so grave that it contradicts the idea of law as being based on the value and dignity of men, common to all nations; the contradiction of the order or statute with the idea of justice must be so intolerable that the order or statute, being wrongful law, has to give way to justice. This formula served as the theoretical justification for the German courts' decision in several cases. In one of the most important of the *Mauerschützenprozesse*, the *Streletz and Kessler* judgment,¹⁷¹ the German Federal Constitutional Court invoked the *Radbruchschen Formel*.

The former GDR defence minister Kessler and his deputy Streletz, were charged with incitement to commit intentional homicide. The question at issue was whether they could invoke as ground of justification the fact that their actions were legal under the law applicable in the GDR. The defendants submitted that holding them liable would run counter to the prohibition on the retroactive application of criminal law and Article 103(2) of the German Constitution laying down the *nullum crimen* principle and the terms of the Unification Treaty which clearly states that no former GDR citizen shall be punished for an act that was not criminally prohibited in the GDR.¹⁷²

¹⁷⁰ The Radbruchschen Formel reads as follows: 'Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzumutbar ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als 'unrichtiges Recht der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur unrichtiges Recht, vielmehr entbehrt es überhaupt der Rechtsnatur.' Gustav Radbruch (1946) 1 *Süddeutsche Juristenzeitschrift* 105.

¹⁷¹ BGHSt40, 218; NJW 1994; BGHSt 40, 241 NJW 1994.

¹⁷² G Werle 'Criminal Justice and state criminality: The current German position' in M Rwelamira & G Werle (eds) *Confronting Past Injustices. Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (1996) 21, 27 The reunified German courts applied the substantive provisions of East German criminal law regarding homicide and complicity. According to the *Einigungsvertrag* (the German Unification Treaty) East German criminal law would be applied in cases which originated in East Germany except in cases where West German law was more lenient. Muller (note 24) 656.

The defendants relied on two justification grounds: first, section 27 para 2 of the East German Border Act (*Grenzzgesetz*) which provided that border guards may, if necessary, shoot at a person to prevent or to stop the commission of a major crime;¹⁷³ and second, the East German state practice of not prosecuting the use of deadly force in the enforcement of the border regime. The *Bundesgerichtshof* (BGH) denied the validity of both justification grounds. It held that a ground of justification has to be disregarded by the courts if it implies a patent violation of fundamental principles of justice and humanity.¹⁷⁴ This was the case in the *Mauerschützenprozessen*: section 27 was aimed at willfully killing unarmed people for the sole reason that they tried to cross the border. The object of making the border ‘inviolable’ had absolute priority over the life of the refugee. The BGH emphasised the differences between the Nazi regime and East German regime but still employed Radbruch’s formula.¹⁷⁵ The court stated that in spite of the difficulties of transposing Radbruch’s formula from the context of National Socialism to the present context, the *Formel* applies to cases of this type. The BGH found Streletz and Krenz criminally liable on the basis of intentional homicide as indirect principals.¹⁷⁶ Kessler and Streletz were sentenced to seven years and six months imprisonment respectively. Krenz, as a member of both the Political Bureau and the NDC, was sentenced to six years and six months imprisonment.¹⁷⁷ After unsuccessful petitions to the *Bundesverfassungsgericht* (BVerfG) the defendants filed an individual application against the Federal Republic of Germany on the basis of a violation of the European Convention for the Protection of Human Rights.¹⁷⁸

The European Court of Human Rights found that the German convictions of Streletz, Kessler and Krenz did not constitute a violation of Article 7(1) of the

¹⁷³ Border Statute (*Grenzzgesetz*) of 25 March 1982.

¹⁷⁴ BGHSt 45, 270, Judgment of 26 July 1994. See H Horskotte ‘The Role of Criminal Law in dealing with East Germany’s Past: The Mauerschützen cases’ in: W F Ebke & D F Vagts (eds) *Democracy, Market Economy and the Law* (1995) 221.

¹⁷⁵ The court stated: ‘In this wholly exceptional situation, the requirement of objective justice, which also embraces the need to respect the human rights recognised by the international community, makes it impossible for a court to accept such justifications. Absolute protection of the trust placed in the guarantee given by Article 103 para 2 of the Basic Law yield precedence, otherwise the administration of criminal justice in the Federal Republic would be at variance with its rule-of-law premises.’ *Streletz, Kessler* (note 3) para 65. According to Horskotte the application of the *Radbruchschen Formel* in the ‘wall guard’ cases can be compared to the substantive law applied by IMT at Nuremberg which, for its part, had at least partial recourse to concepts of natural law. The important difference would be that the offence that was prosecuted was homicide and the BGH was not required to develop new offences such as crimes against humanity; the relevance of the *Radbruchschen Formel* was restricted to the elimination of grounds of justification. Hortschette (note 174) 222.

¹⁷⁶ BGHSt 45, 270.

¹⁷⁷ *Ibid.*

¹⁷⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950. See J Arnold ‘The German Border Guard Cases before the European Court of Human Rights’ (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 67.

Convention¹⁷⁹ which provides that ‘no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed’. The court stated that the purpose of the provision is to ensure that no one is subject to arbitrary prosecution, conviction or punishment.¹⁸⁰ Unlike the German courts the European Court did not rely on the *Radbruchschen Formel*. Instead it relied exclusively on the terms of the East German law to find that the inapplicability of the asserted justifications was foreseeable by the applicants.

The European Court emphasised the importance of the rule of law and held that

It is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those who existed previously, cannot be criticized for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.¹⁸¹

The European Court held that, at the time the acts were committed, the applicants’ acts constituted offences defined with sufficient *accessibility and foreseeability* in East German law.¹⁸² A practice by a state which flagrantly violates human rights, such as the border policy of the GDR, could not be covered by the protection of Article 7(1) - as such practice could not be described as ‘law’ within the meaning of the article.¹⁸³

(v) *Bouterse*

Pursuant to the request by the relatives of two victims, Colonel Desi Bouterse was prosecuted in the Netherlands for the torture and killing of fifteen political opponents of the Surinam government in 1982. This was the first prosecution in the Netherlands of a non-national for crimes committed extraterritorially. On 20 November 2000 the Court of Appeal in Amsterdam ordered the public prosecutor to prosecute Bouterse for the crime of torture committed in Surinam. But on 18 September 2001 the Dutch Supreme Court (Hoge Raad) reversed this decision.¹⁸⁴ The Supreme Court emphasised that the alleged torture committed by Bouterse did not constitute a criminal offence under Dutch law at the time it was committed in 1982. The Supreme Court further ruled that the Netherlands lacked jurisdiction over the offences at that time.¹⁸⁵ The Supreme Court interpreted Article 5 of the 1984 Torture Convention and Article 5 of the Dutch Torture

¹⁷⁹ *Streletz, Kessler and Krenz* (note 3).

¹⁸⁰ *Ibid* para 88

¹⁸¹ *Streletz, Kessler and Krenz* (note 3) Concurring Opinion of Judge Levits, para 81.

¹⁸² *Streletz, Kessler and Krenz* (note 3) para 89

¹⁸³ *Ibid* para 87

¹⁸⁴ *Bouterse*, Hoge Raad, Criminal Chamber, Judgment of 18 September 2001, nr 00749/01 (CW 2323).

¹⁸⁵ For a summary of the case see L. Zegveld ‘The Bouterse Case’ (2001) XXXII *Netherlands Yearbook of International Law* 98, 99.

Convention Implementation Act of 1988¹⁸⁶ as only permitting prosecution and trial if a jurisdictional link is present. This interpretation by the Supreme Court considerably restricted the jurisdiction of the Dutch courts to exercise universal jurisdiction.

The Amsterdam Court of Appeal asked Professor Dugard whether the prohibition against torture had the status of customary international law in 1982. Dugard relied primarily on the practice of international bodies to establish that a customary rule prohibiting torture existed. This approach to identifying custom was accepted by the Court of Appeal and allowed it to determine that torture was prohibited in international law in 1982.¹⁸⁷ In his Opinion Professor Dugard wrote that torture was a crime against humanity and a crime under international law, involving individual responsibility well before 1982 (the date of the Torture Convention).¹⁸⁸ Dugard argued that even though the Netherlands only became a party to the Torture Convention in 1989 the conduct of Bouterse fell within the definition of a crime against humanity under customary international law in 1982.¹⁸⁹ Dugard therefore implied that since serious international crimes such as torture had been accepted as crimes under customary international law, the principle of legality, at least in its strict form (requiring written law) was not applicable in the case of crimes against humanity in international criminal law.

Zegveld argued that the Court of Appeal, following Dugard, circumvented the principle of legality in an inventive manner by distinguishing between retrospective and retroactive law.¹⁹⁰ Whereas retroactive law is prohibited by the principle of legality, retrospective law could be regarded as merely declaratory of existing customary law.¹⁹¹ The court held that the 1984 Torture Convention and the 1988 Implementation Act might be applied retrospectively to cover conduct that was unlawful under Dutch law before 1989 but was not criminalised specifically.¹⁹²

The Supreme Court (Hoge Raad) rejected the distinction between retrospective and retroactive law. It held that the principle of legality stipulated in Article 1 of the Criminal Code and Article 16 of the Constitution unreservedly prohibited the trial and punishment under Dutch law of a trial that was not an offence under Dutch law at the time it was committed.¹⁹³ Article 16 of the Dutch Constitution

¹⁸⁶ The full title of the Act is the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment (Implementation) Act.

¹⁸⁷ Zegveld (note 185) 100.

¹⁸⁸ *In re Bouterse*, Expert Opinion of Prof. C J R Dugard, 7 July 2000 para. 5.3.2.

¹⁸⁹ *Ibid* para. 8.4.4.

¹⁹⁰ Zegveld (note 185) 101.

¹⁹¹ *Ibid*. See also the definitions offered by the *Finta* court (note 3).

¹⁹² Para 6.3

¹⁹³ Zegveld (note 185) 100. On 18 September 2001 the Supreme Court decided not to prosecute Bouterse. The Supreme Court did not agree with the Court of Appeal's position that the Torture

states: ‘Geen feit is strafbaar dan uit kracht van een daaraan voorafgegane wettelijke strafbepaling.’ The court held that the Implementation Act did not grant retroactive force to the jurisdictional rules in Article 5 of the Act and Article 16 was not set aside by the Torture Convention. In addition the court held that the history of the Act also did not offer any points of contact for the permissibility of granting retroactive force to Article 5.¹⁹⁴ The court explained the difficulties inherent in prosecuting Bouterse:

Voor het standpunt dat de Nederlandse rechter niet op grond van ongeschreven volkenrecht een universele strafrechtsmacht mag uitoefenen die de wetgever hem niet heeft gegeven vind ik niet alleen steun in de Grondwet en in de rechtspraak maar daarvoor pleiten ook staatkundige oorwegingen. Die rechter zou zich aldus begeven op de terrein van buitenlandse betrekkingen...¹⁹⁵

(vi) Conclusion

Of the cases discussed in this section *Bouterse* was the only case in which a national court decided not to prosecute on the basis of a violation of the principle of legality. One explanation for this could be that, with the exception of *Streletz and Kessler*, the other cases all dealt with the prosecution of war crimes committed during World War II. Most post World War II national prosecutions were conducted on the basis of laws that copied the provisions of the Nuremberg Charter.¹⁹⁶ In the *Streletz and Kessler* case the German courts relied on the *Radbruchschen Formel* which was formulated with the kind of atrocities committed during World War II in mind, to justify the infringement of the principle of legality. Bouterse did not commit a war crime and the Dutch courts did not link the acts of torture committed by him to war crimes committed during World War II. A second explanation could be that the Torture Convention Implementation Act is fundamentally different from the national legislation relied on in *Eichmann*, *Finta* and *Polyukhovich*. The Nazi and Nazi Collaborators Law, the Australian War Crimes Act and section 7 of the Criminal Code of Canada all made provision and could be said to have been specifically tailored for the *ex post facto* punishment of war crimes committed in Europe during World War II. However, since torture is a *jus cogens* crime one could reason that the arguments in favour of *ex post facto* prosecution raised in the context of war crimes may be equally applicable to cases of torture.

7. The Principle of Legality in American Law

The *nullum crimen* principle in the US is based on very different historical foundations than the German version of the principle. Indeed, it has been argued that the ‘reception of the English common law in America included the English

Convention could be applicable to Bouterse’s acts in 1982 and reversed the Appeals Court decision. *Bouterse* (note 3) paras 24, 42.

¹⁹⁴ *Bouterse* (note 3) para 63.

¹⁹⁵ *Ibid* para 75.

¹⁹⁶ *Boot* (note 1) para 249.

disregard of *nullum crimen*?¹⁹⁷ The modern importance of the principle of legality in America sprang from the European intellectual movement known as the Enlightenment.¹⁹⁸ American reformers who tried to replace the common law with legislative codification embraced the ideas of the Enlightenment which included the legality ideal.¹⁹⁹

The relationship between the separation of powers doctrine and the principle of legality forms part of the historical origins of the principle and was discussed above. The separation of powers doctrine forms an integral part of American constitutional theory and American law has long recognised the principle of nonretroactivity in the criminal law.²⁰⁰

La Fave and Scott point out that undue vagueness in a statute will result in it being held unconstitutional.²⁰¹ But because of the inherent limitations in the use of language the authors write that there is no 'simple litmus-test' for determining whether a statute is void for vagueness.²⁰²

Some have asserted that the American 'void for vagueness' doctrine and the 'rule of strict construction' are corollaries of the principle of legality.²⁰³ It might be more correct to understand the 'void-for-vagueness doctrine' and the 'rule of strict construction' as rules used to implement the notions underlying *nullum crimen*.²⁰⁴ The rule of strict construction (also called the rule of lenity) requires that penal statutes must be construed against the state.²⁰⁵ Today the rule of strict construction is employed less frequently than the void for vagueness doctrine.²⁰⁶ The American Supreme Court has held that a federal or state statute which vaguely defines a punishable offence violates the Fifth Amendment and Fourteenth Amendment due process clauses and is therefore unconstitutional.²⁰⁷ A criminal statute which is so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application' is considered unconstitutional.²⁰⁸ The void for vagueness doctrine aims to eliminate laws that

¹⁹⁷ S Glaser 'Nullum Crimen Sine Lege' (1942) 24 *Journal of Comparative Legislation and International Law* 29-30.

¹⁹⁸ J C Jeffries 'Legality, Vagueness and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 190.

¹⁹⁹ *Ibid.*

²⁰⁰ L H Tribe *American Constitutional Law* 2nd ed (1988) para 5-17.

²⁰¹ W R LaFave and A W Scott *Criminal Law* (1972) 84. LaFave and Scott refer to *Lanzetta v New Jersey*, 306 U.S 451, 453, 59 S. Ct. 618, 619, 83, L. Ed in which it was stated that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

²⁰² *Ibid* 84, 84.

²⁰³ See R Haveman (note 19) 43.

²⁰⁴ Jeffries (note 198) 195.

²⁰⁵ *Ibid* 198.

²⁰⁶ *Ibid* 199.

²⁰⁷ *International Harvester Co v Kentucky* 234 US 216 (1914). See Boot (note 1) 120.

²⁰⁸ *Connally v General Construction Company* 269 US 385 (1926). 84. LaFave and Scott 83.

invite manipulation.²⁰⁹ In his classic analysis of the void-for-vagueness doctrine Professor Amsterdam writes that '[Vagueness] is a means for securing the Court's control over the methods by which governmental compulsion may be brought to bear on the individual'.²¹⁰

Factors taken into account in deciding whether a law is vague and therefore void include considerations such as the nature of the governmental interest, the feasibility of being more precise and whether the vagueness affects the fact or merely the grade of criminal liability.²¹¹ The first purpose of the void for vagueness doctrine is that a vague statute cannot serve as adequate warning to people. Fairness requires that citizens should have prior notice of what is forbidden. A vague statute also fails to provide uniform criteria for law enforcement authorities.²¹²

It is difficult to find many examples of crime creation by judges in modern American criminal law.²¹³ The courts however continue to employ the void-for-vagueness doctrine to reign in judicial creativity.

In the seminal case of *Winters v New York*²¹⁴ it was held that subsection 2 of para 1141 of the New York Penal Law which prohibited the distribution of a magazine made up of news and stories of 'criminal deeds of bloodshed and lust so massed as to become vehicles for inciting violent and depraved crimes' was so vague and indefinite that it violated the Fourteenth Amendment which protects freedom of speech and the press.²¹⁵ The court stated that a statute violated an accused's right to procedural due process and freedom of speech and the press if it fails to give fair notice of what acts will be punished.²¹⁶

United States v Cohen Grocery Co,^{217a} a case decided during the First World War, involved the constitutionality of section 4 of the Food Control Act. This section penalised the making by any person of 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessities'. The court decided that these words must be construed as forbidding and penalising the exaction of an excessive

²⁰⁹ Jeffries (note 198) 197. For more on vagueness in American criminal law see SH Kadish and MG Paulsen *Criminal Law and its Process* (1975) 182-200.

²¹⁰ A G Amsterdam 'The Void-for-Vagueness Doctrine in the Supreme Court' 109 (1960) *University of Pennsylvania Law Review* 115.

²¹¹ *Ibid* 196.

²¹² See *Papachristou v Jacksonville* 405 USW 156 (1972), *Kolender v Lawson* 461 US 352 (1983).

²¹³ *Ibid* 194. According to Jeffries the reason for this is that as statute and precedent accumulated in American law, gaps were met by new legislation or filled by judicial accretion.

²¹⁴ 333 US 507 (1948).

²¹⁵ *Ibid*.

²¹⁶ *Ibid* 509, 510.

²¹⁷ 255 US 81 (1921)

price upon the sale of a commodity.²¹⁸ The court decided that the section was ambiguous and therefore repugnant to the Fifth and Sixth Amendments of the Constitution which require due process of law and that persons accused of crime shall be adequately informed of the nature and cause of the accusation. In the view of the court the section did not contain any ascertainable standard of guilt.²¹⁹

The connection between the void for vagueness doctrine and the principle of legality is clear. If a law is so vague that it is necessary for the courts to decide whether an act is criminal, the courts are given the discretion to create liability and usurp the legislative function. Because of the close association between popular sovereignty and legislative primacy in the US,²²⁰ judicial innovation in the field of criminal law is seen as illegitimate.

8. Common Law Crimes: Scottish Law

In contrast to the position in England and Wales where there are no criminal codes but much of the law is defined in criminal statutes, much of Scottish criminal law is not the product of legislation. Rather, the definitions of crimes arise from successive decisions of criminal courts or from the writings of highly respected legal authors.²²¹ Scottish criminal law is therefore predominantly of a common law nature. Other sources of criminal law are legislation (Acts of Parliament), secondary legislation and extra-national legislation by which Scotland is bound. Common law crimes in Scotland include the most serious crimes such as murder, robbery, rape, assault, theft and fraud as well as less serious crimes such as breach of the peace.²²² The common law basis of Scots law lends great flexibility and adaptability to the system and enables it to develop without recourse to legislation.²²³ In theory this means that the criminal justice system can respond to new situations quickly by referring to an existing common law crime made to cover a form of behaviour which is causing concern. At the same time the lack of a criminal code leaves the system open to criticism – as being less definite and less certain than in other jurisdictions.

There exists some confusion as to whether the High Court of Justiciary is prevented from applying the law retroactively owing to the courts enjoying what is known as ‘declaratory power’ which is the power vested in the High Court to declare conduct to be a crime even if it has not previously been considered

²¹⁸ Ibid 88. The court stated ‘Why Congress should employ so unskilled and ambiguous a phrase for the purpose when it would have been easy to express the supposed purpose in briefer and more lucid words...is difficult to understand.’ The court referred to the rules regarding the strict construction of penal statutes. Ibid 95.

²¹⁹ Ibid 81.

²²⁰ Jeffries (note 198) 201.

²²¹ P Young *Crime and Criminal Justice in Scotland* (1997) 5.

²²² Ibid 5.

²²³ Ibid 6.

criminal.²²⁴ This power of the court is exercised retrospectively. It is possible for a person to act on sound legal advice that his action is not criminal, only to subsequently discover that he is to be penalised. Because of the incorporation of the European Convention in Scotland and the importance of Article 7(1) it is not permissible to apply law retroactively.²²⁵ According to McCall Smith and Sheldon, the resulting infringement of the principle of legality is self-evident.²²⁶

In the case of *McLaughlan*,²²⁷ the crime of shameless indecency was recognised by the court. According to McCall Smith and Sheldon, this case set remarkably broad boundaries for criminal law because although the precise definition of crimes may be an unrealistic goal it is 'quite another thing to use broad moral categories, such as dishonesty or falsehood as the basis for criminalisation'.²²⁸ More recently in *Webster v Dominick*²²⁹ the High Court had to decide whether the charge of shameless indecency disclosed any offence recognised by Scots law, the court held that it did not. In so deciding, the court did not rely on Article 7 (1) of the Convention but instead relied on the intrinsic vagueness and uncertain foundations in precedent of the crime of 'shameless indecency'.²³⁰

The use of the declaratory power is, however, subject to various restrictions which safeguards it against abuse. The decisions of the courts should, for example, as a fundamental constitutional rule not conflict with a rule laid down by Parliament.²³¹

9. The Principle of Legality in Regional and International Human Rights Instruments

(i) Universal Declaration of Human Rights

Formulations of *nullum crimen sine lege* are included in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and in three important regional human rights treaties: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. The provision containing the *nullum crimen* principle in the Universal Declaration of Independence will briefly be discussed. More attention will be paid to the jurisprudence of the European Court of Human Rights.

²²⁴ For examples of how the declaratory power is used, see C H W Gane & C N Stoddart *A Casebook on Scottish Criminal Law* 3ed (2001) 7-8.

²²⁵ Young (note 221) 6, 7. In South Africa the principle of legality prevents the creation of new crimes and even the extension of existing crimes. See *S v Von Molenendorff* 1987(1) SA 135 (T) at 169.

²²⁶ R A A McCall Smith, D Sheldon *Scots Criminal Law* 2 ed (1997) 7.

²²⁷ *McLaughlan v Boyd*, 1934 JC 19, 1933 SLT 629.

²²⁸ McCall Smith & Sheldon (note 226) 9.

²²⁹ 2003 SLT 975, 2003 SCCR 525.

²³⁰ *Ibid.* The High Court in this case referred to the creation of the offence of public indecency in South African law and specifically to *R v Marais* (1888) 6 SC at 367.

²³¹ Young (note 221) 7.

In the *Eichmann* case Counsel for the Defence, Dr. Servatius, argued that retroactive legislation is contrary to the very basis of the rule of law.²³² He relied *inter alia* on Article 11 (2) of the Universal Declaration of Human Rights. Green points out that this plea by the defence in *Eichmann* ignored the fact that the Universal Declaration of Human Rights is a declaration of policy only and not a binding legal instrument.²³³

Article 11 of the Universal Declaration of Human Rights contains the following formulation of the principle of legality:

1. Every one charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

There has been considerable debate surrounding the interpretation and content of the term ‘international law’ as a basis for individual criminal responsibility in the Universal Declaration.²³⁴ It was not clear whether “international law” referred only to codified law or whether it also included customary law.

(ii) European Court of Human Rights

The European Court of Human Rights has emphasised that the principle of legality, as formulated in Article 7 (1), occupies a prominent place in the Convention system of protection. This is illustrated by the fact that no derogation from it is permissible under Article 15 in times of war and other emergency. According to the court Article 7 should be applied ‘in such a way as to provide safeguards against prosecution, conviction and punishment’.²³⁵

According to the European Court criminal laws have to be ‘accessible and foreseeable’ while not excluding common law as a basis for individual criminal responsibility. To understand the way in which the Court has interpreted Article 7 one civil law case and one case from common law will be examined.

In *Baskaya and Okçuoglu v Turkey* the court took a flexible approach to the principle of legality. The facts were the following: Mr Okçuologu was the owner of a

²³² Green (note 139) 459.

²³³ Ibid. Dugard describes the Universal Declaration of Human Rights as “a recommendatory resolution of the General Assembly” which is not legally binding on states. See Dugard *International Law, A South African Perspective* (2005) 314.

²³⁴ See the discussion by Boot (note 1) para. 129.

²³⁵ *SW v United Kingdom* (note 5) para 34.

publishing house and Mr Baskaya a professor of economics and a journalist. The publishing house had published a book written by Mr Baskaya. The book was an academic essay addressing the socioeconomic revolution of Turkey since the 1920s, which included a criticism of the 'official ideology' of the state, and the Kurdish problem. Mr Baskaya and Mr Okçuologu were charged under section 8 of the Prevention of Terrorism Act 1991 with disseminating propaganda against 'the indivisibility of the State'.²³⁶ The Turkish Court of Cassation upheld the finding of the Istanbul National Security Court and found the applicants guilty. Both the applicants were sentenced to imprisonment and fines.²³⁷ Mr. Baskaya and Mr Okçuologu complained that their convictions and sentences, under section 1 and 2 of section 8 of the Prevention of Terrorism Act 1991 violated Article 7 of the European Convention.

The relevant section of this Act prohibited 'written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation'.

The complainants argued that because of the vagueness of the words 'dissemination of propaganda against the indivisibility of the State' and the lack of clarity of the wording of section 8 it was not foreseeable at the time that the relevant publication constituted an offence. The court decided however that section 8 did not confer an overbroad discretion on the national courts to interpret the scope of the offence, that it was difficult to frame laws with absolute precision and that a certain degree of flexibility was called for.²³⁸ It was decided that the interpretation of the law by the national court did not go beyond what could reasonably be foreseen in the circumstances. The European Court did therefore not find a breach of the principle of legality.²³⁹ The court did however, find that Article 10 of the Convention which protects freedom of expression was violated since the limitation of expression was disproportionate to the aims pursued.²⁴⁰

The European Court stated that a law may still satisfy the requirement of foreseeability even if the person concerned has to obtain legal advice to assess 'to a degree that is reasonable in the circumstances' the consequences of a given action.²⁴¹

²³⁶ *Baskaya and Okçuologu v Turkey*, ECHR, Judgment of 8 July 1999, para 13.

²³⁷ *Ibid* para 19.

²³⁸ *Ibid* para 39.

²³⁹ *Ibid* para 40.

²⁴⁰ *Ibid* paras 65 -67.

²⁴¹ *Cantoni v France*, ECHR, Judgment of 15 November 1996, para 35. See also *Tolstoy Miloslavsky v United Kingdom*, ECHR, Judgment of 13 July 1995, Ser A-316-B, 71, para 37.

In *S W v United Kingdom*²⁴² the European Court was confronted with an alleged retroactive application of criminal law. The Court had to consider the common law offense of rape in England. This case concerned the controversial question of marital rape and was decided together with the case *C R v United Kingdom*.²⁴³ The defendants in both cases were charged with raping their wives. A difference between the two cases was that Mr R had left his wife following marital difficulties whereas Mr W and his wife were still living together at the time of the alleged conduct. In both cases the defendants had sexual intercourse with their wives against their will. Mr W invoked the marital immunity which existed in English common law. English common law provided that a husband who forces his wife to have sexual intercourse could plead immunity against charges of rape because of the 'implied consent' included in the state of marriage. According to constant case law in England forcible sexual intercourse with one's wife was not unlawful. Mr W was convicted on the basis of a development in the case law - the existing offence of rape was extended to include conduct which until then was excluded by the common law. The House of Lords declared that the common law is capable of evolving in the light of changing social, economic and cultural developments.²⁴⁴

The court found that there is an element of interpretation in all law, including criminal law. According to the Court elucidation of doubtful points and adaptation to changing circumstances is acceptable, provided that the resultant development of the criminal law through judicial law-making is reasonably foreseeable.²⁴⁵

The court stated that the decisions of the Court of Appeal and House of Lords did no more than continue a perceptible line of case law development which dismantled the immunity of a husband from prosecution for rape.²⁴⁶ The court spoke of an 'evolution' of the criminal law through judicial interpretation towards treating the conduct of a husband who forcibly has sexual intercourse with his wife as within the scope of the offence of rape.²⁴⁷ The court held that there has therefore been no violation of Article 7 (1).²⁴⁸

A minority of the European Commission was not prepared to accept the correctness of the reform by the national courts and stated that the conviction was

²⁴² *S W v United Kingdom* (note 5) .

²⁴³ *C R v United Kingdom*, ECHR, Judgment of 22 November 1995, Ser. A-335-C. The applicant complained to the Commission after the House of Lords rejected his final appeal. *R v R* [1991] 4 All England Law Reports 481.

²⁴⁴ *S W v United Kingdom* (note 5) para 12.

²⁴⁵ Ibid para 36. See also the case of *Tolstoy Miloslavsky v UK* Judgment of 13 July 1995, Series A No. 316-B 71-72.

²⁴⁶ Ibid para 43.

²⁴⁷ Ibid.

²⁴⁸ Ibid para 47.

based almost wholly on the abolition of marital rape and not on the exception thereto.²⁴⁹

In both the *S W* and *C R* cases the European Court adopted a strong moral position. In *S W v United Kingdom* it held:

The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeals and the House of Lords...cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment...²⁵⁰

The significance of these cases for the application of the principle of legality in the context of the Tribunals lies firstly in the importance of the European Court's decisions and secondly in the reliance of the court on moral considerations and the Tribunals' appeals to morality. The moral repulsion expressed by the judges at the IMT and at the Tribunals respectively is often used as a justification for not adhering to strict principles of justice.

The above statement of the European Court may be criticised on the ground that it is possible to argue that Article 7 could be violated *even if* the end result was moral. In their commentary on the case Lawson and Schermers ask whether one can accept such a development of the law without violating the principle of legality.²⁵¹ They write that the door would be wide open for abuse if the moral repulsion of an act would be sufficient basis for its retrospective criminalisation.²⁵² Although it is true that moral values change over time and it is necessary for the law to reflect these changes, the use of moral repulsion as a justification for violating the principle of legality should be questioned.

10. Relevance of the Principle of Legality in International Criminal Law

The idea that the principle of legality does not apply in international law as it does in national law was expressed in the Nuremberg judgment. It was stated that 'this [international] law is not static, but by continual adaptation follows the need of a changing world.'²⁵³ Many commentators have argued that the principle of legality does not apply in a legal system such as international law that develops by practice and that international law resembles the common law in its developing character. The sources of international law are conventions, customs and general principles.

²⁴⁹ See the Dissenting Opinion of Mr Bekes in *C R v United Kingdom* (note 246) 'While it is true that the common law is by its very nature subject to change to take account among other things of developments in attitudes and behaviour, it is no less true that it cannot be abruptly replaced by a written statute.' See also Dissenting Opinion of Mr Loucaides, joined by Mr Trechsel, Mr Nowicki and Mr Cabral Barreto in *S W v United Kingdom* (note 5) paras 54-55.

²⁵⁰ Ibid para 44; cf *C R. v United Kingdom* (note 249) para 42.

²⁵¹ R A Lawson & H G Schermers *Leading Cases of the European Court of Human Rights* 2 ed (1999) 615.

²⁵² Ibid 616.

²⁵³ International Military Tribunal (note 2) 464.

Nullum crimen sine lege fits more comfortably into a system of written, statutory law. It was stated in the *Justice* case: ‘to have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.’²⁵⁴

Bassiouni points out that, because of the fact that the drafters of international law and conventions are diplomats and not experts in international criminal law one can not expect the same technical rigour from the international process as from national legislative bodies. He points out that the international legislative process has been imprecise and international crimes have often been defined in broad general terms without regard for the enunciation of the elements of the crime.²⁵⁵ Haveman writes that open-ended provisions such as Articles 3 and 5 of the ICTY Statute are not examples of clearly and strictly defined crime definitions.²⁵⁶ In the context of crimes against humanity, for example, it is not clear what is meant by ‘other inhumane acts’.

Kelsen believed that the principle of legality does not apply ‘at all’ in international law.²⁵⁷ He wrote: ‘It does not apply to customary law and to law created by precedent for such law is necessarily retroactive in respect of the first case to which it is applied.’²⁵⁸ He continued to describe the principle of legality as a principle of justice as follows:

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts punishable with retroactive force. In case two the postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.²⁵⁹

One such exception to the rule against retroactive law, in Kelsen’s opinion, is a retroactive law which provides individual punishment for acts which were ‘illegal

²⁵⁴ VI *L R T W C* 41 (1848); XV *L R T W C* 167-168 (1949).

²⁵⁵ Bassiouni & Manikas (note 11) 288

²⁵⁶ Haveman (note 19) 34.

²⁵⁷ One such example of a crime where legal condemnation followed moral condemnation is slavery. According to Bassiouni, slavery has evolved from a ‘moral offense’ to an international crime. See M C Bassiouni ‘Enslavement as an International Crime’ (1991) 23 *New York University Journal of International Law* 445, 450

²⁵⁸ Kelsen (note 5) 165.

²⁵⁹ *Ibid.* See also H Kelsen ‘The Rule against *Ex Post Facto* and the Prosecution of the Axis War Criminals’ (1944) 8 *The Judge Advocate Journal* 8. Cf Green (note 139) 457.

though not criminal' at the time they were committed.²⁶⁰ In his view the London Agreement was an example of such a law.²⁶¹

The jurisdiction of the Tokyo Tribunal was also challenged on the ground that the provisions of the Charter are 'ex post facto' legislation and therefore illegal.²⁶² The Tokyo Tribunal rejected the challenge and stated that the 'law of the Charter is decisive and binding on the Tribunal'²⁶³ and stated its 'unqualified adherence'²⁶⁴ to the Nuremberg reasoning. The Phillipine judge of the Tokyo Tribunal, Judge Jaranilla, rejected objections that the IMTFE applied *ex post facto law*.²⁶⁵ He emphasised that, long before the war, the acts of Japan and its leaders has been the subject of repeated warnings on the part of the Allied Powers and Japan had signed the Kellogg-Briand treaty in April 1929. Japan therefore knew that it would be brought to justice. According to Jaranilla, the fact that Japan accepted the terms of surrender of the Allied Powers made the *nullum crimen* defence unsustainable.²⁶⁶

The Dutch Judge, Röling, wrote a dissenting opinion in which he held that crimes against peace were not regarded as true crimes before the London Agreement. His view on the applicability of the *nullum crimen* argument was:

However this maxim [nullum crimen sine lege] is not a principle of justice but a rule of policy, valid only if expressly adopted...As such the prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom. It is, however, neither the task nor within the power of the Tribunal to judge the wisdom of such policy.²⁶⁷

Judge Pal, the Indian Judge, also dissented. He maintained that the rule concerning crime against peace constituted *ex post facto* legislation and that a victor nation under international law is not competent to legislate on international law.²⁶⁸

²⁶⁰ Kelsen (note 5)164.

²⁶¹ Ibid.

²⁶² Judgment, International Military Tribunal for the Far East (Judgment, 1 November 1948) in R J Pritchard & SM Zaide (eds) 20 *The Tokyo War Crimes Tribunal* (1981) 48, 436.

²⁶³ Ibid 435.

²⁶⁴ Ibid 439.

²⁶⁵ Concurring Opinion of Judge Jaranilla, Member from the Republic of the Phillipines, *In re Hirota and Others, International Military Tribunal for the Far East*, Tokyo, 12 November 1948 ('Tokyo Judgment') Vol I, 501.

²⁶⁶ Ibid.

²⁶⁷ *Dissenting Opinion of Judge Röling*, Tokyo Judgment (note 265) Vol II 1059.

²⁶⁸ Pal argued that although the prosecution cited a list of twenty-six international agreements in support of its argument that the Charter was an expression of positive law, the fact that the Tribunal said in its judgment that war was illegal 'after 1928' implicitly recognized that none of the agreements except the Pact of Paris had any real bearing on the question. Judge Pal ordered acquittals for all the accused. *Dissenting Opinion of Judge Pal*, Tokyo Judgment, Vol. II, 551. See the excellent analysis of Pal's dissent by E S Borgwardt 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *International Law and Politics* 411.

Bassiouni is of the opinion that the application of the principle of legality is different in international law from that in national law. In 1992 Bassiouni wrote: '[T]he principles of legality in international law are necessarily *sui generis*: they must balance the needs of justice for the world community and fairness for the accused in the context of the Rule of Law.'²⁶⁹ He believes that in order to achieve this balance, one would have to take into account various factors such as the lack of international legislative policies and standards, the *ad hoc* process of technical drafting and the assumption that international criminal law norms will be embodied in the national criminal law norms of various states.²⁷⁰ Bassiouni suggests that the principle of legality in international law is therefore best expressed as *nullum crimen sine iure* - no crime without *some* law. This implies the existence of *some* legal prohibition arising under conventional or customary international law but the precise meaning of this suggested requirement is not clear.

According to Triffterer only the core of the principle of legality is relevant in international law. He regards the core as the idea that to prevent arbitrary punishment, every state infringement on the liberty of individuals must be bound to an existing norm.

Der Kerngehalt dieses Satzes, der sich zu einem Teilaspekt des Menschenrechts auf persönliche Freiheit entwickelt hat und durch dessen Verankerung im Völkerrecht bestätigt worden ist, beinhaltet dass zur Beseitigung von Willkür jeder Staatliche Eingriff in die Freiheitsphäre des Einzelnen an das Vorhandensein einer Norm gebunden sein muss; diese kann dem gesetzten oder dem ungesetzten Recht angehören. Sie muss bereits zum Tatzeit existent sein, ein näher bestimmtes Verhalten festlegen und durch den Hinweis auf dessen Strafbarkeit eine an den Einzelnen gerichtete generelle Strafdrohung enthalten; eine konkrete Strafdrohung, die Art und Höhe der Strafe genau bestimmt, wird dagegen nach ganz überwiegende Meinung nicht gefördert.²⁷¹

Triffterer writes that the strict form or function of the principle of legality has been designed or tailored for domestic legal orders. He argues that unlike domestic law, international law does not have a need for control by the democratically elected legislatures over legal norms. This is why only the core of the principle is valid in international law. This view is confirmed by Article 11(2) of the ICCPR and Article 7(2) of the European Convention of Human Rights.²⁷²

Luban offers a fresh perspective and challenges the notion that what violates the principle of legality violates the rule of law. He also challenges the idea that the

²⁶⁹ Bassiouni & Manikas (note 11) 265.

²⁷⁰ Ibid 289.

²⁷¹ Triffterer (note 7) 218.

²⁷² Triffterer writes: 'Im Völkerrecht dagegen bestand für die Kontrolle der Volksvertretung über alle Rechtsnormen, keine Bedürfnis. Deshalb gilt dort allein die Kerngehalt. Das kommt auch in Art. 7 Abs. 2 der Europäischen Menschenrechtskonvention und Art. 11 Abs. 2 des Paktes über die Bürgerlichen und Politischen Rechte von 1966 zum Ausdruck.' Ibid 219.

same philosophy regarding human behaviour underpins the principle of legality in domestic law and international law. In his view it is possible to say that Nuremberg violated the *nullum crimen* principle and still view Nuremberg as an advance on the Rule of Law.²⁷³ He disagrees with Fuller's close association between the Rule of Law and the principle of legality and states that the denial that Nuremberg embodied the Rule of Law results when one begins 'at the wrong end'.²⁷⁴ Starting at the wrong end to Luban means starting with Fuller instead of Hobbes. To Fuller *ex post facto* law is wrong because it violates the legitimate expectations of people to know the content of the law which then enables them to guide their actions.²⁷⁵ If Hobbes forms the baseline however, and Luban argues that his views should, one would argue that in the state of nature (and especially in the state of war) individuals do not try to guide their actions by trying to make them correspond to rules.²⁷⁶ Apart from the question of legality, Luban argues that Nuremberg constitutes a clear advance on the rule of law in *most other respects*.²⁷⁷ He argues that individual behaviour and expectations are different in the context of peacetime domestic law from that of international criminal law and that this should influence our understanding of the principle of legality and our assessment of the fairness of trials.

For the purpose of this study the principle of legality has to be understood in the context of international criminal law. It is argued here that Bassiouni is correct in insisting on the existence of *some* legal prohibition arising under conventional or customary international law. Insisting on a strict interpretation of the principle will make it impossible for the Tribunals to carry out their mandate.

11. The *Ad Hoc* Tribunals and the Principle of Legality

(i) Legality at the ICTY

Neither the ICTY Statute nor the ICTR Statute contains a provision embodying the *nullum crimen sine lege* principle. Cassese writes that the principle of legality has been laid down 'implicitly' in the ICTY and ICTR Statutes.²⁷⁸ In support of this view Cassese refers to para 29 of the Secretary General's Report: 'It should be pointed out that in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather

²⁷³D Luban 'The Legacies of Nuremberg' (1987) 54 *Social Research* 803.

²⁷⁴ *Ibid.*

²⁷⁵ See Fuller (note 8) 33-9.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.* 806. In support of his argument Luban mentions the salient features of Nuremberg such as the contrast between Nazi justice and the justice meted out by the IMT. He also believes that the IMT's adoption of individual criminal responsibility enforces the Rule of Law by making possible the first realistic deterrent in the history of international law. *Ibid.* 807.

²⁷⁸ Cassese (note 46) 145 fn 18.

the International Tribunal would have the task of applying existing international humanitarian law.’ The principle does however feature explicitly in Article 23 of the ICC Statute.

An appropriate starting point for an analysis of the principle of legality in the case law of the tribunals is the statement of the Secretary General:

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.²⁷⁹

The statement seems to be a compromise between founding the subject matter jurisdiction of the Tribunal on the basis of treaties and founding the jurisdiction on customary international law or perhaps even general principles of law.

One of the most important differences between the application of the principle at the Tribunals and in municipal systems, (particularly civil law systems) is that certain civil law systems excludes customary law as a basis for punishment.²⁸⁰ Whereas the Tribunals’ resort to customary law was intended to avoid violating the principle of legality, the use of customary law to *found* punishment *would* be a violation of the legality principle in civil law.

It was out of concern for the legality principle that the Security Council decided to use customary international law as the framework for the jurisdiction *ratione materiae* of the ICTY.²⁸¹ By making use of international customary law, the ICTY could avoid creating new offences, applying law established a posteriori, or confronting the problem of the adherence of some but not all states to specific conventions.²⁸² The Secretary General observed that in assigning to the Tribunal the task of prosecuting persons responsible for serious violations of humanitarian law, the Security Council was not creating or purporting to ‘legislate’ the law.²⁸³ Reminiscent of Nuremberg, he emphasised that the ICTY would apply *existing* international humanitarian law.²⁸⁴ It is also interesting that in contrast to the Nuremberg Tribunal which (in its only general exposition on the principle of legality) described the principle as a ‘maxim’, the Secretary General (in his

²⁷⁹ *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808, S/25704*, para 34

²⁸⁰ See A Eser & B Burckhardt *Strafrecht 1: Schwerpunkt Allgemeine Verbrechen* (1992) 19.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid* para 29.

²⁸⁴ *Ibid.*

statement quoted above) regards the application of *nullum crimen sine lege* as ‘particularly important’.

As Lamb points out, the difficulty with the Secretary General’s formulation is that it is easier to state than to apply.²⁸⁵ Since the *nullum crimen* principle is based on the value of legal certainty, it sits uneasily with the fact that customary international law is unwritten and often difficult to define.²⁸⁶

The Secretary General’s Report was silent on the question of retroactivity. The ICTY Statute clearly provides for retroactive jurisdiction since it states in Article 8 that ‘the temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.’ But without such a retroactive provision it would probably be impossible to fulfill the mandate of the Tribunal to prosecute those most responsible for violations of humanitarian law.

The issue of retroactive jurisdiction was however addressed in a preliminary CSCE study which affirmed the *nullum crimen* principle and suggested the test of foreseeability.²⁸⁷ The study concluded that *nullum crimen* is satisfied provided ‘no act is criminal unless this is laid down by law and no act be punished unless punishment is prescribed by law’.²⁸⁸ The ICTY addressed the issue of reconciling retroactive jurisdiction with *nullum crimen* by using the fairness standard and by referring to Article 15 of the ICCPR.²⁸⁹ The requirement of procedural fairness was emphasised in the *Tadic* judgment which stated that ‘what is important is that it be set up by a competent organ in keeping with the relevant legal procedures and that it observes the requirements of procedural fairness’.²⁹⁰

In spite of its omission from the Statute there can be little doubt that the principle of legality applies to the practice of the Tribunals *inter alia* because of its inclusion in many human rights instruments. This can be said to be the case even though the Tribunals cannot become parties to general international human rights instruments. Since the Tribunals have been established as subsidiary organs of the Security Council, the Tribunals should not act contrary to the principles included in various United Nations instruments. The Preamble of the UN Charter calls for conditions under which ‘respect for the obligations arising from treaties and other sources of international law can be maintained’. Article 24(2) of the Charter obliges the Security Council to act ‘in accordance with the purposes and principles of the United Nations’ and one of those, the maintenance of peace and security,

²⁸⁵ Lamb (note 101) 741.

²⁸⁶ *Ibid.*

²⁸⁷ Proposal for an International War Crimes Tribunal for the Former Yugoslavia under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia (by Rapporteurs Corell/Turk/Thune), UN Doc S/25307 (9 February 1993).

²⁸⁸ *Ibid.* 41.

²⁸⁹ *Ibid.* 45.

²⁹⁰ *Tadic* (note 217).

directs the Security Council to act ‘in conformity with the principles of justice and international law’.

Commentators have argued that the open-ended crime definitions in the ICTY Statute violate the principle of legality.²⁹¹ Article 3 of the ICTY Statute states that the Tribunal ‘shall have the power to prosecute persons violating the laws or customs of war’ and that such violations ‘shall include, but not be limited to’ five crimes. Article 5 lists a seemingly limited amount of crimes directed at the civilian population but ends with the clause ‘other inhumane acts’. Even when crimes are mentioned explicitly, their meaning might still be unclear. Wladimiroff, defence counsel in the *Tadic* case, said the following in the context of the *Tadic*:

Neither the prosecutors nor the counsel for the defence knew before the start of the trial which would be the facts and circumstances to be proved by the prosecution...The prosecutor did not know the extent of the burden of proof, while for the defence it was not clear beforehand which the borders of the combat in court were.²⁹²

Morris and Scharf write the ‘authoritative pronouncement by the first international criminal tribunal since Nuremberg that the principle of individual criminal responsibility for violations of international humanitarian law applicable in internal armed conflicts constitutes customary international law’ was supposed to take care of the principle of legality.²⁹³ The authors find no violation of *nullum crimen sine lege* as long as the rules applied are part of international customary law. But saying it does not make it so. And this might be begging the question. Determining the content of international customary law is one of the most vexing questions in international law. The *Celebici* judgment attempted to provide substance to the phrase ‘existing international customary law’ by referring to paragraph 35 of the Secretary General’s Report which specified the customary law applicable as being the 1949 Geneva Conventions, the Fourth Hague Convention and the Regulations attached thereto of 18 October 1907, the 1948 Genocide Convention and the Nuremberg Charter.²⁹⁴ The judgment reiterated that the Security Council is not a legislative body and cannot create offences. It was emphasised in *Celebici* that the Statute does not create substantive law but merely provides a forum and framework for the enforcement of existing international humanitarian law.²⁹⁵

The principle of legality has been considered or discussed in many ICTY cases. In *Aleksovski* the Appeals Chamber described the *nullum crimen* principle as meaning that a person might be found guilty of a crime only if the relevant acts constituted

²⁹¹ Haveman (note 19) 57.

²⁹² M Wladimiroff ‘De berechting van de eerste zaak voor het Joegoslavië tribunaal en verdedigingsperspectief’ (1997) 20 *G(a)* 33 *Trema* 38, as cited and translated by Haveman *ibid* 34.

²⁹³ V Morris & M Scharf *An Insider’s Guide to the International Criminal Tribunal for Rwanda* (1998) Vol 1, 131.

²⁹⁴ *Prosecutor v Delalic et al.* IT-96-21, 16 November 1998, para 416

²⁹⁵ *Ibid* 417.

a violation of the law at the time of their commission.²⁹⁶ The court continued by stating that the *nullum crimen* principle ‘does not prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be described to particular elements of a crime.’²⁹⁷ Statements such as these indicate that the Tribunal sees itself as identifying rather than making the law. But the view that the Tribunal declares rather than makes the law is optimistic in cases where there are very few limited conventional or customary sources from which to determine the law.²⁹⁸ As will be illustrated in Chapter 6, the chapter on lawmaking through the case law, the Tribunals’ image of itself is not borne out by what happens in the Trial and Appeals Chambers in Arusha and The Hague. In most of the cases before it, the Tribunals have made law.

The *nullum crimen* principle was also discussed extensively by the Trial Chamber in *Vasiljević*:

However, the Trial Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution, in this case ‘violence to life and person’. From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.²⁹⁹

Vasiljević stressed the need for precision and the need for international criminal law to be grounded on the principle of specificity. The Chamber also emphasised that offences have to be defined with sufficient clarity to be *foreseeable* and *accessible*.³⁰⁰

The problem of the retrospectivity of crime definitions is vividly illustrated by the *Furundžija* case, in which it was held that oral penetration amounts to rape in international law despite the fact that it was regarded as sexual assault (a lesser offence) in many national systems.³⁰¹ The court also held that a person might be

²⁹⁶ *Prosecutor v Aleksovski* IT-95-14/1, 25 June 1999 para 135.

²⁹⁷ *Ibid* para 127.

²⁹⁸ C Harris ‘Precedent in the Practice of the ICTY’ in R May, D Tolbert & J Hocking (eds) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 348.

²⁹⁹ *Prosecutor v Vasiljević* IT- 98-32-T, 29 November 2002, para 193.

³⁰⁰ *Ibid* para 198.

³⁰¹ The Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime.

convicted for the war crime of ‘cruel treatment’ as a crime recognized by customary international law, while admitting that ‘no international instruments defines cruel treatment’ and that ‘no narrow or special meaning’ should be given to this expression.³⁰² The *Furundžija* case and other instances of lawmaking in Tribunal case law will be discussed more extensively in Chapter 6.

But adherence to the principle of legality does not have to stifle development of the law. In *Aleksovski* the ICTY stated that the non-retroactivity of criminal rules does not bar courts from refining and elaborating upon existing rules through a process of ‘interpretation and clarification as to the elements of a particular crime’.³⁰³ In *Ojdanić* the ICTY stated that respecting *nullum crimen* does not preclude progressive development of the law:

The principle of *nullum crimen sine lege* is, as noted by the International Military Tribunal, first and foremost, a ‘principle of justice’... This fundamental principle ‘does not prevent a court from interpreting and clarifying the elements of a particular crime’. Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making the assessment.³⁰⁴

The court’s emphasis on the fact that *nullum crimen* is a principle of justice is of course reminiscent of Nuremberg. It is also significant that the Tribunal once again stated that the crime must be foreseeable – an approach which is in line with the approach taken by the ECHR.

Despite what Jescheck describes as the ‘relaxed attitudes’ of the IMT³⁰⁵ towards the principle of legality the *ad hoc* Tribunals are treating the principle with more seriousness. Article 11 (1) of the ICC Statute which provides unequivocally: ‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’ seem to be the culmination of a process which had its

In para 184 of the judgment the Trial Chamber states that ‘due to the nature of the International Tribunal’s subject - matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenseless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex – and sentenced according to the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules – then he is not adversely affected by the categorisation of forced oral sex as rape rather than sexual assault’. See *Prosecutor v Furundžija* IT-95-17, 10 December 1998 paras 182-184.

³⁰² *Prosecutor v Tadić*, IT-94-1-T, 7 May 1997, para 724, 725. This question was asked by G Mettraux ‘Book Review’ (2002) 2 *International Criminal Law Review* 426.

³⁰³ *Aleksovski* (note 296) para 127.

³⁰⁴ *Prosecutor v Ojdanić* IT-99-37-AR72, 21 May 2003, paras 37-38.

³⁰⁵ Jescheck (note 73) 42.

hesitant start at Nuremberg and was refined by the jurisprudence of the ICTY and ICTR.

Cassese is of the opinion that after ten years of work, the ICTY is at a stage where to state the law (*dire la droit*) is perhaps less indispensable than to do justice (*administrer la justice*).³⁰⁶ He writes that in the past the judges might have dwelt on the law at length because it could perhaps have constituted a means of establishing the Tribunal's legitimacy and authority as a court of law.³⁰⁷ According to Cassese this need is felt less because of the profuse case law generated by the Tribunals and the moral authority acquired by the Tribunals. But the legitimacy and authority of the Tribunals need to be affirmed *continuously* and Cassese's pronouncement should not be interpreted or understood to mean that judges should become any less diligent in upholding principles of justice such as the principle of legality.

It can be argued that the frequent amendments made to the ICTY and ICTR Rules of Procedure and Evidence constitutes a violation the principle of legality. This view will be discussed in Chapter 7, the chapter on Rulemaking.

(ii) The Principle of Legality and the ICTR

The ICTR Statute is the first international Statute which expressly criminalises acts committed in the context of an internal armed conflict. By the time the ICTR Statute was adopted, Additional Protocol II had not yet been recognised as a part of customary international law. Until this time, it was of course also not accepted that individual criminal responsibility could flow from violations of Protocol II. The Secretary General explained this development by stating that the Security Council 'had elected to take a more expansive approach to the choice of the applicable law than the one underlying the Yugoslav Tribunal'.³⁰⁸ Significantly, the subject matter jurisdiction of the Rwanda Tribunal includes international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.³⁰⁹

In his Report the Secretary General acknowledged that the question of whether common Article 3 entails the individual criminal responsibility of the perpetrator is 'still debatable'.³¹⁰ It was stated that some of the crimes included in the article 'when committed against the civilian population, also constitute crimes against

³⁰⁶ A Cassese 'Black Letter Lawyering v Constructive Interpretation' *The Vasiljević Case* (2004) 2 *JICJ* 265.

³⁰⁷ *Ibid.*

³⁰⁸ *Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955* (1994) S/1995/134, 13 February 1995, para 12 reprinted in V Morris & M Scharf *The International Criminal Tribunal for Rwanda* Vol II (1998) 197.

³⁰⁹ UN Doc S/P 3453 (8 November 1994) 4.

³¹⁰ Secretary General's Report (note 308) para 12 fn 8.

humanity and as such are customarily recognised as entailing the criminal responsibility of the individual'.³¹¹

Because the Security Council did not consider itself competent to legislate, it must be concluded that the Council considered the content of the Statute to be existing law. In light of the fact that Rwanda ratified the Geneva Conventions in 1964 and the two Protocols in 1984 it could be argued that the Security Council was not legislating but simply laying down substantive rules which were already in force in Rwanda.³¹² The content of the subject matter jurisdiction, and specifically the possibility of individual criminal responsibility for violations of humanitarian law in internal armed conflicts has however been criticised as an 'unrestricted approach to the applicable law' taken by the Security Council.³¹³ The mere statement by the *Tadic* Appeals Chamber that individuals can incur individual criminal responsibility for violations of humanitarian law committed in internal armed conflict³¹⁴ does not in any way explain or condone the violation of the possible violation of the principle of legality.

12. ICC

From the point of view of legality, the ICC's approach to crime definitions is an improvement on that of the *ad hoc* Tribunals. The principle of legality is included in Article 22 of the Rome Statute which includes the prohibition on retroactivity, the extension of crime definitions by analogy and the *lex certa* principle. The Rome Statute also contains a clause stating that the definition of a crime shall be interpreted in favour of the accused.³¹⁵ Apart from Article 22, Article 21(1), setting out the applicable law of the ICC, could also be said to provide support for the application of the principle of legality. The ICC should apply the law, such as the Statute, Rules³¹⁶ traditional sources of international law³¹⁷ and the principles and rules of law as set out in its previous decisions³¹⁸ and not go outside of these sources.

The principle of legality was relied upon by those seeking to have the crimes within the jurisdiction of the ICC defined expressly in the Statute rather than

³¹¹ Ibid.

³¹² Rwanda succeeded to the 1949 Geneva Conventions on 5 May 1964. Rwanda succeeded to the Additional Protocols on 19 November 1984. See <http://www.icrc.org/>

³¹³ Boot (note 1) 246.

³¹⁴ *Prosecutor v Tadic* Decision on Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995.

³¹⁵ Article 22 of the ICC Statute entitled 'Nullum crimen sine lege' states:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

³¹⁶ Article 21(1) (a) ICC Statute

³¹⁷ Article 21 (1) (b) and (c) ICC Statute

³¹⁸ Article 21 (1) (c) ICC Statute

leaving it to the Court to interpret general international law. The rationale for this was that general international law might not set out elements of the offences with sufficient precision, particularly where the crime in question was not defined by a general treaty (as in the case of aggression).³¹⁹

According to Boot the formulation of the *nullum crimen* principle in the Rome Statute emphasises the limited extent to which states have ceded some of their sovereignty to the ICC.³²⁰ She writes that ‘recognition by states of the criminality of a particular norm’ was necessary for the drafting of an international code of crimes as well as for the establishment of the court.³²¹ In her view the Article 22 formulation was perhaps too strict and could prevent the court from exercising its jurisdiction over violations of international humanitarian law beyond the limits set by the ICC Statute.³²²

13. *Nulla Poena Sine Lege*

Nulla poena sine lege, no punishment without law, has been described as the sentencing counterpart of *nullum crimen sine lege*.³²³ International human rights instruments prohibit the imposition of a criminal sanction heavier than the one applied at the time the offence was committed.³²⁴

Out of concern for the prohibition on retroactive sentencing the statutes of the *ad hoc* Tribunals require judges to establish prison terms in light of the national practice in the place where the crimes took place.

Article 25 (1) of the ICTY Statute states:

The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment the Trial chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

Article 23 (1) of the ICTR Statute and Rule 101(B) (iii) of the Rules of Procedure and Evidence of both Tribunals directs the Tribunal to have recourse to the general practice regarding prison sentences in Rwanda in determining terms of detention.

The above provisions seem very difficult to implement. One reason for this is the fact that there had only been a few isolated national prosecutions for crimes against humanity in the former Yugoslavia and Rwanda. Implementation is also

³¹⁹ B Broomhall *International Justice and the International Criminal Court, Between Sovereignty and the Rule of Law* (2003) 31.

³²⁰ Boot (note 1) 613.

³²¹ Ibid 614.

³²² Ibid 613.

³²³ Lamb describes *nulla poena* as the ‘sentencing counterpart’ of the maxim *nullum crimen sine lege* (note 101) 733.

³²⁴ See Article 15 (1) of the International Covenant on Civil and Political Rights (1976) and Article 11 (2) of the Universal Declaration of Human Rights.

complicated by the fact that Rwandan and Yugoslav law provide for the death penalty. In practice the reference to national practice has largely been ignored by the Tribunals.³²⁵

Although the national law of Yugoslavia provided for the death penalty³²⁶ it considered life imprisonment to be cruel, inhuman and degrading treatment and limited its maximum custodial sentences to 15 or 20 years. Because the ICTY Statute excluded the death penalty 'general practice' would seem to dictate a maximum available sentence of 20 years.³²⁷ In the Security Council, the United States Permanent Representative to the United Nations, Madeleine Albright, declared that her government considered life imprisonment to be the maximum penalty, because in a sense it replaced the death penalty.³²⁸ She made this statement in spite of the fact that Yugoslavia's criminal legislation does not provide for life imprisonment. The judges of the ICTY however accepted Albright's position. Rule 101 (a) of the ICTY Rules state: 'A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.' Bassiouni has written that this provision 'may violate the principles of legality and the prohibition against *ex post facto* laws' at least with respect to Yugoslavia. He argued that the provision should be amended, presumably to limit sentences to 20 years.³²⁹ In the sentencing of Dusko Tadic the ICTY declared that it was authorized to impose sentences up to and including life imprisonment, even though such sentence was not part of Yugoslav law. The Tribunal stated that this would not be a violation of the principle of legality.³³⁰ It is not clear why the judges did not regard imposing life imprisonment as violating the principle of *nulla poena*. In the *Delalic* case the Tribunal affirmed that the Tribunal was entitled to depart from Yugoslav practice because it did not consider the reference to national practice as mandatory or binding.³³¹ The Trial Chamber in this case stated

³²⁵ See W A Schabas 'Sentencing by International Tribunals: A Human Rights approach' (1997) *Duke JCIL* 479. The Secretary General's Report states: 'While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties.' Report of the Secretary General pursuant to Paragraph 2 of SC Resolution 808 (1993), UN Doc S/25704 (3 May 1993) para 36.

³²⁶ Yugoslavia's criminal legislation provided for capital punishment in the case of genocide and crimes against humanity. The death penalty was however abolished in Slovenia, Croatia and Macedonia in 1990 and 1991 and in Bosnia in 1995.

³²⁷ This issue was well-known to the Security Council when it adopted the Statute and had been discussed in the CSCE draft. See H Correll, H Turk and G Hillestad Thune *Proposal for an International War Crimes Tribunal for the former Yugoslavia* (1993) 49-53.

³²⁸ UN Doc S/PV. 3217 (1993).

³²⁹ Bassiouni & Manikas (note 11) 701-2

³³⁰ 'Consequently for crimes which, in the courts of the former Yugoslavia, would receive the death penalty, the International Tribunal may only impose imprisonment but it may impose a maximum penalty of life imprisonment in its stead, consistent with the practice of states that have abolished the death penalty and with the commitment by States progressively to abolish the death penalty under the Second Optional Protocol to the International Covenant on Civil and Political Rights...' *Prosecutor v Tadic* IT-94-1-S, Sentencing Judgment, 14 July 1997, 112 ILR (1999) 286 para 8, 9.

³³¹ *Prosecutor v Delalic et al.* IT-96-21-T, 16 November 1998, para 1192.

that Professor Bassiouni's criticism was based on 'an erroneous and overly restricted view' of the principle of legality.³³²

Schabas points out that it is ironic that especially in the context of Rwanda, the *nulla poena* principle is applied not to protect the accused but to support the imposition of harsh sentences.³³³ In *Prosecutor v Kambanda*, the ICTR has noted that the reference to national practice is not binding and merely a guide for the Tribunal.³³⁴ In *Kambanda*, the Trial Chamber stated that it would prefer to 'lean on its unfettered discretion' each time it has to pass sentence.³³⁵ In the sentencing decision of *Kayishema and Ruzindana*, another ICTR Trial Chamber stated: 'In light of the findings of the Judgment against Kayishema and Ruzindana, this Chamber finds that the general practice regarding prison sentences in Rwanda represents one factor supporting this Chamber's imposition of the maximum and very severe sentences, respectively.'³³⁶ When sentencing, the Rwanda Tribunal also repeatedly makes reference to the fact that the criminal statutes of Rwanda provided for capital punishment – the implicit message being that offenders before the ICTR should consider themselves lucky to receive terms of life imprisonment.³³⁷ Article 25 however speaks of 'the general practice regarding *prison* sentences'. Nothing in the ICTR Statute or Rules indicates that the Tribunal should attribute any relevance to the existence of capital punishment in Rwanda.

In Schabas's opinion the provisions requiring the Tribunals to have 'recourse' to 'national practice' are virtually unworkable. In the former Yugoslavia some of the crimes before the Tribunals were not defined even in national law. Because of the fact that in Rwanda, there had been no domestic implementation of international crimes, the ICTR came to the conclusion that the crimes under their jurisdiction were subject to the most severe penalties. The ICTY came to a similar conclusion. According to Schabas the provisions requiring recourse to national practice were meant to protect the accused from abusive punishment but 'has been stood on its head'.³³⁸ He believes the Tribunals have 'twisted it into an additional argument for severity'.³³⁹

But does *nulla poena sine lege* apply to international criminal law at all? According to the Romanian jurist Vespasian Pella, the *nulla poena sine lege* principle applied to international criminal law as much as to domestic law 'par la force de l'équité et de

³³² Ibid para 1209.

³³³ Schabas (note 325) 522.

³³⁴ *Prosecutor v Kambanda* ICTR-97-23-S, 4 September 1998, 37 ILM (1998) 1411 para 23. Also *Prosecutor v Serushago* ICTR-98-39-St., 2 February 1999 para 18.

³³⁵ Ibid para 25

³³⁶ *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, 21 May 1999 para 7.

³³⁷ *Kambanda* (note 334) para 4, *Prosecutor v Kayishema* (ibid) para 6.

³³⁸ Schabas (note 117) 539.

³³⁹ Ibid.

la raison'.³⁴⁰ A 1951 proposal by the International Law Commission for the Draft Code of Offences Against the Peace and Security of Mankind stated that the penalty 'shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence'. This proposal was criticized as being contrary to the *nulla poena* principle.³⁴¹ The General Assembly agreed that it was desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as 'some guidance for its decision'.³⁴² In the 1996 Draft Code of Crimes Against the Peace and Security of Mankind the ILC did not specify any precise penalties. It stated only that 'punishment shall be commensurate with the character and gravity of the crime'.³⁴³ The commentary accompanying the draft stated that it was 'not necessary for an individual to know in advance the precise punishment as long as the actions constitute a crime of extreme gravity for which there will be severe punishment'. This, according to the ILC, is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nuremberg judgment and in Article 15(2) of the International Covenant on Civil and Political Rights.³⁴⁴

According to Schabas, the retroactivity argument can only be invoked once. He believes it suffices that the argument was invoked at Nuremberg and that from the time of the International Military Tribunal's judgment potential offenders have been 'put on notice' that war crimes and crimes against humanity are subject to the most severe sanctions. All that is required is that the law should be foreseeable and accessible.³⁴⁵ The European Court of Human Rights has supported this position in recent decisions such as *S W v United Kingdom* and *CR v United Kingdom*.³⁴⁶ This view can, of course, be criticized. If one accepts Schabas' view it will mean that, for all practical purposes, the principle of legality has been made redundant and that subsequent to Nuremberg it has no 'inhibiting' role to play in future decisions, lawmaking and sentencing. An important function of the principle of legality is to advance legal certainty by requiring specificity, clarity, foreseeability and accessibility. It is doubtful whether the existence and memory of Nuremberg solves the problem of the principle of legality.

14. Conclusion

In his opening statement at the IMT Chief Prosecutor Robert Jackson stated that it cannot be denied that 'these men [the defendants] are surprised that this is the

³⁴⁰ V V Pella 'La Codification du droit penal international' *Revue general de droit international public* (1952) 337.

³⁴¹ *Report of the 1953 Committee on International Criminal Jurisdiction*, UN Doc A/2645, para 118, *Yearbook of the International Law Commission*, Vol II (1950) 314.

³⁴² *Ibid.*

³⁴³ *Report on the International Law Commission on the Work of its Forty-Seventh Session* UN Doc A/51/10. 29-30.

³⁴⁴ *Ibid.*

³⁴⁵ Schabas (note 117) 538.

³⁴⁶ *Ibid.* See the discussion of these cases above.

law; they really are surprised that there is any such thing as law'.³⁴⁷ The principle of legality seeks to prevent defendants being 'caught by surprise'. From this point of view the proceedings at the Nuremberg trials failed to fully meet the demands of justice. Even criminals against humanity who may seem ignorant of any law, deserve the benefit of this principle.

A similar danger exists in the context of lawmaking at the Tribunals. The judges seem to use the abhorrent actions of the defendants before the ICTY and ICTR as justification to disregard technical legal requirements or fundamental principles of justice such as the principle of legality. The judges at the Tribunals should be wary of invoking natural law arguments concerning a 'higher law', as was done in the *Mauerschützenprozesse*,³⁴⁸ since this could render their decisions arbitrary and unprincipled. Although there might be some merit in Cassese's view that it is no longer necessary for the Tribunals to discuss the applicable law at great length because of the 'moral authority of the court'³⁴⁹ this should not mean that the principle of legality is neglected. One should be similarly cautious of accepting the European Court's appeal to morality in the context of the Court's interpretation of the principle of legality.

The exercise of Allied jurisdiction on the basis of the London Agreement was described as a 'legal innovation of the first magnitude'.³⁵⁰ The Tribunals have similarly been praised for being innovative. But the more innovative and creative the judges, the more serious the danger of violating the principle of legality. The *nullum crimen* dilemma is the dilemma at the heart of international criminal prosecutions: meeting the demands of (natural) justice on the one hand and respecting the rights of the accused on the other.

In the post World War II national prosecutions the courts failed to satisfactorily address the question of retrospectivity. The courts also failed to develop independent reasoning or justification for applying *ex post facto* law. The plea of violations of *nullum crimen sine lege* was rejected in the *Eichmann*, *Finta* and *Polyukhovitch* cases on the basis of Nuremberg jurisprudence and according to Lamb, no new arguments were raised in supporting this conclusion.³⁵¹ The courts in all these cases endorsed the views of the IMT. In *Eichmann* the court quoted the IMT which stated that crimes against humanity and war crimes were 'the expression of international law existing at the time of its [the Tribunal's] creation'.³⁵² It seems as if the issue of *nullum crimen* was simply dealt with in reliance on the IMT's judgment that the Charter was declaratory of international

³⁴⁷ International Military Tribunal Vol. 2, 143, 144; See Jackson *The Nuremberg Case* (1971) 81.

³⁴⁸ See BGHSt 39, 1 (16-22); NJW 1993, 141 (paras 145–147); 100 ILR 364 (paras 380–388); BGHSt 40, 241 (paras 244-249); NJW 1995, 2728 (paras 2730–2731).

³⁴⁹ Cassese (note 306) 265.

³⁵⁰ Schick (note 82) 785.

³⁵¹ Lamb (note 101) 739.

³⁵² *Eichmann* (note 3)

law and was not *ex post facto* law. Following Nuremberg, most national prosecutions regarded the principle as a non-binding ‘maxim’. Bassiouni has written that it was ‘as if the accumulation of time and precedents relying on the IMT’s judgments had cured all possible legal defects. This leads to the legally incongruous conclusion that ‘reiteration of the same argument confirms its validity’.³⁵³ It would be consistent with this (flawed) reasoning to argue that the ‘moral authority’ Cassese writes of has legitimising value in itself. If the ‘moral authority’ of Nuremberg caused and justified subsequent prosecutions to follow the precedent set by the IMT, the moral authority of the *ad hoc* Tribunals might legitimise the ICC’s possible future reliance on the precedent set by the ICTY and ICTR.

During her time as chief prosecutor at the ICTY Louise Arbour remarked: ‘Collectively we’re linked to Nuremberg. We mention its name every single day.’³⁵⁴ But did the *ad hoc* Tribunals approach the *nullum crimen* dilemma in a new way? Or did they simply repeat the arguments devised at Nuremberg and the subsequent national prosecutions? It seems as if the Tribunals took note of the criticism of the Nuremberg Tribunal and as if significant progress has been made. Unlike the Nuremberg Tribunal, the ICTY and ICTR do not simply dismiss the principle of legality as a ‘maxim’ but treat it more seriously. Unlike the IMT, the ICTY and ICTR have never *rejected* the applicability of *nullum crimen* and the attempt by the Secretary General and the Tribunals to solve the quandary of legality by resorting to customary international law, though not unproblematic, is new. The Tribunals have also taken greater care to prove that the law they apply *was* customary international law and therefore *lex lata*. The concern with the principle of specificity raised in cases such as *Vasiljević*,³⁵⁵ as well as the concern with the requirements of foreseeability and accessibility is in line with approach taken by ECHR and shows an awareness on the part of the Tribunals that they are part of a greater family of international courts and tribunals. The problem concerning the clarity of crime definitions in the respective Statutes remains a serious one. But the greater specificity of crime definitions in the ICC Statute is probably a direct result of the *ad hoc* Tribunals’ flaws and inexperience.

Cassese declares that the principle of non-retroactivity ‘is *now* solidly embedded in international law’.³⁵⁶ However, many questions remain. The exact position of *nullum crimen* in the jurisprudence of the Tribunals and in international criminal law generally is uncertain. Mégret makes the critical observation that all debates regarding whether the Nuremberg verdict was based on *ex post facto* law reflect the vision that this is a question which can be answered ‘within the law’ when all serious reflections on the issue invariably seem to lead to debates on what law

³⁵³ Bassiouni (note 44) 145- 146.

³⁵⁴ O Ward ‘War Crimes Tribunal on a Roll’ *Toronto Star*, 23 March 1998, A2.

³⁵⁵ See *Vasiljević* (note 299).

³⁵⁶ Cassese (note 46) 149.

is.³⁵⁷ One can only answer the question of whether the principle of legality has been violated once consensus exists on what constitutes *already existing* law.

Triffterer and Bassiouni present strong arguments for moving away from the strict formal requirements of the principle of legality in the context of international criminal law. What seems clear from the case law of the ECHR is that the requirements of *accessibility* and *foreseeability* form the core of the principle of legality and has universally been accepted as standards against which criminal law and international criminal law should be tested. It is argued here that the peculiar nature of international criminal law calls for a reinterpretation of the meaning of the principle of legality. Because of the rudimentary nature of international criminal law it is unreasonable to insist on a strict interpretation of the principle. This does not mean that one should take a relaxed view. The standards of accessibility and foreseeability should be respected. With time, as international criminal law becomes more developed and codified one may once again insist on greater certainty and specificity.

³⁵⁷ F Mégret 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 226.

CHAPTER 6

LAWMAKING THROUGH THE CASE LAW

1. Introduction

Judges speak through their judgments. The growing body of Tribunal case law can be described as the arena where the activism or restraint of the judges can be detected and dissected. All questions and considerations regarding the concept of judicial lawmaking in the context of the Tribunals, the backgrounds, qualifications, activism or restraint of Tribunal judges as well as the position of the *nullum crimen* principle at the Tribunals are ultimately reflected in the cases. The present chapter will focus on substantive lawmaking and will look at the way Tribunal judges have made law in specific cases.

The ICTY and ICTR have often found themselves in unknown or uncertain territory. Robert Jackson wrote that one of the chief obstacles to the Nuremberg trial was the 'lack of a beaten path'.¹ The historical significance of the *ad hoc* Tribunals can be attributed to the fact that it is the first time international tribunals have had to adjudicate certain international crimes. Some hold the view that the judges, since they are operating in the context of international law, are prohibited from finding a *non liquet*² and have no choice but to 'make' law and set new precedent. Lauterpacht's belief that the principle of completeness of the legal order was one of the 'general principles' referred to in section 38 (1) (c) of the ICJ Statute was discussed in Chapter 2. He believed that finding a *non liquet* would be inconsistent with the completeness of the international legal order. Although Judge Vereshchetin has argued in the context of the ICJ, that the prohibition on *non-liquet* does not mean that a court is necessarily asked to fill gaps,³ many recognise that international criminal tribunals, to be effective at all, need to be entrusted with wide discretion including the discretion to develop law and extend the application of the law to new areas.⁴ If one takes the view that it is the task of

¹ Mr. Justice Jackson in his *Report to the President* of 7 October 1946 on the Judgment of the International Military Tribunal at Nuremberg, available at www.yale.edu/lawweb/avalon/imt/jackson

² See N Ronzitti 'Is the *non-liquet* of the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the FRY acceptable?' (2000) 82 *International Review of the Red Cross* 840. See Declaration of Judge Vereshchetin *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, 279 and J Stone 'Non-Liquet and the Functions of Law in the international community' (1959) 25 *BYIL* 123 .

³ Declaration, Judge Vereshchetin, *ibid.* Lauterpacht was a strong proponent of the view that international courts have the duty never to refuse to give a decision 'on the ground that the law is non-existent, controversial or uncertain or lacking in clarity.' See H Lauterpacht 'Some observations on the prohibition of *non liquet* and the completeness of the legal order' in *Symbolae Verzijl* (1958) 196-9.

⁴ In 1923 Brierly stated: 'For the greater part of English criminal law is now statutory; and in any case the discretionary powers which our law, statutory or not, allows to a judge in defining the constitution of a crime or fixing the sentence is not in the least comparable in extent to the

the Tribunals to clarify and develop humanitarian law this should be balanced with the demands of legal certainty and the principle of legality.

This chapter will address lawmaking in the context of the establishment of the ICTY and in classifying the conflict in the former Yugoslavia. It will address issues of participation in the commission of crimes and the definition of specific crimes. The judges have also made law *incidentally* or in *obiter* statements – when pronouncing on matters not central to the legal question before them. Judge Cassese’s elegant exposition of the relationship between municipal and international law in the *Erdemovic* case⁵ is a good example of such incidental lawmaking.

The *Tadic* case is an example of groundbreaking lawmaking and a significant part of this chapter will be devoted to an examination of lawmaking in this case. The three ‘rape cases’ *Akayesu*, *Furundzija* and *Kunarac* substantially developed the law relating to gender crimes. The crime of rape, never before defined in international law, was defined in *Akayesu*. Subsequent to this decision the *Furundzija* and *Kunarac* Trial Chambers each developed its own definition of rape - sparking debate and controversy among commentators. The definition of torture was developed in the *Kunarac* case. The question of whether duress constitutes a defence in international criminal law is canvassed in the context of the *Erdemovic* decision.

The Tribunals have also made law in many cases other than the ones discussed in this chapter. The above cases were chosen merely as a *sample* of Tribunal lawmaking. The cases are illustrative of different methods of lawmaking: the cases selected show *inter alia* how the tribunals formulated and expanded definitions, applied purposive interpretation and filled gaps in the Statutes. The cases were also chosen because of the academic debate they triggered. The description of the facts and lawmaking in each case will be followed by academic comment. Finally, the question of whether a particular instance of lawmaking constitutes legitimate or illegitimate lawmaking is explored.

2. Lawmaking in *Tadic*

Dusko Tadic was not only the first accused to be tried before the ICTY but also the first accused to be tried before any international criminal tribunal since Nuremberg. The *Tadic* case presented a unique opportunity for the ICTY to clarify and develop international criminal law. The bold approach taken by the judges in the *Tadic* Appeals Chamber decisions⁶ set the tone for similarly adventurous future

extraordinarily wide discretion which would have to be entrusted to an international criminal court attempting to apply and develop such laws of war as exist at present.’ J L Brierly ‘Do we need an International Criminal Court?’ (1923) 8 *BYIL* 86-7.

⁵ *Prosecutor v Erdemovic*, IT-96-22-A, 7 October 1997, para 59.

⁶ This includes both *Prosecutor v Tadic* IT-94-1-A, 15 July 1999 (*Tadic Appeals Judgment*) and the *Prosecutor v Tadic* IT-94-1-AR72A, A 2 October 1995, (hereinafter *Tadic Jurisdictional Decision*).

lawmaking. The Appeals Chamber cases were, however, criticised by academic commentators for developing the law too much.⁷

According to Judge Cassese, the Presiding Judge in the *Tadic Jurisdictional Decision*, the *Tadic* Appeals Chamber decisions constitute clear examples of lawmaking by ICTY judges.⁸ The Appeals Chamber in the *Tadic Jurisdictional Decision*, consisting of Judges Cassese, Li, Dechenes, Sidhwa and Abi Saab made international law in four respects in this case. First, the court decided that Security Council Resolutions are subject to judicial review and that the ICTY was lawfully established. Secondly, the court found that the conflicts in the former Yugoslavia were both of an international and of a non-international nature and blurred the distinction between the two by finding that war crimes may be committed in non-international armed conflicts. Thirdly, the court held that the concept of protected persons should be redefined. The fourth instance of lawmaking involved the extension of the concept of criminal responsibility for participation in a group with a common purpose. The lawmaking by the judges in this case can be seen as one of the most important legacies of the ICTY.

(i) *competence de la competence*

Three grounds of appeal were raised in the *Tadic Jurisdictional Decision*. These can be summarised as:

- a) the unlawful establishment of the Tribunal;
- b) the unjustified primacy of the International Tribunal over competent domestic courts;
- c) a lack of subject-matter jurisdiction

This section will concentrate on the alleged unlawful establishment of the Tribunal. The question before the Tribunal was whether the establishment of the ICTY was an appropriate measure to be taken by the Security Council under Chapter VII of the United Nations Charter. The Tribunal was essentially asked to decide whether it had the jurisdiction to decide on its own jurisdiction. Since the legality of the establishment of the Tribunals was discussed in Chapter 1, this section will focus on the judges' application of the doctrine of *competence de la competence*. The Tribunal relied on this principle to legitimize the establishment of the ICTY.

Both the Trial and Appeals Chambers of the ICTY decided that the Security Council did not act arbitrarily in establishing the ICTY. Although the two

⁷ See J E Alvarez 'Nuremberg Revisited: The *Tadic* Case' (1996) 7 *EJIL* 245, M Sassoli and L M Olson 'The judgment of the ICTY Appeals Chamber on the merits of the *Tadic* case' (2000) 82 *International Review of the Red Cross* 734; A Nollkaemper 'The legitimacy of International law in the case law of the International Criminal Tribunal for the former Yugoslavia' in TAJA Vandamme & J-H Reestman (eds) *Ambiguity in the Rule of Law, The Interface between National and International Legal Systems* (2001) 13.

⁸ Interview, 6 June 2003, Florence.

chambers arrived at a similar result, the majority opinions of the two presiding judges, Judge McDonald at the trial stage and Judge Cassese at the appellate stage were very different.

The Trial Chamber took a limited view of the competence of the Tribunal and held that the competence of the Tribunal is precise, narrowly defined and described in Article 1 of its Statute.⁹ This competence entails prosecuting persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. According to the Trial Chamber, this is the full extent of the competence of the Tribunal¹⁰ and the Security Council simply did not 'intend' to permit Tribunal judges to 'question the legality of the law which established it'.¹¹ The Trial Chamber emphasised the fact that the Tribunal was a *subsidiary organ* of the Security Council¹² and that the Tribunal should not go beyond what its judges considered to be its strictly defined mandate.

The Appeals Chamber disagreed with this view and held that the principle of *competence de la competence* (or *Kompetenz-Kompetenz* in German) gave jurisdiction to any international judicial body to determine its own jurisdiction¹³ that therefore the Tribunal was empowered to decide the question of whether it had been validly established by the Security Council.¹⁴ The Appeals Chamber stated that although the ICTY (like the ICJ) does not have the power of judicial review over the actions of the Security Council, the ICTY can 'collaterally' examine the legality of the Security Council's decision in deciding whether it has jurisdiction to proceed with a case.¹⁵ It is not clear what this 'collateral' examination means and why, in the absence of the competence to review, the Tribunal may determine its own jurisdiction when this question is dependant on the ability to review the Security Council's decision.

The Appeals Chamber drew comparisons with the *Effects of Awards* case.¹⁶ In this case the ICJ had to decide on the judicial nature of the United National Administrative Tribunal (UNAT), a judicial body established by the General

⁹ *Prosecutor v Tadic*, Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995 (hereinafter *Tadic Trial Decision*).

¹⁰ *Ibid* para 8.

¹¹ *Ibid*.

¹² The ICJ has discussed the view that the United Nations Administrative Tribunal is a subsidiary, subordinate organ of the Security Council and that the Tribunal's judgment, as a result, cannot bind the General Assembly which established the Administrative Tribunal. *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, *ICJ Reports* 1954, (hereinafter *Effects of Awards*) para 56-61. See also the *Tadic Trial Decision* (note 9) para 32.

¹³ *Tadic Jurisdictional Decision* (note 6) para. 18

¹⁴ *Ibid* para. 19.

¹⁵ *Ibid* paras. 8-10.

¹⁶ *Ibid* para. 16-18. *Effects of Awards* (note 12).

Assembly.¹⁷ The ICJ held that the power to determine its own jurisdiction (*Kompetenz-Kompetenz*) is contained in the Statute of UNAT: 'In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.'¹⁸

According to the Appeals Chamber, the Tribunal is a 'self contained system' whose 'inherent' or 'incidental' jurisdiction derives automatically from the exercise of the judicial function.¹⁹ The Appeals Chamber went even further, *Kompetenz-Kompetenz* was not only a power but an *obligation* in international law.²⁰ In support, the court quoted Judge Cordova who stated that it is the 'first obligation of the Court' as it would be of any other judicial body to ascertain its own competence.²¹

Unlike the Trial Chamber, the Appeals Chamber found that examining the Security Council's action in establishing the Tribunal was not an unreviewable 'political' question but was within its 'inherent' judicial powers.²² The Tribunal refused to limit its inherent power without express derogation from this 'well-entrenched principle of general international law'²³ and suggested that to decide otherwise would undermine both its judicial character and the intention of the Security Council to create an independent body, comparable to the UN Administrative Tribunal.²⁴

Gaeta supports the view of the Appeals Chamber that the Tribunal, being a self-contained system, has inherent jurisdiction to determine certain matters unregulated by Statute.²⁵ Since international judicial bodies (such as the Tribunal) are not assisted by the means and instruments found in domestic jurisdictions such international judicial bodies can not be expected to fulfil their mandate by exercising only the limited powers expressly contained in their constitutive instruments.²⁶ She makes the following interesting statement:

In the international legal system, the lack of an institutionalized and integrated judiciary means that each court or tribunal constitutes a kind of unicellular organism. It is therefore inevitable that such 'monads' often...find within themselves the means and powers that

¹⁷*Effects of Awards* (note 12) 60 -61.

¹⁸ Article 2 para. 3 of the Statute of the United National Administrative Tribunal

¹⁹ *Tadic Jurisdictional Decision* (note 6 above) para 14.

²⁰*Ibid* para 18.

²¹ Judge Cordova, Dissenting Opinion, *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, Advisory Opinion, *ICJ Reports* 1956, 77, 163.

²² *Tadic Jurisdictional Decision* (note 6) para 24. See in this regard P Gaeta 'Inherent Powers of International Courts and Tribunals' in L C Vohra, F Pocar, Y Featherstone, O Fourmy (eds) *Man's Inhumanity to Man* (2003) 356.

²³ *Ibid* para 19.

²⁴ The question of the legality of the creation of the UN Administrative Tribunal was considered in the *Effects of Awards* case (note 12).

²⁵ Gaeta (note 22) 365.

²⁶ *Ibid* 366.

enable them to tackle the procedural problems that may emerge in the course of judicial proceedings, and thus safeguard their judicial character.²⁷

In Gaeta's view the doctrine of inherent powers enables international judicial bodies to fill the *lacunae* in their constitutive instruments.²⁸

Alvarez has been particularly critical of the reasoning in *Tadic*. He argues that the Appeals Chamber used the *Kompetenz-Kompetenz* doctrine as a 'license' to review the legality of the Security Council acts.²⁹ He claims that *Kompetenz-Kompetenz* became the 'linchpin' to a whole series of extraordinary limitations on the power of the Security Council in *Tadic*. In his view *Tadic* suggests limitations on the power of the Security Council which not even the ICJ has 'dared to suggest'.³⁰ Alvarez writes that the decision that the Tribunal could determine its jurisdiction was transformed into a 'general vehicle' for making pronouncements on some of the most contentious issues in the international community concerning the power and functions of the Security Council.³¹

Alvarez criticises the Appeals Chamber's consideration of *Kompetenz-Kompetenz* as a general principle applicable within international tribunals without indicating precisely where this rule is found. It is not clear from the judgment whether *kompetenz kompetenz* is a general principle of law applicable in domestic courts, an implied term of the ICTY's Statute or a rule of custom that applies among international tribunals.³² Alvarez suggests that reaching for 'general principles' means the Tribunal is relying on 'soft law' - it displays a tendency to resort to norms whose status among the traditional sources of international law is not precisely defined.³³ In his opinion the trial judges in *Tadic* resorted to a variety of non-binding materials to define the offences at issue or to consider questions of jurisdiction - these non-binding materials being the Report of the Secretary-General, the Report of the *ad hoc* Committee of the Permanent International Criminal Court and the ILC Draft Articles on the Peace and Security of Mankind.³⁴ The problem with 'soft law' is that it lacks the legitimisation of traditional sources of international law. 'Soft' norms have not been consented to by States nor are they the product of general international consensus.³⁵

²⁷ Ibid 365, 366.

²⁸ Ibid 366, 367.

²⁹ Jose E Alvarez *Law-Making in International Organisations* (Part III) LLM Course Materials (Fall 2003) 20.

³⁰ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK, Libya v US) Provisional Measures*, 14 April 1992 ICJ Reports 1992, 3, 114.

³¹ Alvarez (note 29) 21.

³² Ibid 22.

³³ Ibid. The ICTY is not the only international institution who does this – Alvarez mentions the WTO and regional human rights courts' reach for comparable 'general principles', *ibid*.

³⁴ *Ibid*.

³⁵ Chinkin includes as 'soft law' laws that (1) have been articulated in non-binding form; (2) contain vague and imprecise terms; (3) emanate from bodies lacking international law making authority; (4)

Importantly, he writes that reliance on soft law does not alleviate the concerns surrounding judicial lawmaking but may even aggravate concerns regarding legitimacy.

In spite of initial objections to the establishment of the ICTY and the academic criticism of the *Tadic Jurisdictional Decision*, with time, the method of establishment has been accepted. The ‘resort to soft law’ criticised by Alvarez is not unusual in international adjudication. Many commentators have agreed with the decision of the Appeals Chamber. According to Fischer the arguments of the Appeals Chamber are today widely regarded as the correct interpretation of the UN Charter.³⁶ In the context of discussing the legality of the ICTR Morris and Scharf state that the ICTR complied with the requirements set out in *Tadic* that a Tribunal has to be ‘established by law’ in accordance with ‘proper international standards’ set forth by the Appeals Chamber and provide ‘guarantees of fairness, justice and evenhandedness’.³⁷ By using the standards developed in *Tadic*, the authors lend their implicit approval and support to the establishment of the ICTY and to the arguments of the Appeals Chamber in *Tadic*.³⁸

The Appeals Chamber’s stance that it had jurisdiction to determine whether the Tribunal had been lawfully established raises the possibility that the Appeals Chamber could have decided that the Tribunal had been *unlawfully* established. It is difficult to determine the legal consequences in such a situation.³⁹ According to McGoldrick the political consequences of such a decision would be devastating.⁴⁰

The decision that the acts of the Security Council were reviewable could be described as an instance of judicial lawmaking. The ICTY was the first international judicial body to engage in a form of ‘judicial review’ over the actions of the post-Cold War Security Council.⁴¹ The use of *Kompetenz-Kompetenz* by the Appeals Chamber can be described as one of the most innovative aspects of the *Tadic Jurisdictional Decision* and, perhaps of the entire body of ICTY and ICTR jurisprudence.

The case is also a good example of *obiter* lawmaking by appellate judges. The judges went beyond the strict legal question and discussed *inter alia* the possible

are directed at non-state actors whose practice cannot constitute customary international law; (5) lack any corresponding theory of responsibility and (6) are based solely on voluntary adherence. See C Chinkin ‘Normative Development in the International Legal Systems’ in Dinah Shelton (ed) *Commitment and Compliance* (2000) 21, 30, 36.

³⁶H Fischer ‘Comment’ in A Klip and B Sluiter *Annotated Leading Cases of the International Criminal Tribunal for the former Yugoslavia 1993-1999* Vol. 1 (1999) 140.

³⁷ *Tadic Jurisdictional Decision* (note 6) para 14.

³⁸V Morris & M Scharf *The International Criminal Tribunal for Rwanda* (1998) 109.

³⁹ See H Lauterpacht ‘The Legal Effects of Illegal Acts of International Organisations’ in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965) 88-112.

⁴⁰ D McGoldrick, P Rowe, E Donnelly (eds) *The Permanent International Criminal Court* (2004) 34.

⁴¹ Alvarez (note 7) 250.

limitations on the power of the Security Council. Ultimately it can be argued that the ends justify the means. The positive consequences of the establishment of the Tribunals legitimised their establishment. If the *Tadic* Appeals Chamber had not made law by approving the establishment of the ICTY, the ICTY could not have made law in other cases. Some say that without the ICTY there would have been no ICTR or ICC.⁴² However, the recent tendency towards creating internationalised courts or mixed Tribunals (such as the Special Court for Sierra Leone) and the fact that the ICC was established by treaty and not by Security Council Resolution might indicate that establishment purely by Security Council fiat is not ideal.

(ii) Distinction between international and internal armed conflict

The *Tadic Jurisdictional Decision* was the first opportunity the Appeals Chamber had to classify the conflict in the former Yugoslavia. The Trial Chamber concluded that it did not have to determine whether the conflict was internal or international.

Before the Appeals Chamber, *Tadic* asserted that no armed conflict existed in the former Yugoslavia.⁴³ He alleged that there had been movement of tanks in the Prijedor region but no actual combat. The Appeals Chamber however decided that it was only necessary to show that ‘the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’ and that an armed conflict did exist in the region.⁴⁴

The court then decided the question of whether the Statute refers only to international armed conflicts. The Appeals Chamber immediately pointed out that on the face of it, some provisions in the Statute do not make it clear whether they are limited to offences occurring in international armed conflicts only or whether they also apply in internal armed conflicts. Article 2 is one such provision. Article 2 refers to ‘grave breaches of the Geneva Conventions’.⁴⁵ Grave breaches are widely understood to be committed only in international armed conflicts. The Geneva Conventions and Protocol 1 define grave breaches as occurring only in international armed conflicts. Article 3 of the Statute, concerning violations of the laws and customs of war, lacks any express reference to the kind of conflict required and contributed to the uncertainty.⁴⁶ Article 5, dealing with crimes against humanity, expressly confers jurisdiction over crimes committed in either internal or international armed conflict.⁴⁷ For the purpose of Articles 2 and 3 it was

⁴² See McGoldrick (note 40) 35.

⁴³ *Tadic Jurisdictional Decision* (note 6) para 66.

⁴⁴ The Appeals Chamber stated that an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between groups in a State. According to the Appeals Chamber the conflict in the former Yugoslavia fulfilled these criteria. *Ibid* para 70.

⁴⁵ *Ibid* para 71

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

therefore necessary for the Appeals Chamber to classify the conflict as either internal or international.

The Appeals Chamber indicated that such classification was a complex issue:

[W]e conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context.⁴⁸

The court therefore decided that the conflict was of a ‘mixed character’, containing both internal and international aspects.⁴⁹ The court adopted a teleological approach to the interpretation of the Statute. Since it was the object of the Statute ‘to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects’ the Security Council intended the subject-matter jurisdiction to extend to both internal and international armed conflicts.⁵⁰

With regard to article 3 the Appeals Chamber held that the Statute was not confined to international armed conflicts but included violations of humanitarian law applicable to internal armed conflicts.⁵¹ Judge Cassese stated that the ‘primary purpose of the establishment of the International Tribunal [was] not to leave unpunished any person guilty of any serious violation, whatever the context within which it may have been committed’.⁵² The Tribunal once again relied on a purposive approach to extend the protection of humanitarian law.

According to Horst Fischer, Article 3 was interpreted by the Appeals Chamber as being the ‘residual clause’ which was designed to ensure that no serious violation of international humanitarian law will escape the Tribunal’s jurisdiction.⁵³ Since the Appeals Chamber intended Article 3 to confer jurisdiction over any serious offence not covered by articles 2, 4 or 5 it is fitting that it held that article 3 applied to non-international armed conflicts. This helped to make article 3, in the words of Fischer ‘watertight and inescapable’.⁵⁴

⁴⁸ Ibid para 77, 78. The Appeals Chamber stated in para 72: ‘As members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.’

⁴⁹ Ibid para 74.

⁵⁰ Ibid para 78.

⁵¹ Ibid para 91.

⁵² Ibid para 92.

⁵³ Fischer (note 36) 141.

⁵⁴ Ibid.

The Appeals Chamber in this decision adopted a relatively conservative approach to Article 2 of the ICTY Statute when it decided that ‘in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.’⁵⁵ Cassese referred to the statement contained in the *amicus curiae* brief of the US government that Article 2 applied to armed conflicts of a non-international as well as an international character.⁵⁶ Although Cassese recognised that the views of a permanent member of the Security Council provides a possible indication of a change in *opinion juris*, he concluded that this was not sufficient ‘in the state of development of the law’ to lead to the conclusion that the grave breaches provisions applied during non-international armed conflict.⁵⁷

The *Tadic Jurisdictional Decision* was however not memorable for what it said about Article 2. With regard to Article 2 the Appeals Chamber merely confirmed the *status quo*. The lawmaking in this decision occurs with regard to Article 3. By holding that article 3 could apply in internal armed conflicts, the ICTY broke new ground.

The ICC Statute takes the developments in *Tadic* further. Article 8 (2) (c) of the ICC Statute, the ‘war crimes’ article, stipulates that the ICC shall have jurisdiction over violations of article 3 of the four Geneva Conventions. Article 8 (2) (e) provides that the ICC will have jurisdiction over ‘other serious violations of the laws and customs applicable in an armed conflict not of an international character’.⁵⁸ This article is far more detailed and extensive than the article on ‘violations of the laws and customs of war’ in the ICTY Statute which does not state whether the violations had to take place in an international armed conflict or internal armed conflict. The fact that states finally agreed to explicitly attach international criminal responsibility to certain war crimes committed in internal

⁵⁵ Ibid para 84.

⁵⁶Ibid para 83. See the discussion by C Warbrick and P Rowe in ‘The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case’ (1996) 45 *International and Comparative Law Quarterly* 698

⁵⁷ Ibid para 83. In a Separate Opinion Judge Abi-Saab adopted a more progressive approach arguing that the ICTY should assume jurisdiction under Article 2 of the Statute for acts committed in internal conflicts in one of two ways. It could either assume such jurisdiction on the basis of a new interpretation of the Geneva Conventions or it could do so by the establishment of a new customary rule ancillary to those Conventions. He held the view that the practice of applying the grave breaches regime also in internal conflicts had already attained the status of a new customary rule. According to Judge Abi-Saab there is an evolution in the law within the system of sources containing the grave breaches regime. See R Kolb ‘The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes’ (2000) 71 *BYIL* 274.

⁵⁸ The list of such violations include intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, pillaging a town or place, even when taken by assault; committing rape, sexual slavery, enforced prostitution, forced pregnancy, killing or wounding treacherously a combatant adversary. See article 8 (e) ICC Statute.

armed conflict can be described as a tremendous achievement of the Rome Conference.

(iii) Redefinition of ‘protected persons’ by Appeals Chamber

The question whether the conflict in the former Yugoslavia was of an internal or international nature was discussed extensively in the subsequent *Tadic* Trial Chamber⁵⁹ and Appeals Chamber decisions in answering the question of whether the Bosnian Muslims were ‘protected persons’.

The indictment charged Tadic with a list of crimes allegedly committed in the Prijedor region of Bosnia-Herzegovina between 25 May 1992 and early August 1992. Many of the counts in the indictment concerned events said to have taken place at a camp at Omarska, where large numbers of Bosnian Muslims and Croats were detained by Serb forces. The charges dealt with accusations of rape, unlawful killing, torture and cruel treatment. In respect of each of the alleged incidents the indictment charged the defendant under Articles 2, 3 and 5 of the Statute of the Tribunal.⁶⁰ Article 2 of the ICTY Statute gives the ICTY the power to prosecute persons committing or ordering the commission of grave breaches of the 1949 Geneva Conventions. The grave breaches contained in Geneva Conventions and Protocol 1 can be committed only in international armed conflicts.⁶¹ In order for the grave breaches regime to apply a conflict must not only be international - the Geneva Conventions require in addition that the victims of the conflict must be ‘protected persons.’ Article 4(10) of the Fourth Geneva Convention defines ‘protected persons’ as those ‘in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’

The defendant maintained that the Tribunal lacked subject-matter jurisdiction in respect of all these charges, on the ground that none of the acts alleged in the indictment had taken place in the course of an international armed conflict. In order for the Appeals Chamber to try Tadic for grave breaches, it was therefore crucial for both the Trial and Appeals Chambers to qualify the conflict in which Tadic committed those crimes as international.

The majority of the Trial Chamber in *Tadic* held that, throughout the period of the indictment, the Geneva Conventions applied in Bosnia because of the existence of an ongoing international conflict between Bosnia and the SFRY.⁶² The Trial Chamber had to decide on a standard according to which outside support can render the law of international armed conflicts applicable to the behaviour of

⁵⁹ *Prosecutor v Tadic* IT-94-1-T, 7 May 1997.

⁶⁰ *Tadic* *ibid.* (note 59). See the factual findings in paras 194 - 477.

⁶¹ The Appeals Chamber held that the concept of grave breaches under the Geneva Conventions was inseparable from the concept of protected persons and that neither concept featured in common Article 3 (the only article in the Conventions applicable to internal armed conflicts) *Tadic Appeals Judgment* (note 6) para. 79-85.

⁶² *Ibid* para 572.

rebels. It was argued that the International Court of Justice had clarified this standard when it had to decide whether the violations of international humanitarian law committed by the Nicaraguan contras could be attributed to the United States.⁶³ The Trial Chamber declared that the ICJ in the *Nicaragua* case set a particularly high standard for determining whether the United States could be said to be responsible for the activities of the *contras*. The ICJ states:

United States participation, even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the contras, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua...For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁶⁴

The Trial Chamber decided that the law applicable to state responsibility was relevant in determining the law concerning international criminal liability. To establish state responsibility, it was necessary to establish that the FRY exercised *effective control* over the Bosnian Serb army or the Republika Srpska. The provision of personnel, logistical support and common aims was not enough. To establish effective control the Prosecution had to establish that the FRY controlled the Bosnian Serb army by the giving of orders and by directing its operations. According to the majority the prosecution merely established that the Republika Srpska and the Bosnian Serb army received financial and other support from the FRY and armed forces of the FRY and that they coordinated their activities to reach common goals.⁶⁵ The effective control test was not satisfied. The majority found that the Republika Srpska and the Bosnian Serb army could not be regarded as *de facto* organs of State or agents of the FRY. As a result, the civilian victims in the *Tadic* case could not be regarded as protected persons within the meaning of the Fourth Geneva Convention because they were not in the hands of a party of which they were not nationals. The Bosnian Muslims were in the hands of their fellow Bosnian Serb nationals.⁶⁶ The grave breaches provisions were therefore held not to apply.

In a cross-appeal the Prosecution suggested that the definition of protected persons should be adapted to 'the principal challenges of contemporary conflicts'. The Appeals Chamber subsequently abandoned the literal interpretation of the definition of protected persons followed by the Trial Chamber. Instead, the Appeals Chamber replaced the requirement of nationality with the factors of

⁶³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgment of 27 June 1986, Merits, *ICJ Reports* 1986, 14.

⁶⁴ *Ibid* para 115.

⁶⁵ *Tadic* (note 59) paras 602, 605.

⁶⁶ *Ibid* para 608.

allegiance and effective protection.⁶⁷ The Appeals Chamber justifies this step by citing some cases which held that under specific provisions of the Geneva Conventions, nationality is not decisive, namely for refugees and neutral nations.⁶⁸ Although the victims in *Tadić* were not refugees or neutral nationals, the Appeals Chamber used the example of refugees and neutral nationals to illustrate the point that, in these cases the lack of allegiance to a State and diplomatic protection by this State were considered as more important than the formal link of nationality.⁶⁹ The Appeals Chamber also referred to the inadequacy of applying the nationality criterion to contemporary conflicts and stated that international humanitarian law must apply according to *substantial relations* rather than formal bonds:

This legal approach, hinging on substantial relations rather than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that of the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance.⁷⁰

The Appeals Chamber found that since it had been shown that the Bosnian Serb forces acted as *de facto* organs of another State (the FRY), the requirements of Art 4 had been met: the victims were ‘protected persons’ as they found themselves in the hands of armed forces of a State of which they were not nationals.⁷¹ The Chamber took a purposive approach: It looked at the purpose of Article 4 which, according to the Appeals Chamber, is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy diplomatic protection, ‘and correlatively are not subject to the allegiance and control of the State in whose hands they may find themselves.’ It held that it would frustrate the object and purpose of the Geneva Convention if nationality was kept as the only criterion in such conflicts.⁷² This seems to be a good example of the Appeals Chamber using the ‘maximum protection’ justification to extend the protection of the Geneva Conventions to those not previously protected.

According to the Appeals Chamber State responsibility and individual criminal responsibility are different issues and the ICJ, in *Nicaragua*, did not have to determine whether the law of international or non-international armed conflict applies because it considered Article 3 of the Geneva Conventions to apply to both kinds of conflict.⁷³ In the view of the Appeals Chamber the test applied by the ICJ in *Nicaragua* is unconvincing because it is at variance with State and judicial practice. The Appeals Chamber was of the view that *overall control* by a foreign State over an organisation is sufficient to render the foreign State responsible for

⁶⁷ Ibid paras 163-169.

⁶⁸ See Fourth Geneva Convention, Articles 4 (2), 44 and 70 (2).

⁶⁹ *Tadić Appeals Judgment* (note 6) para 165.

⁷⁰ Ibid para 168.

⁷¹ Ibid .

⁷² Ibid paras 163 ff.

⁷³ *Nicaragua* (note 63) para 219.

all acts of that organisation and to activate international humanitarian law relative to international conflicts.⁷⁴ The Appeals Chamber came to the conclusion that the Bosnian Serbs *were* under such overall control by the FRY.⁷⁵

Both the Trial and Appeals Chambers relied on Article 8(a) of the 1996 ILC Draft Articles on State Responsibility, the 2001 revised version of which reads as follows:

The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on instructions of, or under the direction or control of that State in carrying out the conduct.⁷⁶

This provision means that a State may opt to act through private individuals or groups of private individuals, or persons not enjoying the status of an organ of State, rather than acting itself through its organs.⁷⁷

The dramatic result of the redefinition of ‘protected persons’ by the Appeals Chamber is that, in the future, all victims of international armed conflict, if it can be proven that they pass the new test formulated by the Appeals Chamber, can benefit from the protection provided by the protected person status under the Geneva Conventions.

In *Tadic* the ICTY Appeals Chamber went beyond the interpretation of existing law to create new law.⁷⁸ The Appeals Chamber’s blurring of the distinction between international and internal armed conflicts called for a redefinition of protected persons. The traditional definition of protected persons was incompatible with the Appeals Chamber’s decision on the classification of the conflict. This would be an example of commendable lawmaking or development of the law, lawmaking by which the Tribunals extended the protection of humanitarian law and an example of what Meron would call the humanisation of humanitarian law. The Trial Chamber in *Blaskic* stated: ‘In a nation that had

⁷⁴ *Prosecutor v Tadic*, IT-94-1-A, 15 July 1999, para. 156. The *Celebici* Trial Chamber came to the same conclusion. In its view the *Nicaragua* test was not applicable to the question of individual responsibility. See *Prosecutor v Delalic* IT-96-21-T, 16 November 1998 (*Celebici Trial Judgment*) paras 233 and 234. In this case the court again faced the ‘classification’ question. Concerning the international nature of the conflict, the Trial Chamber adopted a very flexible and generic standard, avoiding the technical point of attribution. The Chamber simply states that with regard to the involvement of outside Croat and Serb forces and the degree of control exercised, the conflict was clearly international. The grave breaches regime did therefore apply if it could be said that the victims were protected persons. *Ibid*, paras 204 ff.

⁷⁵ *Ibid* para. 162.

⁷⁶ *Responsibility of States for Internationally Wrongful Acts* (2001) 103 available at

http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

⁷⁷ Andre de Hoogh ‘Articles 4 and 8 of the 2001 ILC articles on state responsibility, the *Tadic* case and attribution of acts of Bosnian Serb authorities to the Federal Republic of Yugoslavia’ (2002) 72 *BYIL* 277.

⁷⁸ *Tadic Appeals Judgment* (note 6) paras 163-169.

crumbled, ethnicity became more important than nationality in determining loyalties'.⁷⁹ The intricacy of the situation in the former Yugoslavia (of a state dissolving into many states) calls for a new response to the question or test of allegiance to nationality and perhaps a rethinking of the usefulness of the notion of nationality and of what it is that that notion really means.

Many academic commentators have questioned the reasoning and conclusion reached both by the Trial Chamber and the Appeals Chamber. Special Rapporteur James Crawford questioned whether Article 8 (a) of the Draft Article on State Responsibility as it then stood 'should extend beyond cases of actual authorisation or instruction to cover cases where specific operations are under the direction and control of the State'.⁸⁰ Crawford proposed to attribute conduct to a State if a specific operation was carried out under its direction and control, provided that the complaint related to conduct constituting a necessary, integral or intended part of the operation.⁸¹ The 2001 Commentary on the Articles on State Responsibility incorporates this suggestion. It states that conduct 'under the direction or control' of the State will be attributable to the State 'only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation'.⁸²

De Hoogh criticises the Trial Chamber decision. He believes it is inadequate and illogical to impose the same kinds of standards applicable to organs of State to *de facto* organs or agents. He points out that the Trial Chamber notion that control must actually have been exercised is inconsistent with the Chamber's observation that 'there was little need for the VJ and Government of the Federal Republic of Yugoslavia ...to attempt to exercise any real degree of control over...the VRS'.⁸³ In his view both the Trial Chamber and Appeals Chamber misread the *Nicaragua* case and equated the criterion of effective control (concerning violations of human rights law and humanitarian law) with that of dependence and control (for agency determination).⁸⁴

The text and commentary of the new Article 8 require the exercise of direction or control over specific conduct engaged in by the (group of) persons. The ILC requires that control must be exercised in regard to the specific conduct of the person or entity concerned. This seems to be contrary to the notion, expressed by the Appeals Chamber, that overall control is sufficient.

In their comments on the lawmaking of the judges when classifying the conflict in *Tadic*, Sassoli and Olson write that it is doubtful whether it is appropriate for the

⁷⁹ *Prosecutor v Blaskic*, IT-95-14, 3 March 2000, paras 125-133.

⁸⁰ Crawford *First Report on State Responsibility* A/CN.4/490/Add. 5, 22 July 1998, 16 - 24.

⁸¹ *Ibid* 23.

⁸² *Responsibility of States for Internationally Wrongful Acts* (note 76) 108.

⁸³ *Tadic Trial Decision* (note 9) paras 603-604.

⁸⁴ De Hoogh (note 77) 290.

ICTY to provide an answer to general international law different from the answer given by the ICJ. They are concerned that double standards may result if the ICTY continues to apply its own theory to inter-State disputes.⁸⁵ It may be asked whether the principle of completeness of the legal system, insisted on by Hersch Lauterpacht⁸⁶, does not presuppose the expectation of consistency between different international courts. The ILC's revised Commentary on the Draft Articles takes note of the different approaches taken by the ICJ and ICTY and merely states that in each case it is a matter of appreciation whether conduct was or was not carried out under the control of the State.⁸⁷

Meron also finds the ICTY's reliance on *Nicaragua* problematic. He expressed reservations on whether the *Nicaragua* case and its criteria were of any relevance in characterising the conflict. In his view applying the *Nicaragua* test leads to artificial and incongruous conclusions.⁸⁸ Interestingly, the Trial Chamber in *Celebici* warned of the dangers of relying on the reasoning and findings of a very different judicial body concerned with rather different circumstances from the case at issue – for example the ICJ's reasoning on the issue of State responsibility should not be transposed wholesale into the context of conflict classification.⁸⁹ Meron does however support the softening of the line between international and non-international armed conflicts.⁹⁰ He applauds the Appeals Chamber's reasoning that 'the impetuous development and propagation in the international community of human rights doctrines'⁹¹ calls for a blurring of the distinction between international and non-international armed conflicts which results from it.⁹²

Fenrick similarly agrees with the blurring of this distinction and writes that as long as humanitarian law remains in two boxes, an internal box and an international box, courts addressing criminal responsibility would have to undergo 'similar analytical contortions' to that of the Appeals Chamber.⁹³

The judgment can be criticised on the ground that both the Trial Chamber and the Appeals Chamber failed to give sufficient weight to the situation of a State dissolving into several States, where the armed forces of the former central state

⁸⁵ Sassoli & Olson (note 7) 3

⁸⁶ H Lauterpacht 'Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Law' in *Symbolae Verzijl* (1958) 216. See Chapter 2.

⁸⁷ See the Commentary on Article 8 in James Crawford *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002) 112. See also the Commentary on the website of the International Law Commission (note 76).

⁸⁸ T Meron 'Classification of armed conflict in the former Yugoslavia: Nicaragua's fallout' (1998) 92 *AJIL* 236-42.

⁸⁹ *Celebici Trial Judgment* (note 74) paras 230-231.

⁹⁰ T Meron 'Cassese's *Tadic* and the Law of Non-International Armed Conflicts' in L C Vohrah et al (note 22) 535.

⁹¹ *Tadic Jurisdictional Decision* (note 6) para. 97.

⁹² *Ibid* 535.

⁹³ W J Fenrick 'The Application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia' (1999) 834 *International Review of the Red Cross* 317.

necessarily have many links with the former central authorities. It can be argued that such links are not necessarily an indication of control.⁹⁴ By finding that the Bosnian Serbs acted as *de facto* agents of another state (the FRY), (which was necessary to qualify the conflict as international), the Appeals Chamber expanded the scope of protection of humanitarian law and made law. But was this a legitimate interpretation of the Article 2 of the ICTY Statute?

With regard to the question of conflict classification and with regard to all aspects of lawmaking in *Tadic* one can argue that the Tribunal exercised a choice. Confronted with the choice between a literal or purposive interpretation of the Statute, the Appeals Chamber did not follow the literal interpretation but instead preferred the purposive approach.⁹⁵

Had the ICTY not qualified the conflict in which *Tadic* committed those crimes as international the Appeals Chamber could not try *Tadic* for grave breaches. When taking a purposive interpretation the ICTY and ICTR must take the objects and purpose of the Statutes into consideration as well as the social and political considerations which gave rise to their creation.⁹⁶ In order to give effect to the purpose of the ICTY Statute ie to prosecute persons for serious violations of international humanitarian law, it was therefore crucial for both the Trial and Appeals Chambers to classify the conflict as international.

Although the Trial Chamber and Appeals Chamber's reliance of the *Nicaragua* case and adoption of the overall control standard can legitimately be criticised it can be argued that the decision led to a correct *outcome*. In order for Article 2 to fulfill its purpose the Tribunal had to find a way of classifying the conflict as an international conflict. The judges needed to make law to make Article 2 functional.

⁹⁴ Interestingly, Sassoli and Olson consider the standard the Appeals Chamber applies an unintended form of 'judicial ethnic cleansing'. Instead of constituent peoples of Bosnia and Herzegovina groups such as the Serbs and Croats are considered as 'agents' of a foreign state. Sassoli & Olson (note 7) 3, 4. The important question here is whether the fact that the acts of the Serbs and the Croats can be legally attributed to a foreign State means that they themselves should also be 'attributed' to that State, ie considered as foreigners. This question is particularly important in the context of determining 'protected person' status. This was the conclusion in *Celebici* (note 74) para 259 where it was argued that Bosnian Serbs detained by the Bosnian government were protected persons because they had not accepted the nationality of Bosnia and Herzegovina.

⁹⁵ One can apply the rules of customary international law on treaty interpretation as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties to the ICTY and ICTR Statutes. Article 31 of the Vienna Convention states:

1. A treaty shall be interpreted in good faith and 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.

⁹⁶ *Celebici Trial Judgment* (note 74) para 170. See also Meron (note 90) 535, 536.

(iv) Extension of Common Purpose Doctrine

Tadic was one of many accused before the ICTY charged with participating in a joint criminal enterprise (or common criminal purpose).⁹⁷ The systemic nature of the violations committed in the former Yugoslavia and Rwanda resulted in many individuals being charged with crimes that were committed in the context of a group.⁹⁸ Van Sliedregt comments that at the ICTY joint criminal enterprise has become the concept par excellence to construct the criminal responsibility of senior political and military leaders.⁹⁹ Other ICTY accused charged with participating in a joint criminal enterprise include *Kordic/Cerkez*¹⁰⁰, *Krstic*¹⁰¹, *Kvočka*¹⁰², *Krnjelac*¹⁰³, *Blaskic*¹⁰⁴, *Vasiljevic*¹⁰⁵, *Furundzija*¹⁰⁶ and *Milosevic*.¹⁰⁷ The only ICTR case in which an accused was charged with participating in joint criminal enterprise was *Kayishema*.¹⁰⁸

⁹⁷ The two terms seem to denote the same concept. See W J Fenrick's chapter 'The ICTY and the development of international humanitarian law' in K Koufa (ed) *The New International Criminal Law* (2003) 937. The Trial Chamber in *Brđjanin and Talić* noted that the Appeals Chamber has labelled the concept as a common plan, a common criminal purpose, a common design, and a common concerted design. *Brđjanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36, 26 June 2001 para 24.

⁹⁸ It is clear that joint criminal enterprise is becoming increasingly important at the ICTY. Indictments are increasingly resting the accused's liability on this basis. Of the forty-two indictments filed between 25 June 2001 (the date on which the first indictment relying explicitly on joint criminal enterprise was filed) and 1 January 2004 twenty-seven (64%) relied explicitly on joint criminal enterprise. For more statistics see A M Danner, J S Martinez 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 107.

⁹⁹ E Van Sliedregt *Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 101.

¹⁰⁰ *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, 26 February 2001.

¹⁰¹ *Prosecutor v Krstic*, IT-98-33-T, 2 August 2001.

¹⁰² *Prosecutor v Kvočka et al*, IT-98-30/1-T, 28 February 2005.

¹⁰³ *Prosecutor v Krnjelac*, IT-97-25, 15 March 2002.

¹⁰⁴ *Prosecutor v Blaskic* IT-95-14-A, 29 July 2004.

¹⁰⁵ *Prosecutor v Vasiljevic*, IT-98-32-A, 25 February 2004.

¹⁰⁶ *Prosecutor v Furundzija*, IT-95-17/1-T, 10 December 1998.

¹⁰⁷ *Prosecutor v Milosevic*, IT-01-51-I (Bosnia and Herzegovina), 22 November 2001 on line at <http://www.un.org/icty/indictment/english/milii011122e.htm> The Prosecutor submitted that Milosevic participated in a joint criminal enterprise whose objective was to forcibly lead out from certain areas of Bosnia and Herzegovina all the non-Serb population with the purpose of achieving the creation of a ethnically homogenous Serbian state.

¹⁰⁸ *Prosecutor v Kayishema*, ICTR-95-1-T, 21 May 1999 paras 203-204. Based upon the ICTY's JCE jurisprudence, the ICTR Appeals Chamber has found that joint criminal enterprise may also be employed at the ICTR. *Prosecutor v Ntakirutimana*, Judgment, ICTR-96-10-A, 13 December 2004, para 468. Danner and Martinez speculate that the relative lack of jurisprudence relating to joint criminal enterprise at the ICTR may be due to a variety of factors (note 82). First, conspiracy to commit genocide is included within the ICTR Statute and has been frequently alleged by the prosecution, thus removing much of the need for recourse to JCE. See eg *Prosecutor v Musabyimana*, ICTR Indictment, ICTR-2001-62-I, 15 March 2001, paras 35-39, *Prosecutor v Kamuhanda*, ICTR Indictment, ICTR-99-54-A, 15 November 2000, para 1, *Prosecutor v Bisengimana*, ICTR Indictment, ICTR-2000-60-I, 10 July 2000 para 1; *Prosecutor v Rugambarara*, ICTR Indictment, ICTR-2000-59, 10 July 2000 para 1; *Prosecutor v Bizimungu*, ICTR Indictment, ICTR-99-50-I, 10 May 1999, para 1.

Tadic is important because as the first decision it set the foundation stone for liability for common purpose.¹⁰⁹ It was the Tribunal decision which developed most dramatically the law with regard to common purpose. Significantly, the Appeals Chamber in *Tadic* extended the concept of ‘common purpose’ to cases involving a common design where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. This particular form of ‘common purpose’ has been described as ‘third category’ common purpose (after its description by the *Tadic* Appeals Chamber) or extended common purpose.¹¹⁰

Although the ICTY Statute does not expressly refer to joint criminal enterprise the ICTY has held in several cases that this form of liability can be inferred from Article 7(1).¹¹¹ Article 7(1) provides that:

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 and 5 of the present Statute, shall be individually responsible for the crime.

The absence of express provision for common purpose is a lacuna in the Statute. Ideally of course international criminal law requires clear and certain definitions for the various bases for liability.¹¹² The *Tadic* Appeals Chamber considered joint criminal enterprise to be a form of ‘commission’ under Art 7(1). This view was upheld by the Appeals Chamber in the *Krnjelac* Appeals Judgment¹¹³ and the *Ojdanic* Motion Challenging Jurisdiction.¹¹⁴ The *Tadic* Appeals Chamber established that the notion of joint criminal enterprise was firmly established in customary law and was recognized by the ICTY Statute.¹¹⁵

Common purpose (or ‘aiding and abetting’) was referred to in the *Tadic* Trial Chamber decision¹¹⁶ and focused on in the *Tadic* Appeals Chamber decision.¹¹⁷ The Appeals Chamber in *Tadic* emphasised that joint criminal enterprise is a

¹⁰⁹ E Katselli ‘The notion of individual criminal responsibility for participation in a joint criminal enterprise in the new international law with respect to the crime of genocide and in view of the new charges for Bosnia against Slobodan Milosevic’ in K Koufa (ed) *The New International Criminal Law* (2003) 1032.

¹¹⁰ Danner & Martinez (note 98) 108.

¹¹¹ Ibid 102-6.

¹¹² S Powles ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity’ (2004) 2 *JICJ* 606.

¹¹³ *Prosecutor v Krnjelac*, IT-97-25-A, 17 September 2003, para 73.

¹¹⁴ *Prosecutor v Ojdanic*. Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, Appeals Chamber, 2 May 2003, para 20.

¹¹⁵ *Tadic Appeals Judgment* (note 6) para 220.

¹¹⁶ *Tadic* (note 59) paras 681- 687.

¹¹⁷ *Tadic Appeals Judgment* (note 6).

necessary component of Art 7 (1) and firmly rooted in international customary law.¹¹⁸

Since the Appeals Chamber's development and extension with regard to the third category is the most innovative and controversial this section will focus on this category of common purpose. Unlike the ICTY Statute, the ICC Statute contains an explicit provision incorporating joint criminal enterprise and does not extend to crimes beyond the scope of the joint criminal enterprise. The drafters of the ICC Statute therefore did not seem to accept the third category of common purpose developed by the *Tadic* Appeals Chamber. For conceptual clarity it is important to understand the distinction made by the Tribunals between 'joint criminal enterprise' and the crime of 'aiding and abetting'.

According to the *Tadic* Appeals Chamber the aider and abettor is always an accessory to the crime perpetrated by the principal (in common purpose no 'principal' is required). The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime. By contrast, by acting in pursuance of a common purpose it is sufficient that the participant performs acts that *in some way* are directed to the furthering of the common plan. In the case of aiding and abetting the requisite *mens rea* is knowledge that the acts performed assisted in the commission of the crime.¹¹⁹

The Appeals Chamber in *Krnjelac* stated that the acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor to the principal offence since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent.¹²⁰

The Trial Chamber found that Dusko Tadic participated in 'ethnic cleansing' operations within an armed group in the Prijedor Region by helping to remove non-Serb men from the villages of Sivi and Jaskici. In the village of Jaskici five men were later found to have been killed. There was no evidence that Tadic took part in the killings in the village of Jaskici. The Trial Chamber therefore concluded that Tadic could not be sentenced for them. This conclusion was overturned by the Appeals Chamber. It was found beyond a reasonable doubt that the five victims had been killed by members of the armed group to which Tadic belonged.¹²¹ It was further held that under the common purpose doctrine, Tadic

¹¹⁸ Ibid para 189.

¹¹⁹ Ibid para 229.

¹²⁰ In the *Krnjelac* Appeals Judgment a further distinction was made between an accomplice and a co-perpetrator. The Appeals Chamber referred to a co-perpetrator as a participant in a joint criminal enterprise who is not the principal offender. An accomplice in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime. *Krnjelac* (note 103) para 75.

¹²¹ *Tadic Appeals Judgment* (note 6) paras 178-184.

could be held responsible for those killings even if they were committed by other members of his group and even if the killing of the inhabitants of the village was not necessarily part of their common plan. The Appeals Chamber decided that such responsibility exists once the risk of death becomes a predictable consequence of the execution of the common plan and the accused was either reckless or indifferent to that risk.¹²²

According to the Appeals Chamber the relevant case law shows that the notion of common design encompasses three categories of collective criminality.¹²³ The *actus reus* and *mens rea* required differs according to the category of common purpose.¹²⁴ The first category represents cases where all the co-defendants who act pursuant to a common design possess the same criminal intention.¹²⁵ The second category, which can be seen as a variation of the first, embraces the so-called ‘concentration camp’ cases. In these cases it was held by the court that the offences charged have been committed by members of the military or administrative units such as those running concentration camps.¹²⁶ Examples of the second category of common purpose can be found in the *Krnjelac* (involving crimes committed in the KP Dom detention facility) and *Kvočka* cases. With regard to the *Kvočka* case, regarding crimes committed in the Omarska camp, the Trial Chamber stated: ‘the second category, which embraces the post-war ‘concentration camp’ cases, best resonates with the facts of this case...’¹²⁷

The third of these categories concerns cases where an act is committed by a co-perpetrator outside the common design which is a natural and foreseeable consequence of the effecting of the common purpose.¹²⁸

The Appeals Chamber in *Tadic* came to the conclusion that all co-perpetrators are responsible for acts committed by one co-perpetrator outside the common design, if it was foreseeable that they might be committed and the accused willingly took the risk.¹²⁹ For the purpose of category three common purpose, the relevant mental state required is therefore lowered from intention to recklessness or

¹²² Sassoli & Olsen (note 7) 6.

¹²³ *Tadic Appeals Judgment* (note 6) para 195

¹²⁴ The *actus reus* required for common purpose is set out in para 31 of *Krnjelac* (note 103) and the *mens rea* requirement is set out in para 32 of *Krnjelac* *ibid*.

¹²⁵ *Ibid* para 196. With regard to this category the Appeals Chamber refers to the *Georg Otto Sandrock* case. See *Trial of Otto Sanders and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th –26th November 1945, UNWCC, vol I, 35.

¹²⁶ *Tadic Appeals Judgment* (note 6) para 202. In the ‘concentration camp’ cases the accused held some position of authority within the hierarchy of the concentration camps. The Chamber refers to the *Dachau Concentration Camp* case (*US v Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November–13th December, 1945, UNWCC, vol. XI.) and the *Belsen* case (*Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September –17th November, 1945, UNWCC, vol II, 1).

¹²⁷ *Kvočka* (note 102) para 84

¹²⁸ *Tadic Appeals Judgment* (note 6) para 204.

¹²⁹ *Ibid* paras 204–226.

knowledge. The Trial Chamber in *Kayishema* suggested that the accused may be responsible for crimes that were objectively foreseeable, even if he did not himself foresee them.¹³⁰ This has the effect of lowering the standard even further, to that of negligence. The Trial Chamber in *Brdjanin and Talic* stressed that the Appeals Chamber in *Tadic* did not require the prosecution in such a case to establish that the accused intended any further crime to be committed or that he shared with the other participant the state of mind required for the further crime.¹³¹

The Appeals Chamber did not base its extension of common purpose on a provision of the ICTY Statute or on a rule of international humanitarian law. Instead, the Appeals Chamber based its conclusion on its own analysis of precedents and national legal systems. The Chamber looked at the *Essen Lynching* case,¹³² a case brought before a British military court, as well as the *Kurt Goebell et al (Borkum Island)* case,¹³³ the decision of a United States military court.

Sassoli and Olsen comment that it is not clear why the Appeals Chamber chose to review the *Borkum Island* case as a precedent for the third category of common purpose. In their view the case fits more neatly under category one since this was a clear case of common design to kill.¹³⁴

The *Tadic* Appeals Chamber also cited a number of Italian cases in support of third category common purpose. Of these, the only case that clearly sets out third category common purpose is *D'Ottavio et.*¹³⁵ In light of the fact that the Appeals Chamber cited only one case which unequivocally serves as an example of third category common purpose it is difficult to see how the Tribunal can conclude that third category common purpose is 'firmly established in international customary law'.¹³⁶

Resorting or referring to cases from other fora or contexts can be problematic. To determine the authoritative value of a case it must be appraised within the context of the forum in which it was heard as well as in the context of the law it applied.¹³⁷ Case law from British military courts for the trials of war criminals whose jurisdiction was based on the rules and procedure of the domestic military courts, for example, were less helpful in establishing rules of international law than case law of tribunals set up specifically to apply international law.¹³⁸ Also it can be

¹³⁰ *Kayishema* (note 108) paras 203 -204.

¹³¹ *Tadic Appeals Judgment* (note 6) para 30.

¹³² *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December 1945, UNWCC, vol I, 88, at 91.

¹³³ *US v Kurt Goebell et al*, 6 February – 21 March 1946 (*Borkum Island* case).

¹³⁴ Sassoli & Olson (note 7) 7.

¹³⁵ *D'Ottavio et.* (an unpublished judgment) is a case on Appeal from the Assise Court of Terano (on file with the ICTY library). *Tadic Appeals Judgment* (note 6) para 215.

¹³⁶ *Ibid* para 220.

¹³⁷ *Furundzija* (note 106) para 196.

¹³⁸ *Ibid*.

argued that international tribunals are not bound by past doctrines; they must apply customary international law as it stands at the time of the commission of the offences. The Trial Chamber in *Tadic* was of the opinion that it must interpret the notion of crimes against humanity as it stood at the relevant times when the offences were committed and not at the time of WW II or soon thereafter when the notion was being developed.¹³⁹

In its examination of national jurisdictions the Trial Chamber found that British and US military courts in Germany, Italian courts judging World War II events, common law jurisdictions, France and Italy adopt the approach favoured by the Appeals Chamber.¹⁴⁰ In Dutch law liability in third category common purpose cases can be constructed by using the *dolus eventualis* standard. This type of liability is referred to as co-perpetration (*medeplegen*).¹⁴¹ Van Sliedregt points out that in The Netherlands, as in other civil law systems, common purpose liability can exist as way of prosecuting those who jointly commit a crime in circumstances where it is unclear which person 'gave the final blow'.¹⁴²

Sassoli and Olsen criticise the approach of looking at national jurisdictions. They say that by doing so the Appeals Chamber is comparing apples to oranges. It also seems as if the definition of the 'third category' seems to vary throughout the Chamber's discussion. The Chamber first considers it sufficient that the result not covered by the common plan is predictable and that the accused was indifferent to that risk.¹⁴³ The Chamber reviews Italian cases and concludes that 'it would seem that [the Italian court of Cassation] either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*)'.¹⁴⁴ But these are two distinct concepts: *dolus eventualis* entails responsibility for a deliberate crime and *culpa* is negligence. In the next paragraph however it is stated by the Chamber that 'more than negligence...the so-called *dolus eventualis* is required (also called advertent recklessness in some legal systems)'.¹⁴⁵ In summing up the chapter the Chamber mentions yet another standard, ie that the crime was foreseeable and the accused willingly took that risk.¹⁴⁶ But this standard implies *less* than *dolus eventualis*, where the result and not only the risk is accepted. At the same time it also implies much *more* than the initially mentioned standard, ie that the risk is predictable (this includes unconscious negligence) and the accused is indifferent to such risk. It is not clear which standard the Appeals Chamber finally applied. Taking into account how the standard was applied to *Tadic* it seems as if the standard adopted in the conclusion, namely that the crime was foreseeable and the

¹³⁹ *Tadic Appeal Judgment* (note 6) para 654.

¹⁴⁰ *Ibid* para 224.

¹⁴¹ Van Sliedregt (note 99) 105.

¹⁴² *Ibid*.

¹⁴³ *Ibid* para 204.

¹⁴⁴ *Ibid* para 219.

¹⁴⁵ *Ibid* para 220.

¹⁴⁶ *Ibid* para 228.

accused willingly took the risk was the standard the Appeals Chamber decided upon.

The Appeals Chamber referred to two conventions which, at the time of the judgment, were not yet in force. It first mentions the International Convention for the Suppression of Terrorist Bombing of 15 December 1997, adopted by the UN General Assembly, which criminalises an intentional contribution ‘either ... made with the aim of furthering the general criminal activity or purpose of the group or...made in the knowledge of the intention of the group to commit the offence...concerned’¹⁴⁷ Secondly, it refers to the ICC Statute which at the time of the judgment was not yet ratified by the required amount of States. The Appeals Chamber considered the Statute to express the *opinio juris* of the States which adopted the Statute. In Article 25 (3) (d) the ICC Statute stipulates that a person shall be criminally responsible for a crime if that person in any way ‘contributes to the commission of a crime...by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group...; or (ii) be made in the knowledge of the intention of the group to commit the crime’. Sassoli and Olsen are critical of the Appeals Chamber decision. They believe the wording of the Statute does not necessarily cover the third category, as it requires the intention of the group to commit the crime, while in the third category, only one member has the intention to commit the additional crime.¹⁴⁸

The Appeals Chamber came to the following conclusion:
the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that [that] case law reflects customary rules of international criminal law.¹⁴⁹

It is not at all clear that the third category of common purpose is as firmly established in international law as the Appeals Chamber suggests. The Appeals Chamber’s conclusion that the third category of the common criminal purpose was considered customary in character can therefore be questioned. Danner and Martinez are of the view that the cases referred to by the Appeals Chamber (post-Nuremberg prosecutions conducted by military authorities) do not support the ‘sprawling’ form of joint criminal enterprise employed by the ICTY.¹⁵⁰ The authors criticise the Appeals Chamber’s analysis of the *Essen Lynching* case. They point out that the summary of the case relied upon by the *Tadic* Appeals Chamber¹⁵¹ provides no statement of the legal basis for the conviction. In addition there is no indication in the case that the prosecutor explicitly relied on

¹⁴⁷ Ibid para 221. See GA Resolution 52/164, 15 December 1997.

¹⁴⁸ Sassoli & Olson (note 7) 7.

¹⁴⁹ *Tadic Appeals Judgment* (note 6) para 226.

¹⁵⁰ Danner & Martinez (note 98) 110.

¹⁵¹ The summary was provided by the reporter from the United Nations War Crimes Commission (UNWCC).

the concept of common purpose. The case is simply not an example of common purpose liability and does not provide support for third category common purpose. In neither of the 'POW mob violence cases' (*Essen Lynching* and *Borkum Island*) cases were the defendants charged with participation in some larger plan *outside* of the unlawful treatment of the prisoners involved. These cases do not provide authority for the sweeping forms of extended common purpose. With regard to the reference to national jurisdictions, it is important to recognise that many countries (such as Germany) do not recognise extended common purpose and that in countries such as Britain and Canada where such liability is recognised, the doctrine has been subject to significant criticism because it lowers the *mens rea* required for the commission of the principal crime without affording a diminution in the sentence imposed.¹⁵²

If there is less supporting national case law to rely on than the Appeals Chamber purports, the Appeals Chamber's conclusion that the third category of common purpose has become part of international customary law may be false. It may then be asked whether extended common purpose is compatible with the principle of legality. It was argued in *Ojdanic* that joint criminal enterprise did not fall in the Tribunal's jurisdiction and infringed the principle of *nullum crimen*.¹⁵³ It is also important that the prosecutor must specifically plead joint criminal enterprise in the indictment in order not to surprise the accused.¹⁵⁴ Sensitivity to *nullum crimen* is especially important in light of the myriad ICTY cases and indictments relying on common purpose.

But even if one does accept the third category it is not clear that this would be a desirable development of international law. Sassoli and Olsen point out that an essential element of combatant status is immunity from punishment for those who respect that law.¹⁵⁵ A soldier for example cannot be convicted of rape because some of his comrades committed rape. Exceptions to this rule should only be made in extreme cases. It should also be kept in mind that membership in the armed forces is not always voluntary. It might be crucial to take into account the circumstances under which a combatant joined the armed forces. It should be stressed that it is fundamental to international criminal law and the aims it seeks to achieve that criminal responsibility is imposed on individuals. Many believe that the significance of the whole recent movement of establishing international criminal Tribunals lies in the development of the notion of individual criminal

¹⁵² Danner & Martinez (note 98) 109.

¹⁵³ *Ojdanic* (note 114) para 21.

¹⁵⁴ Powles (note 112) 618. According to Powles the prosecution has been errant in effectively alleging joint criminal enterprise in indictments to enable the accused to fully appreciate the nature of the charges against him. In *Krnjelac* the Trial Chamber refused to consider whether the extended form (third category) of criminal purpose applied, as it had not been pleaded in the indictment. *Krnjelac* (note 103) para 117.

¹⁵⁵ Sassoli & Olson (note 7) 8.

responsibility. Holding individuals accountable discards the notion of collective guilt and makes it clear that crimes were committed by individuals. According to Sassoli and Olsen the common purpose doctrine should not lead to a 're-collectivisation' of responsibility.¹⁵⁶

Although many national jurisdictions might have expanded the common purpose doctrine to combat collective crime one needs to be sensitive to the international context in which the Tribunals adjudicate crimes. Danner and Martinez warn that international tribunals should proceed cautiously and show awareness of the fact that the law they develop may be applied in other contexts they cannot yet foresee. Courts should be sensitive to the implications or ripple effects of extending liability in this manner. In the context of extended common purpose, national governments may use the doctrine to prosecute, for example, persons who provide any form of support to a terrorist organisation, however loosely defined.¹⁵⁷ Care should be taken not to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened.

It is argued here that the extension of common purpose by the Appeals Chamber is an example of unwarranted judicial lawmaking. One reason for this is that the Appeals Chamber failed to take the culpability principle seriously. According to the culpability principle individuals can only be punished for their individual choices to engage in wrongdoing. An individual's liability should not be dependant on how broadly or loosely a prosecutor describes the criminal goal of the enterprise or how loosely judges construe foreseeability. Another objection to the extended form of common purpose is that it fails to distinguish between the liability of senior commanders or political leaders and low-level perpetrators. This type of lawmaking by the ICTY also seems to violate the ICTY's own mandate and view of lawmaking; that a new rule only becomes new law if it becomes part of customary international law – the view expressed in the Secretary General's Report.¹⁵⁸ It is clear that the absence of an explicit provision for joint criminal enterprise is a gap in the ICTY Statute. The gap (particularly pertaining to circumstances described as third category common purpose by the *Tadic* Appeals Chamber) cannot be filled by finding support in two or three national jurisdictions.

3. Rape as Crime Against Humanity: *Akayesu*, *Furundzija*, *Kunarac*

The lawmaking with regard to the crime of rape is one of the most dramatic contributions of the Tribunals. Rape was not expressly included as a crime against humanity in the Nuremberg Charter. Rape was however covered by the phrase

¹⁵⁶ According to Sassoli & Olson criminal responsibility based on simple membership of a group would water down the criminal responsibility of actual perpetrators and their leaders and 'create a net of solidarity around them', *ibid*.

¹⁵⁷ Danner & Martinez (note 98) 80.

¹⁵⁸ *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 S/25704* ('Secretary General's Report').

‘other inhumane acts’. Control Council Law No. 10 did include rape as a crime against humanity but there were no prosecutions on the basis.¹⁵⁹ In cases such as *Akayesu*¹⁶⁰ and *Furundzija*¹⁶¹ the *ad hoc* Tribunals prosecuted, charged and convicted accused for the crime of rape.

Whereas previously rape was too often regarded as a spoil of war it can now be said to be firmly criminalised and prosecuted in international law. Meron describes the prosecution of rape as crime against humanity as a ‘normative development’ of the Tribunals.¹⁶² He writes that both the legal and moral importance of the fact that the ICTY Statute goes beyond the Nuremberg Charter to provide that rape can constitute a crime against humanity cannot be overestimated.¹⁶³ It is also important that rape can be prosecuted as a war crime *or* a grave breach (as recognised by the ICRC and United States).¹⁶⁴ The crimes of rape and sexual violence are included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute and Article 7 and 8 of the ICC Statute. Whereas gender-based crimes were largely ignored during the Nuremberg and Tokyo trials, crimes of sexual violence are being charged in the ICTY and ICTR as violations of the laws and customs of war, genocide, crimes against humanity and as grave breaches of the 1949 Geneva Conventions. But the judges’ lawmaking in the rape cases has also been subject to strong criticism. It is difficult to reconcile the fact that three different trial chambers defined rape in three different ways with the need for legal certainty and the principle of legality. The first of the three rape definitions was formulated by the *Akayesu* Trial Chamber.¹⁶⁵

Jean Paul Akayesu was the mayor of Taba commune – a position which gave him the exclusive control over the communal police and responsibility for maintaining public order. It was alleged in the indictment that, when Tutsi civilians sought refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia or communal police and subjected to sexual violence, or beaten on or near the bureau communal premises.¹⁶⁶ According to the indictment many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm.¹⁶⁷ Although Akayesu was not alleged to have committed these crimes himself, it was alleged that Akayesu was present at the time of the acts of sexual violence and had

¹⁵⁹ M Boot *Nullum Crimen Sine Lege and the Subject-Matter Jurisdiction of the International Criminal Court* (2001) 102

¹⁶⁰ *Prosecutor v Jean Paul Akayesu*, ICTR-96-4-T, 2 September 1998.

¹⁶¹ *Furundzija* (note 106).

¹⁶² T Meron ‘The Normative Impact on International Law’ in Y Dinstein, M Taborg, (eds) *War Crimes in International Law* (1996) 222.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* See also T Meron ‘Rape as a Crime under International Humanitarian Law’ (1993) 87 *AJIL* 424, 428.

¹⁶⁵ *Akayesu* (note 160).

¹⁶⁶ *Ibid* para 3 and para 12 A of Indictment.

¹⁶⁷ *Ibid.*

knowledge thereof. At trial Akayesu denied that any rapes were committed at the bureau communal in his presence or otherwise.¹⁶⁸

Until the judgment in *Akayesu*, rape and other forms of sexual violence had never been defined under international law. The Trial Chamber in *Akayesu* formulated a broad and sensible definition of rape and sexual violence. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

The Chamber defines rape as a physical insertion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence [,] which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.¹⁶⁹

The Trial Chamber considered rape to be primarily a form of aggression and that the central element of rape ‘cannot be captured in a mechanical description of objects and body parts’.¹⁷⁰ Instead, the Chamber decided to take a ‘conceptual approach’. In taking this approach the Trial Chamber examined the object in carrying out the rape – whether this object is intimidation, degradation, humiliation, control or discrimination. The Chamber stated that the fact that rape is a crime against personal dignity can be considered torture under certain circumstances.¹⁷¹ In following a conceptual approach the Chamber decided that ‘force’ does not have to be described as physical behaviour per se, but can also be assumed to be inherent in the circumstances.¹⁷² Psychological force will therefore also be understood as force. Because proving rape is not dependent on physical force the victim is spared the ordeal of having to describe the alleged rape in detail. This was one of the considerations that led the Trial Chamber to define rape in this way. The Chamber mentioned the ‘painful reluctance and inability of witnesses to disclose graphic anatomical details’ of sexual violence.¹⁷³ Significantly, the *Akayesu* decision also stated that rape can constitute a separate crime of torture when inflicted by or at the instigation of a public official.¹⁷⁴

The *Akayesu* case was considered groundbreaking because it was the first time in history a defendant was tried and convicted by an international tribunal for

¹⁶⁸ Ibid para 32.

¹⁶⁹ Ibid paras 597, 599. See para 690 stating that: ‘[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.’ The court cites as an example the forcing of a woman (Chantal) to perform gymnastics naked in front of a crowd.

¹⁷⁰ *Akayesu* (note 160) para 597.

¹⁷¹ Ibid.

¹⁷² Ibid para 688.

¹⁷³ Ibid para 687.

¹⁷⁴ Ibid para 597.

genocide.¹⁷⁵ The *Akayesu* decision has been described as historic because it affirmed the ‘intricate linkage’ between sexual violence and genocide in Rwanda.¹⁷⁶ *Akayesu* developed the law relating to gender-based crimes in at least three respects: (1) the Trial Chamber recognised sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence; (2) the Chamber recognised rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and (3) the Chamber enunciated a broad, progressive international definition of both rape and sexual violence. The Tribunal stated that when the ‘intent to destroy a group’ is present, rape and sexual violence can be considered genocide. It concluded that in this specific case sexual violence did constitute a step in the process of the destruction of the Tutsi group – this destruction encompassing ‘destruction of the spirit, of the will to live, and of life itself.’¹⁷⁷ The ICTR in *Musema*¹⁷⁸ and the *Celibici* case adopted the *Akayesu*-style definition.¹⁷⁹

The *Furundzija*¹⁸⁰ case was the first ICTY case which focused on sexual offences. Furundzija was the local commander of the Jokers, a Croatian paramilitary force. The indictment alleged that the following events took place at the headquarters of the Jokers. Furundzija and co-accused B interrogated Witness A. While being questioned by Furundzija, Accused B rubbed his knife against Witness A’s inner thigh and lower stomach. Accused B threatened to put his knife inside Witness A’s vagina if she did not tell the truth.¹⁸¹ Accused B then forced witness A to have sexual intercourse with him. Furundzija was present during the entire incident and did nothing to stop him.¹⁸²

The Trial Chamber found Furundzija guilty of both crimes alleging violations of the laws or customs of war, and sentenced him to ten years imprisonment for torture and eight years imprisonment for outrages upon personal dignity, including rape.¹⁸³

¹⁷⁵ During the *Akayesu* Trial, evidence of rape was heard during courtroom custody. Consequently, the trial was adjourned and the OTP investigated the question of whether Akayesu was guilty of crimes of sexual violence. There was pressure by women’s group on the OTP to amend the indictment. Chief Prosecutor Louise Arbour amended the indictment in June 1997 to add charges of sexual violence. For a summary of the case see. K D Askin ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals’ (1999) 93 *AJIL* 105, 106.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Akayesu* (note 160) para 732.

¹⁷⁸ *Prosecutor v Musema*, ICTR-96-13-T, 27 January 2000, paras 228-229.

¹⁷⁹ *Celibici Trial Judgment* (note 74).

¹⁸⁰ *Furundzija* (note 106).

¹⁸¹ *Ibid* para 38 citing paras 25 and 26 of the amended indictment.

¹⁸² *Ibid* para 26.

¹⁸³ *Ibid* IX Disposition.

As in *Akayesu*, the Trial Chamber in *Furundzija* was faced with the problem of how to define rape. It is interesting that the Trial Chamber in *Furundzija* (decided subsequent to *Akayesu*) stated that no definition of rape existed in international law which might be an indication that the *Furundzija* Trial Chamber did not accept or consider itself bound by the *Akayesu* definition.¹⁸⁴ The Chamber quoted the definition formulated in *Akayesu* but did not seem satisfied with this definition. The Trial Chamber found it necessary to find an accurate description of rape to meet the requirement of specificity (*Bestimmtheitsgrundsatz*) inherent in the principle of legality.¹⁸⁵ For this purpose the Chamber found it necessary to look at the 'principles of criminal law common to the major legal systems of the world' in both the common and civil law systems, as can be derived from national laws.¹⁸⁶ After the Chamber considered international treaties and the relevant case law to see whether a customary rule on the matter could be said to exist, the Tribunal came to the conclusion that no elements other than the few disclosed by such examination could be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity it is necessary to look for principles of criminal law common to the major legal systems of the world.¹⁸⁷

The Trial Chamber decided that 'in spite of inevitable discrepancies, most legal systems in the common and civil law worlds considered rape to be: 'the sexual penetration, however slight of a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.¹⁸⁸ Consent to such conduct must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. Although national law definitions seemed to vary considerably on the aspects of the sex of the victim and the question whether penetration is a necessary element, the element of force seemed common to all jurisdictions.¹⁸⁹ The Appeals Chamber concurred with the definition of the Trial Chamber.

On the important point of whether forced oral penetration could be defined as rape or sexual assault, the Trial Chamber found that there was no uniformity in national legislation. Instead major discrepancies existed with some states treating the crime as sexual assault.¹⁹⁰ In the view of the Trial Chamber the gravity of the

¹⁸⁴ *Furundzija* (note 106) para 175.

¹⁸⁵ *Ibid* para 177.

¹⁸⁶ *Ibid* paras 177, 178.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Furundzija* (note 106) para 185.

¹⁸⁹ *Akayesu* (note 160) para 180.

¹⁹⁰ *Furundzija* (note 106) para 182.

offence accounts for its being treated as rape.¹⁹¹ Perhaps anticipating criticism, the Trial Chamber stated the accused will not be adversely affected by the categorisation of oral sex as rape rather than the 'lesser offence' of sexual assault if he is convicted and sentenced according to the sentencing practices of the former Yugoslavia.¹⁹²

In its consideration of national case law the Trial Chamber found that most legal systems in common law and civil law States consider rape to be forcible oral penetration of any object into either the vagina or the anus. There is however a lack of uniformity in the criminalisation of forced oral penetration with some states treating it as sexual assault and other states treating it as rape. The Trial Chamber then resorted to general principles of international criminal law and failing this, general principles of international law. After finding that the general principle of respect for human dignity forms the fundamental principle of international humanitarian law and human rights law, the Trial Chamber decided that the definition of rape should be broadened to include 'such an extremely serious outrage as forced oral penetration.'¹⁹³

In the subsequent *Kunarac* case the judges made reference to the definition of rape as formulated in the *Furundzija* case but thought it necessary, in the particular circumstances of this case, to elaborate on the element of force.¹⁹⁴ In contrast with *Akayesu* and *Furundzija*, rape was the *exclusive* basis for the indictment in *Kunarac*.¹⁹⁵ The *Kunarac* judgment was the first time all defendants in an indictment were convicted as primary actors or rapists. The *Kunarac* Trial Chamber expanded the definition of rape with regard to the element of force.

The element of force was described in the *Furundzija* definition as 'the sexual penetration, however slight... (ii) by coercion or force or threat of force against the victim or a third person.'¹⁹⁶ The *Kunarac* Trial Chamber was of the opinion that the force demanded for rape is more narrowly defined in *Furundzija* than international law requires.¹⁹⁷ In particular, the *Furundzija* definition does not refer to factors other than force which could contribute to making behaviour 'non-consensual or non-voluntary', which should be included in the definition of rape.¹⁹⁸ A narrow focus on force could permit perpetrators to evade liability by taking advantage of coercive circumstances without relying on physical force.¹⁹⁹

¹⁹¹ Ibid paras 182, 183, 185.

¹⁹² Ibid paras 285, 286.

¹⁹³ Ibid paras 179-186.

¹⁹⁴ *Prosecutor v Kunarac et al*, IT-96-23, 22 February 2001 ('Foca' case).

¹⁹⁵ In the previous cases rape was tried among many other crimes common in times of war. See A M De Brouwer 'Kunarac, Kovac and Vukovic case ('Foca')' (2001) 9 *Tilburg Foreign Law Review* 227.

¹⁹⁶ *Furundzija* (note 106) para 185.

¹⁹⁷ *Kunarac* (note 194) para 438.

¹⁹⁸ Ibid. R Haveman 'Rape and Fair Trial in Supranational Criminal Law' in R Haveman, O Kavran, J Nicholls (eds) *Supranational Criminal Law: a System Sui Generis* (2003) 6.

¹⁹⁹ *Prosecutor v Kunarac*, IT-96-23A 12 June 2002, para 129.

Whereas the *Furundžija* definition concentrated on the element of physical force, in *Kunarac* Trial Chamber moved away from a definition of rape which is dependent on physical force and a description of physical circumstances.

In *Kunarac* the judges re-examined the overview of national law in *Furundžija* and came to the conclusion that the true common denominator for rape is the ‘violations of sexual autonomy’.²⁰⁰ The Trial Chamber in *Kunarac* decided that the punishable behaviour is not confined to force but includes other forms of pressure such as circumstances that make a victim vulnerable or deprive her of the possibility of informed refusal. In *Kunarac* the definition of rape was expanded by the Trial Chamber to encompass all situations in which consent is not ‘freely’ and ‘voluntarily’ given.²⁰¹ Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.

Significantly, the *Kunarac* Trial Chamber found that the rapes committed in this case also constituted a violation of common Article 3 of the Geneva Convention. The Chamber noted that ‘it is well-established in the jurisprudence of the Tribunal that common Article 3, as set out in the Geneva Conventions, has acquired the status of customary international law’.²⁰² Since the *Tadić* Appeals Chamber held that ‘customary international law imposes criminal liability for serious violations of common Article 3...’ and since, in the view of the *Kunarac* Trial Chamber, rape constitutes a serious violation of common Article 3, the crime of rape will entail criminal responsibility under customary international law.²⁰³

The *Kunarac* judgment was praised by human rights organisations because the judgment unequivocally defined rape during wartime as a crime against humanity and a war crime.²⁰⁴ It is also significant that the *Kunarac* definition is gender neutral. The *Kunarac* decision ensures that rape is a crime against humanity regardless of whether the victim is male or female.²⁰⁵ In the ICC Statute, it is made explicit that the requirement of any physical force element to establish rape is rejected, and that inferring consent from the absence of proof of the use of physical force by the accused is at odds with international standards on evidence in cases of sexual violence.²⁰⁶

²⁰⁰ *Kunarac* (note 194) para 440.

²⁰¹ *Ibid* paras 453-460.

²⁰² *Kunarac* (note 194) para 406 citing *Tadić Jurisdictional Decision* (note 9) paras 98, 134.

²⁰³ *Kunarac* (note 194) para 408. See C S Maravilla ‘Rape as War Crime’ (2001) 13 *Florida Journal of International Law* 339.

²⁰⁴ See eg *Bosnia: Landmark Verdict for Rape, Torture and Sexual Enslavement*, Amnesty International, News Release, 22 February 2001. www.amnestyusa.org/news/2001/bosnia

²⁰⁵ Maravilla (note 203) 339, 340.

²⁰⁶ Rule 70 of the Draft Rules of Procedure and Evidence of the International Criminal Court sets out the ‘Principles of Evidence in Cases of Sexual Violence’ as follows: ‘consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine

How is one to assess these definitions? All three instances of rape definition have positive aspects. *Akayesu's* broad definition of rape promotes more respect for personal dignity. *Furundzija*, on the other hand provides a more specific definition satisfying the *lex stricta* component of the principle of legality. What appeals about the *Akayesu* definition is its context sensitivity in appreciating that physical force is not always required: coercion may be inherent in certain circumstances such as armed conflict in which the victim finds him or herself.²⁰⁷ But can the decisions of the various Trial Chambers in this regard be considered legitimate instances of lawmaking?

In his commentary on *Akayesu* Haveman writes that it is problematic that (a) the Chamber formulates yet another definition and (b) that the definition of force is so broad. He emphasises the importance of clearly worded *predetermined* criminal law definitions.²⁰⁸ Haveman criticises the methodology of the court. He believes that whereas in the field of international humanitarian law it might be acceptable to search for 'world trends' to determine what the greatest common denominator might be, it cannot be said to be acceptable in criminal law.²⁰⁹ Criminal law requires concrete rules as well as serious consideration for the rules and law of the territory where the offence was committed.

It is argued here that the fact that rape has been defined in three different ways by the Tribunals can be seen as a violation of the principle of legality. Civil lawyers, especially, would object to the fact that the judges both define crimes and apply those definitions themselves. The law that was ultimately applied by the judges was neither previously written law nor law that was certain. In the case of the Tribunals' treatment of rape both the *lex scripta* and the *lex certa* aspects of the legality principle seem to have been violated.

It is argued here that the rudimentary, incomplete nature of international criminal law called for *some* lawmaking. For the Tribunal to have defined rape *once* (as in *Akayesu*) would have constituted legitimate lawmaking – the lack of a definition of rape in international law was a gap in the law and the ICTR filled this gap. When the Tribunals define rape three times we can no longer speak of legitimate lawmaking. The *Kunarac* case should perhaps be seen as having expanded or developed the already existing definition of rape and not as having *redefined* rape. But whether one describes *Kunarac* as redefinition or merely expansion, difficulties remain in practice.

consent. ...consent cannot be inferred by reason of the silence of, or lack resistance by, a victim to the alleged sexual violence...'

²⁰⁷ *Akayesu* (note 160) para 688.

²⁰⁸ R Haveman 'Rape and Fair Trial in Supranational Criminal Law' (2002) 9 *Maastricht Journal of European and Comparative Law* 276, 277.

²⁰⁹ *Ibid.* The *Kunarac* (note 194) uses the word 'trend' in para 179.

It is problematic that behaviour which can lead to conviction in one case, would not lead to conviction in another case tried by another chamber of the same Tribunal. The Tribunals have stated on more than one occasion that they strive towards consistency in their jurisprudence – consistency both between the jurisprudence of the ICTY and the ICTR and within the jurisprudence of the individual Tribunals. One solution to this problem lies in the Tribunals' approach to *stare decisis*. Even though the Tribunals are not bound by any system of precedent or *stare decisis* the Tribunals can choose to follow a system of *stare decisis* whereby the first Chamber to be faced with a question such as the definition of rape under international law will decide on a definition and this definition will then be applied in future cases.²¹⁰ This system can be followed by both the Trial and Appeals Chambers. The Appeals Chambers of the Tribunals can follow the definition of a crime formulated by an Appeals Chamber in a previous case of the same Tribunal. Failing such precedent, an Appeals Chamber can follow the decisions of the Appeals Chambers of a brother or sister Tribunal (the ICTY can for example follow the precedent of the ICTR). This will contribute to coherence and consistency in international criminal law.

A second solution would have been for the Tribunals to have followed the approach taken by the ICC. In the ICC Statute crime definitions have been formulated in detail. The definitions are refined further in the 'Elements of Crimes'.²¹¹ According to the Draft Elements of rape, the perpetrator must have 'invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.'²¹² The specificity of this definition seems to reflect the *Furundžija* definition. The Elements of Crimes adopted by PCNICC follows more or less the *Furundžija* description and permits the victim to be male or female. The Elements also took the *Kunarac* developments into account since it states that the consent of the victim must have been given voluntarily, taking into account the context of the surrounding circumstances.²¹³ The conceptual *Akayesu* definition was found to be too vague to be satisfactory for criminal prosecution.²¹⁴

²¹⁰ *Prosecutor v Aleksovski*, IT-96-21-A, 20 February 2001, paras 92-94. See C Harris 'Precedent in the Practice of the ICTY' in R May, D Tolbert, J Hocking (eds) *Essays on ICTY Procedure and Evidence, In Honour of Gabrielle Kirk McDonald* (2000) 345.

²¹¹ Report of the Preparatory Commission for the International Criminal Court, addendum, Finalised Draft of the Elements of Crimes, PCNICC/2000/INF/3/Add2.

²¹² Draft finalised text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (2000), 12.

²¹³ *Kunarac* (note 194) para 460. In the *Omarska* case before the ICTY the definition making seemed to come to an end. The judges chose definitions as constructed in *Kunarac* while referring to *Akayesu* for a definition of sexual assault. *Prosecutor v Kvočka et al* IT-98-30/1, 2 November 2001, ('*Omarska*').

²¹⁴ K Kittichaisaree *International Criminal Law* (2001) 113.

Although, in accordance with *Aleksovski*,²¹⁵ the Tribunals are not bound to follow their own previous decisions since no strict system of *stare decisis* applies, the court should not depart from its own previous decisions. Considerations of certainty, stability and predictability should be taken seriously. In principle, the Appeals Chamber should only depart from its previous decisions when it has cogent reasons for such departure such as that a previous decision has been decided on a wrong legal principle or given *per incuriam* because the judges were ill informed about the applicable law.²¹⁶ This was not the case in *Furundzija*, there was no clear error. Previous decisions should only be dismissed with good reason. It is the function of the Appeals Chamber to definitively settle questions of law (provide finality) in order to ensure a single, unified, coherent and rational body of law.²¹⁷

The expansive understanding of rape adopted in *Kunarac* can be described as an instance of purposive interpretation by the tribunals. In the field of human rights purposive interpretation is nothing new. Human rights courts have frequently employed the idea of the object and purpose of the treaties they interpret to support an expansive interpretation of the rights contained in those treaties.²¹⁸ A former President of the ECHR has observed that ‘the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights’.²¹⁹ In *Furundzija* the ICTY adopted a purpose-oriented approach to ‘protecting human dignity’ to broaden the definition of the crime of rape.²²⁰ It should be borne in mind that the Tribunals are *criminal* Tribunals. A method of interpretation which is commendable in the context of human rights law cannot be employed in a criminal setting if this violates the principle of legality and fair trial standards.²²¹

4. Torture

Cassese writes that a customary rule has developed in the international community prohibiting individuals from perpetrating torture.²²² In *Filartiga* a US court held: ‘the torturer has become, like the pirate or the slave trader before him *hostis humani generis*, an enemy of all mankind’²²³ This statement vividly reflects the sentiments

²¹⁵ See the discussion of *stare decisis* in *Prosecutor v Aleksovski*, IT-95-14/1-A, 24 March 2000, paras 89- 115.

²¹⁶ *Ibid* paras 107 – 109. See Kittichaisaree (note 214) 49.

²¹⁷ *Aleksovski* (note 215) para 113.

²¹⁸ Danner & Martinez (note 98) 132.

²¹⁹ A Orakhelashvili ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’ (2003) 14 *EJIL* 529, 534 (quoting Professor R Bernhardt, a former President of the European Court of Human Rights).

²²⁰ *Furundzija* (note 106) para 183.

²²¹ For the fundamental differences between human rights law and criminal law see Danner & Martinez (note 98) 88.

²²² Cassese *International Criminal Law* (2003)119.

²²³ *Filartiga v Pena Irala* 630 F. 2d 876 (2d Cir. 1980) para 980 At a norm-setting level significant contributions to the international prohibition of torture has been a Declaration passed by the UN GA (res 3452 (XXX) of 9 December 1975 and the 1984 UN Convention on Torture and by general treaties on human rights. See Cassese *ibid*.

which led to development of norms and instruments codifying the prohibition against torture. The most important of these instruments is the 1984 UN Torture Convention.²²⁴ The *Furundžija* Trial Chamber stated that no definition of torture exists in international humanitarian law but that such definition can be found in the Torture Convention²²⁵:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person had committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Trial Chamber in *Furundžija* however pointed out that Article 1 of the Torture Convention explicitly limits the purport of the definition by providing that the definition contained therein is ‘for the purposes of this Convention.’²²⁶ In *Furundžija* the Trial Chamber had to decide whether threats and physical attacks (including rape) inflicted during interrogation by a paramilitary group constituted torture. Before the judgment in *Furundžija*, a disputed question in torture cases had been the courts’ use of the definition of torture under human rights law to fill the gaps left by humanitarian law. The Trial Chamber held that the absence of an express definition of torture under international humanitarian law permitted the Chamber to have recourse to human rights law in order to flesh out the definition.²²⁷

In considering whether the relevant acts constituted ‘torture’ the Trial Chamber conducted an extensive review of international humanitarian law and international human rights law, and then determined that the war crime of torture:

- i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
- ii) this act or omission must be intentional;
- iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating, coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
- iv) it must be linked to an armed conflict

²²⁴ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), 10 December 1984.

²²⁵ *Furundžija* (note 106) para 159.

²²⁶ *Ibid.*

²²⁷ *Ibid.* See also *Celibici Trial Judgment* (note 74) paras 452-474. See G Mettraux ‘Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda’ (2002) 43 *Harvard Journal of International Law* 288

v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e. g. as a *de facto* organ of a State or any other authority-wielding entity.²²⁸

The Trial Chamber emphasised that in spite of its reliance on human rights law the important structural differences between human rights law and humanitarian law should be kept in mind. Two such differences would be the role and function of the state under each regime and the criminal nature of each body of law as applied by the Tribunal.²²⁹

As can be seen in subsection (iii) of the above enumeration of the elements of torture, the *Furundzija* Trial Chamber considered that the humiliation of the victim must also be one of the possible purposes of torture.²³⁰ The Trial Chamber justified the inclusion of ‘humiliation’ by referring to ‘the general spirit of international humanitarian law’.²³¹ stating that the primary purpose of international humanitarian law was to safeguard human dignity.²³² The Trial Chamber stated that the term ‘humiliation’ was close to the term ‘intimidation’ (the term found in the Torture Convention). The Trial Chamber also referred to the Geneva Conventions which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from ‘outrages upon personal dignity.’²³³ This approach by the Trial Chamber is consistent with a purposive interpretation of the ICTY Statute.

In addition to setting forth the elements of the crime of torture, the *Furundzija* Trial Chamber found that the prohibition of torture imposes obligations *erga omnes* upon states and has acquired the status of *ius cogens*.²³⁴ According to Cassese, the *Furundzija* judgment is proof of the emergence of a customary rule on torture.²³⁵

Torture as a discrete crime, ie not a crime against humanity or a war crime, may be perpetrated either in time of peace or in time of armed conflict. This was held in *Kunarac*.²³⁶ The *Furundzija* Trial Chamber also stated that there was a momentum towards addressing rape as a means of torture if the rape is resorted to by the interrogator himself or by persons associated with the interrogation.²³⁷ But as is

²²⁸ *Furundzija* (note 106) para 162.

²²⁹ *Kunarac* (note 195) para 470.

²³⁰ *Furundzija* (note 106) para 162

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.* See in this regard Art 3 (1) (c) of the Geneva Conventions, Article 75 (2) (b) of Additional Protocol 1 and Art 4 (2) (e) of Additional Protocol II.

²³⁴ *Furundzija* (note 106) para 151, 153.

²³⁵ Cassese (note 222) 119. Cassese also refers to *Aksoy v Turkey*, ECHR, Judgment of 18 December 1996, ECHR 21987/93, para 62 and *Selmouni v France*, ECHR, Judgment of 7 July 1999, 25803/94, paras 96-105.

²³⁶ *Kunarac* (note 194) paras 488 – 497.

²³⁷ *Furundzija* (note 106) para 163.

evident from the above section on rape, the ICTY also treated rape as a crime distinct from torture.²³⁸

Significantly, the *Kumarac* Trial Chamber, after undertaking a detailed analysis of definitions and interpretations of torture in human rights law, abandoned the element that a public official instigate, consent or acquiesce in the torture (as required under the Torture Convention). The Chamber stated that for the definition of torture under international law the presence of a state official is not necessary. The Trial Chamber found it inappropriate to require such an element and stated: ‘The issue then is the nature of the act committed rather than the status of the person who committed it.’²³⁹ The Trial Chamber therefore concluded that under international humanitarian law,²⁴⁰ a private individual acting in a private capacity may commit an act of torture. (In so finding, *Kumarac* agreed with Cassese who disagreed with the Trial Chamber’s statement in *Furundzija* which requires that a public official be involved in the torture process.²⁴¹) The *Kumarac* Trial Chamber held that: ‘the characteristic trait of the offence in (the context of humanitarian rather than human rights law) is to be found in the nature of the act committed rather than in the status of the person who committed it.’²⁴²

The suggestion made by the *Furundzija* Trial Chamber, that rape can be treated as a means of torture was accepted and developed in *Kumarac*. The Trial Chamber expanded the definition of torture within international humanitarian law. In the course of doing so the Tribunal was required to reconsider the relationship between rape and torture for the purposes of cumulative charging and conviction.²⁴³ *Kumarac* held that rape and torture could be cumulatively charged on the implicit basis that rape does not inherently require gender discrimination as a ‘constituent mental element’.²⁴⁴ In *Kumarac* the Trial Chamber held that the rapes were a form of torture, because they were committed with an intent to discriminate against ‘Muslims in general’ and ‘the victim in particular’.²⁴⁵ According to Dixon this meant that any suggestion that the victim’s identity embraced her femaleness was ruled out at a definitional level.²⁴⁶

The ICC Statute defines torture as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the

²³⁸ Ibid para 163.

²³⁹ *Kumarac* (note 194) paras 493-494.

²⁴⁰ Ibid paras 471, 496.

²⁴¹ *Furundzija* (note 106) para 162. See the comments by Cassese (note 34) 118.

²⁴² *Kumarac* (note 194) para 495.

²⁴³ R Dixon ‘Rape as a Crime in International Humanitarian Law; Where to From Here?’ (2002) 13 *EJIL* 700.

²⁴⁴ *Kumarac* (note 194) paras 443 -460. See Askin (note 176) 700.

²⁴⁵ *Kumarac* ibid paras 711, 816.

²⁴⁶ Dixon (note 243) 701 It was not only ruled out, it was explicitly dismissed by the Tribunal when it held that ‘the complainants were ‘taken out’ to be raped on the basis *only* of their Muslim ethnicity’. Paras 654 and 659 emphasis added.

control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’ The Rome Conference considered that crimes against humanity could be instigated by state or non-state actors. The requirement of official involvement is therefore not included in the definition of torture.²⁴⁷ This is consistent with the way the ICTY developed the law of torture and lends support to the ICTY decisions.

The development of the law by the ICTY, particularly with regard to the dropping of the requirement of state official as the perpetrator, is in line with developments by the European Court of Human Rights on the law of torture. The general trajectory of development by the European Court is towards an expansive understanding of the prohibition of torture. There has, for example, been a dramatic broadening of what falls within the scope of an ‘act of a public official’. It is no longer necessary that ill-treatment must have been meted out by state actors themselves. There is an increasing tendency to focus on what the state can be held responsible for (failing to *prevent* torture for example) and to present its reasoning through the lens of state responsibility.²⁴⁸

The lawmaking with regard to torture consists in the expansion of the definition of torture and in the acceptance that rape can be regarded as a form of torture. The ICTY expands and alters the definition found in the Torture Convention in two ways: (i) the requirement that torture must be perpetrated by a ‘state official’ was abandoned and (ii) the list of prohibited purposes was expanded.

The abandonment of the requirement that torture must be perpetrated by a state official in *Kumarac* can be regarded as an instance of legitimate lawmaking. It was appropriate for the ICTY to adopt a definition of torture that suited the aims of humanitarian law and was in line with the development of the law by the ECHR and accepted by the ICC. There is widespread consensus that torture is now a *ius cogens* crime. This special status conferred on the crime of torture justifies a broadening of liability. An advantage of accepting rape as a form of torture is that this could elevate rape to a *ius cogens* crime and the special stigma and implications for prosecution²⁴⁹ associated with the crime of torture could rub off on the crime of rape.

²⁴⁷ Article 7(2) of ICC Statute. See H von Hebel and D Robinson ‘Crimes within the Jurisdiction of the Court’ in R Lee (ed) *The International Criminal Court* (1999) 99.

²⁴⁸ M D Evans ‘Getting to Grips with Torture’ (2002) 51 *ICLQ* 378. See *A v UK*, Judgment, 23 September 1998, RJD 1998-VI, 2692 (ECHR 611) para 22; *Assenov v Bulgaria*, Judgment, 28 October 1998, RJD 1998-VIII, 3264 (28 ECHR 652), para 95.

²⁴⁹ States have universal jurisdiction over torture. Victims of torture can bring proceedings before a competent national or international body or the victim could bring a civil suit for damage in a foreign court. *Furundzija* (note 106) para 155 In addition it is one of the consequences of the *ius cogens* character of the prohibition of torture that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture.

Finally, with regard to the *Furundzija* Trial Chamber's expansion of the list of prohibited purposes by the inclusion of the word 'humiliation' which results in a more expansive definition, one can consider this as a good example of purposive interpretation of the ICTY Statute. Since the word humiliation is so close in meaning to that of intimidation it will not disadvantage an accused or catch an accused by surprise and therefore does not threaten the principle of legality.

5. Duress: *Erdemovic*

From a lawmaking point of view, *Erdemovic* is particularly interesting. In the course of deciding whether duress should be accepted as a defence, the Appeal Chamber judges analysed two important issues. They first discussed the question of the relevance of national law decisions. Secondly, the judges made law in their treatment of the role and relevance of policy considerations in international criminal law. Since these questions were addressed as *obiter dicta*, *Erdemovic* is an excellent example of *obiter* lawmaking. This section will focus on the judges' treatment of policy considerations and the determination of custom in this case.

Drazen Erdemovic, a corporal in the Bosnian Serb army, admitted to killing 'from 10 to 100' Bosnian Muslim men at Pilica collective farm in the area of Srebrenica. During the killings in which Erdemovic and other members of the 10th Sabotage Detachment of the Bosnian Serb army participated, approximately 1200 unarmed Muslim men were killed.²⁵⁰

Erdemovic pleaded guilty to having participated in the execution squads but argued that if he had refused to execute the orders, he would also have been shot. He also claimed that if he refused the orders, his family would be in danger.²⁵¹ If one takes the view that duress is a complete defence, his guilty plea was equivocal.

Erdemovic was charged with a crime against humanity and, in the alternative, with a violation of the law or customs of war. He pleaded guilty before the Trial Chamber to a crime against humanity and the Trial Chamber dismissed the alternative charge. Erdemovic expressed remorse for his actions at all times. Both the Prosecution and Defence appealed against the sentence.²⁵²

²⁵⁰ *Erdemovic* (note 5) para 3 (setting out the facts stated in the indictment).

²⁵¹ At his initial appearance Erdemovic added this explanation to his guilty plea:

'Your Honour, I had to do this. Had I refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.' *Erdemovic* (note 5) para 4.

²⁵² The Appeals Chamber was asked to revise the sentencing judgment. The appeal was filed on 14 April 1997.

In its judgment of 7 October 1997, the majority of the Appeals Chamber held that Erdemovic's guilty plea was not informed and remitted the case to a Trial Chamber in order that he might replead.²⁵³

The central problem that had to be addressed in the *Erdemovic* trial was whether the defence of duress is a plea in mitigation of the sentence or a complete defence absolving criminal guilt. If duress were found to be a complete defence, the guilty plea would be void since one cannot plead guilty and not guilty at the same time.²⁵⁴

The judges constituting the majority and representing the common law tradition, Judges McDonald and Vohrah, believed that duress can only be a ground for mitigation and that duress can not be a complete defence. The common law judges started by stating that in post-World War II jurisprudence there is no authority for duress as a complete defence for the killing of innocent civilians, the only exception being the unsubstantiated dictum in the *Einsatzgruppe* case.²⁵⁵ The judges adopted a policy-oriented approach, deducing general normative purposes for the law 'in light of its social, political and economic role...in relation to the most heinous crimes known to humankind.'²⁵⁶ According to McDonald and Vohrah allowing duress as a defence would be to undermine the aims and objectives of international humanitarian law.

Judge Li concurred in this result.²⁵⁷ He argued that duress can be a complete defence if certain conditions are met but it cannot be a complete defence in the case of the most serious crimes such as the killing of the innocent.²⁵⁸ Li determined that there was no applicable or conventional international law and that national laws and practices of various states were so divergent that no general principle of law recognised by civilised nations could be deduced from them.

²⁵³ Erdemovic's plea indicated that he did not appreciate that the denial of criminal responsibility is incompatible with an admission of guilt. In addition both Erdemovic and his counsel seemed to be unaware of substantive concepts of international humanitarian law and their distinctive qualities. See 'Commentary' by H van der Wilt in Klip and Sluiter (eds) (note 36) 654.

²⁵⁴ A separate question in this regard was whether the guilty plea was made in an informed way. Four of the judges (Judges McDonald, Stephen, Cassese and Vohrah) denied this. *Erdemovic* (note 5) para. 20.

²⁵⁵ *Ibid*, Joint Separate Opinion of Judges McDonald and Vohrah para 43. McDonald and Vohrah state that the value of this authority is cast substantially into doubt by the fact that a US Military tribunal in the *Einsatzgruppe* case did not cite any authority for its opinion that duress may constitute a complete defense to killing an innocent individual. See also Reports of Trials of War Criminals, United Nations War Crimes Commission, vol. XV, 174.

²⁵⁶ *Erdemovic* *ibid*, Joint Separate Opinion of Judges McDonald and Vohrah para 55. See the analysis of David Turns 'The International Criminal Tribunal for the former Yugoslavia: The *Erdemovic* Case' (1998) 47 2 *ICLQ* 470.

²⁵⁷ *Erdemovic* *ibid*, Separate and Dissenting Opinion of Judge Li, para 5.

²⁵⁸ *Ibid*. These conditions would be (i) the act was done to avoid an immediate danger both serious and irreplaceable; (ii) there was no other adequate means to escape; and (iii) the remedy was not disproportionate to the evil.

The Appeals Chamber in *Erdemovic* extensively discussed to what extent national case law provided support for a rule of customary law regarding the availability or non-availability of duress as a defence. The Appeals Chamber found that insufficient evidence existed for such a rule.²⁵⁹ Judges McDonald and Vohrah examined the case law of various national jurisdictions and came to the conclusion that there is no consistent concrete rule which supports the notion of duress as a complete defence.²⁶⁰ It did however not dispute the view that had the case law been more consistent and uniform, a rule of customary law could have been based on that case law. The Appeals Chamber concluded that state practice (consisting mostly of national case law) was far from consistent and that no rule of customary law could be based on that practice.²⁶¹ In their joint separate opinion Judge McDonald and Judge Vohrah emphasised that the courts had to establish not only state practice but also *opinio juris*:

Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by *opinio juris*. Again to the extent that State Practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions on national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they 'feel that they are conforming to what amounts to a legal obligation' at an international level.²⁶²

The two judges proceeded to look at policy considerations and decided that it would be naïve to believe that international law develops wholly divorced from social and economic policy.²⁶³ They believe that if national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law 'can do no less than match that policy.'²⁶⁴ They state that rejecting duress as a defence avoids having to judge proportionality when it is human lives that are weighed in the balance.²⁶⁵

The Australian judge, Judge Ninian Stephen, dissented and did not follow a traditional common law position. Stephen concluded that despite the exception which the common law makes for murder, duress can be a defence in international law. Stephen points out that the exception in the case of murder only applies where the choice 'truly' lies between one life and another.²⁶⁶ According to Stephen *Erdemovic* was not a case in which the accused was in a position to make a choice

²⁵⁹ Ibid para 55.

²⁶⁰ Ibid, Joint and Separate Opinion of Judges McDonald and Vohrah para 72.

²⁶¹ *Erdemovic* (note 5) para 50.

²⁶² Ibid

²⁶³ In paragraph 73 of their Opinion, under the heading 'Normative mandate for international criminal law'

²⁶⁴ Ibid, Joint Separate Opinion of Judges McDonald and Vohrah, para 73.

²⁶⁵ Ibid para 81.

²⁶⁶ Separate and Dissenting Opinion of Judge Stephen, para 66.

concerning innocent life.²⁶⁷ In *Erdemovic* the choice presented to the accused was not between one life or another.²⁶⁸

Judge Cassese, in his Separate and Dissenting Opinion, represents the civil law position.²⁶⁹ He questions the extent to which an international tribunal may rely on national law for the elucidation of the notion of a 'guilty plea'.²⁷⁰ In his view legal constructs and terms of art found in national law should not be automatically applied at the international level.²⁷¹ Influenced by his civil law background, Judge Cassese also objected strongly to this 'upholding of 'policy considerations' substantially based on English law.' He states that it is extraneous to the task of the Tribunal to discuss policy-considerations and to uphold particularly those of the common law. He describes these policy considerations as meta-legal and contrary to the *nullum crimen* principle.²⁷² He writes that if international law was really uncertain on the point in issue recourse should be had to the position in the former Yugoslavia and not to policy considerations.²⁷³

In Cassese's view duress should be a complete defence. This should however be subject to a few important conditions: an accused must have acted under the threat of imminent harm, both serious and irreparable, to his life and limb (or that of his family); there must have been no adequate means of averting the evil; the crimes committed must not have been disproportionate to the evil threatened; and the situation leading to the duress must not have been brought about by the person coerced.²⁷⁴

²⁶⁷ Ibid para 64, 65.

²⁶⁸ Ibid para 33. In para 55 of his Opinion Judge Stephen states: 'However he chose, the lives of the innocent would be lost and he had no power to avert that consequence. It is in this sense that it can be said that the Appellant had no moral choice.'

²⁶⁹ Ibid, Separate and Dissenting Opinion of Judge Cassese, paras 11 ff.

²⁷⁰ Ibid 2.

²⁷¹ Cassese provides three reasons for this: firstly, he believes that it would normally prove incongruous and inappropriate to apply a national concept in an inter-State legal setting. His argument is one of difference. He emphasises that the legal system of a State is 'radically different' from that of international law. A second reason why he believes great circumspection should be applied before transposing national law concepts 'lock stock and barrel' to the international field is that international criminal law does not originate from a unified body of law. International criminal procedure results from an amalgamation of the civil law system and common law systems and international criminal proceedings do not uphold the philosophy behind one of the two national criminal systems to the exclusion of the other. This unique amalgamation begets a 'legal logic that is qualitatively different from that of each of the two national systems'. Thirdly Cassese points out that the mechanical importation of national law notions into international criminal proceedings may alter or distort the specificity of these proceedings. He points out that the philosophy behind national criminal proceedings is strongly influenced by the fact that national courts operate in a context where the three fundamental functions (lawmaking, adjudication and law-enforcement) are discharged by central organs partaking of the State's direct authority over individuals. This logic cannot simply be transposed to the international level. Ibid para 4, 5.

²⁷² Ibid para 11.

²⁷³ Ibid para 49.

²⁷⁴ Ibid para 16.

He admits that these conditions will seldom be met but insisted that the defence should not be rejected *a priori*. In at least one case, he argues, the defence is clearly applicable: If, by refusing to obey, the accused could not have saved the victims – who would have been killed by other persons – but would only have forfeited his own life as well, the law cannot treat him as a criminal. Cassese goes on to show that the post -World War II decisions which seems to rule out the defence are not as categorical as it was claimed and that other cases, not examined, support the view of duress as a complete defence.²⁷⁵ He disagrees with the majority's interpretation of the *Stalag Luft III*,²⁷⁶ the *Feuerstein*²⁷⁷ and the *Hölzger*²⁷⁸ cases. He writes that the *Stalag Luft III* case 'left open the possibility that duress could be a defence to an unlawful killing' and points out that in *Feuerstein* the Judge-Advocate's dictum on duress was *obiter* since in that case none of the accused raised the defence of duress.²⁷⁹ With regard to the *Hölzger* case he states that even though the Judge Advocate in this case upheld the traditional common law position, the weight of this case is reduced by the fact that the Judge Advocate stated that the court should apply Canadian War Crimes Regulations and Canadian law and not international law.

Regarding policy considerations Judge Cassese contrasts the considerations inherent in the civil law tradition with those claimed by the common law judges. He writes that law is based on what society can reasonably expect from its members, it does not require, by criminal sanction, acts of martyrdom. Treating duress as a mitigating factor is not sufficient since the acts are then still viewed as criminal. Interestingly, Judge Stephen, a common law lawyer, joined the civil law position.²⁸⁰ He stated that the common law exception for murder in pleading duress as complete defence had been applied to positions where the accused had a choice between his life and the life of the victim, not where such choice did not exist.²⁸¹ The law cannot compel someone to die, even for the highest ethical principles.

The question of whether duress is a ground of mitigation or a complete defence resulted in a deep split in the Appeals Chamber and seems to have caused friction

²⁷⁵ *Ibid* paras 19 ff, 30 ff.

²⁷⁶ *Trial of Max Wielen and 17 Others, Proceedings of a Military Court held at Hamburg ('Stalag Luft III')* (1 July 1947 – 1 September 1947), judgment of 2-3 September 1947, files WO 235/424-32 in Public Record Office, Kew Richmond *Law Reports*, vol XI, 31.

²⁷⁷ *Trial of Valentin Feuerstein et al, Proceedings of a Military Court held at Hamburg* (4-24 August 1948), Public Record Office, Kew, Richmond, file WO 235/525. (*Feuerstein et al*) *Law Reports* vol XV, 173

²⁷⁸ See *Record of Proceedings of the Trial by Canadian Military Court of Robert Hölzger and Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany, ('Hölzger et al')* 25 March – 6 April 1946, vol 1

²⁷⁹ *Erdemovic* (note 5) para 22

²⁸⁰ *Ibid*, Separate and Dissenting Opinion of Judge Stephen, paras 24 ff.

²⁸¹ *Ibid* para 25.

between the judges.²⁸² All the judges agreed that neither customary law nor the general principles of law recognised by civilised nations provide the answer to the question whether duress can be pleaded as a defence to the killing of innocent civilians. What the judges disagreed about was the consequence of this finding. Judges McDonald and Vohrah relied upon the need to ‘facilitate the developments and effectiveness of international humanitarian law.’²⁸³ Judge Cassese was of the view that if customary international law did not *preclude* duress as a defence it could be a defence, subject to stringent conditions.²⁸⁴

What should an international criminal tribunal do in light of such a lacuna in the law? It could seek to determine the matter by resort to policy, as did the majority in their pursuit of the goal of preventing the undermining of international humanitarian law. Alternatively a tribunal could apply the national law most applicable to the accused. Cassese took this position. He argued that where the majority found a gap in the law, or where the law was genuinely ambiguous, they should have drawn upon the law applicable in the former Yugoslavia.²⁸⁵

But Cassese only discusses Yugoslav law very briefly after extensively discussing foreign case law.²⁸⁶ Cassese’s discussion of the use and relevance of national case law was necessary since this has not been clarified in the case law before. His *obiter* comments can be seen as an example of legitimate lawmaking. After expressing reservations about the relevance of national case law however, Cassese proceeds to discuss instances of national case law (a small collection of little-known Italian and better-known German cases).²⁸⁷ Cassese motivates his survey of ‘copious case law’²⁸⁸ by stating that the manifest inconsistency of state practice warrants the conclusion that duress can be admitted as a defence.

Disappointingly, Cassese does not explain on which basis the cases were selected which makes the selection appear to have been arbitrarily made. Cassese stated in

²⁸² According to Kolb it led to a clash between the traditions of the common law and the civil law (note 57) 312.

²⁸³ *Erdemovic* (note 5) Joint Separate Opinion of Judges McDonald and Vohrah, 7 October 1997 para 75.

²⁸⁴ *Erdemovic* (note 5) Separate and Dissenting Opinion of Judge Cassese para 41.

²⁸⁵ P Rowe ‘Duress as Defence to War Crimes After *Erdemovic*: A Laboratory for a Permanent Court?’ (1998) 1 *Yearbook of International Humanitarian Law* 213. Separate and Dissenting Opinion of Judge Cassese para 49. For a discussion of Cassese’s rejection of the policy-oriented approach see also M Shahabuddeen ‘Policy Oriented Law in the International Criminal Tribunal for the Former Yugoslavia’ in LC Vohrah et al (note 22) 889.

²⁸⁶ *Erdemovic* (note 5) Separate and Dissenting Opinion of Judge Cassese para 49.

²⁸⁷ *Ibid* paras 35-39. The Italian cases include *Bernardi and Randažzjo*, Court of Assize of Vercelli, brought before Court of Cassation on 18 December 1946 and *Sru et al*, 6 November 1947 in *Giurisprudenza completa della Corte Suprema di Cassazione, sez pen*, 1947, No 2557, 414. These decisions are not readily available. Cassese advises that only the headnote of these two cases has been published. He used the original hand-written text of the two cases provided by the Rome Central Public Record Office.

²⁸⁸ *Erdemovic* (note 5) para 40.

his Opinion that a policy-oriented approach in the area of criminal law would run counter to the fundamental customary principle *nullum crimen sine lege*.²⁸⁹ But undisciplined, unmotivated reference to case law could similarly run counter to *nullum crimen*. The *Erdemovic* case not only highlights the problems surrounding national case law but is also an example of the undisciplined use of national case law.

6. Reprisals

Additional Protocol 1 clarified the law pertaining to reprisals. This Protocol prohibits reprisals and leaves no doubt that reprisals against civilians and civilian targets constitute grave breaches of international humanitarian law. In the view of Obradovic it is now clear that those who carry out reprisals are no longer able to claim in front of a national or international tribunal that they were responding to a similar violation by the enemy.²⁹⁰

In spite of the large number of states that ratified Protocol 1, a cloud of ambiguity hangs over the question whether the prohibition of belligerent reprisals against certain classes of people, such as civilians have become part of international customary law.²⁹¹ Although it is by now clear that the provisions of the Geneva Conventions have crystallised into norms of customary international law, it is much less clear whether the reprisal provisions of Protocol 1 have also attained a similar status.²⁹²

The ICTY discussed the legality of belligerent reprisals in the *Martic*²⁹³ and *Kupreskic*²⁹⁴ cases. Both judgments strained to argue that the provisions of Protocol 1 have become part of customary international law. However, commentators such as Kalshoven and Greenwood have argued that neither the Trial Chamber in *Martic* nor the Trial Chamber in *Kupreskic* needed to address this question at all.²⁹⁵ Since the determination of this question was not central or necessary for the resolution of the cases both judgments analysed the law of reprisals as *obiter dicta*. The lawmaking in *Kupreskic* is therefore an example of *obiter*

²⁸⁹ Ibid, Separate and Dissenting Opinion of Judge Cassese para 11.

²⁹⁰ K Obradovic 'The Prohibition of Reprisals in Protocol 1: Greater protection for War Victims' (1997) 320 *International Review of the Red Cross* 2.

²⁹¹ S Darcy 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 *Military Law Review* 244

²⁹² Ibid 243. Darcy points to arguments for and against the claim that the reprisal provisions in protocol 1 has become part of customary international law. Arguments in favour are the substantial amount of ratifications (160) of Protocol 1, coupled with the opinions of various international organisations and the ICTY. Arguments against this proposition include the refusal of a number of major military powers (most notably the US) to ratify Protocol 1 and the entering of reservations by several states.

²⁹³ *Prosecutor v Martić*, Decision on Review of the Indictment, IT-95-11-R61, 8 March 1996.

²⁹⁴ *Prosecutor v Kupreskic*, IT-95-16-T, 14 January 2000.

²⁹⁵ Kalshoven agrees that the issue of belligerent reprisals should not have been dealt with at all in the *Martic* case. Since the *Martic* case was a Rule 61 procedure it was superfluous for the Trial Chamber to decide on belligerent reprisals. F Kalshoven 'Reprisals and the protection of civilians: two recent decisions of the Yugoslavia Tribunal' in L C Vohrah et al (note 22) 494.

lawmaking. Since the judges in *Kupreskic* (incorrectly) treated the question of the legality of belligerent reprisals as a matter central to the case and did not intend to address it as *obiter* their pronouncements in the case can be described as unintended *obiter* lawmaking.

The lawmaking with regard to reprisals in the *Kupreskic* case took place in an innovative and controversial way as the ICTY resorted to the ‘demands of humanity’ and the ‘dictates of public conscience’ (found in the enigmatic Martens Clause) to supplement the requirements for custom.

The *Kupreskic* case concerned an attack on the village of Ahmici. In the early morning of 16 April 1993, Croat forces attacked the Muslim population of the Bosnian village of Ahmici. The Kupreskic brothers were accused of participating in the attack and of killing and raping 116 Muslim civilians. Zoran Kupreskic held the rank of HVO Commander and his brother Mirjan, was an HVO soldier. The Trial Chamber found that the village contained nothing that could be classed as a military objective and that the purpose of the attack had been ethnic cleansing.²⁹⁶ The Trial Chamber convicted five of the accused of the crime against humanity of persecution and found two of them guilty of murder and other inhumane acts.²⁹⁷

The Defence argued that the attack on the civilians in Ahmici could be justified because Muslim forces had earlier attacked Croat civilians in other villages in that area. The Trial Chamber found that such attacks had occurred but rejected the notion that contemporary international law recognise a defence of *tu quoque*.²⁹⁸ The Trial Chamber also rejected a defence of belligerent reprisals.²⁹⁹

The Trial Chamber came to the conclusion that customary international law prohibited reprisals against civilians. The Chamber reasoned that the provisions of Article 51 (6) and 52(1) of Additional Protocol 1, respectively prohibiting reprisals against civilians and civilian objects, had not been declaratory of custom when they were adopted in 1977.³⁰⁰ These provisions had become part of customary international law in the years since 1977. The Chamber stated that the fact that both Bosnia-Herzegovina and Croatia had become parties to the 1977 Protocols

²⁹⁶ *Kupreskic* (note 294) paras 333-338.

²⁹⁷ *Ibid* paras 766-833.

²⁹⁸ This meant a defence that what would otherwise have constituted a crime under international humanitarian law is justified if an adversary has committed similar crimes. *Kupreskic* (note 295) paras 515-520.

²⁹⁹ *Ibid* paras 521- 536.

³⁰⁰ *Ibid* para 527. Judge Cassese, the Presiding Judge in this case, held this view in an article he wrote a few years earlier. Cassese ‘The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International law’ in (1984) 55 *UCLA Pacific Basin Law Journal* 102-3.

by succession meant that the Convention's provisions were applicable to the conflict in Ahmici.³⁰¹

In considering the question of the legality of reprisals against civilians, the Trial Chamber examined whether states not party to Protocol 1³⁰² were nevertheless bound by the rules on reprisals. The Trial Chamber conceded that state practice did not support the proposition that custom had evolved on this subject but nevertheless found that in this area *the imperatives of humanity or public conscience* weighed heavily in its favour and that from those imperatives it was possible to deduce *opinio necessitatis*, which was sufficient to establish customary law.³⁰³ After considering the Martens Clause, it stated:

...principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent [...] *Opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.³⁰⁴

The Trial Chamber concluded that reprisals against civilians are an 'inherently barbarous means of seeking compliance with international law'³⁰⁵ and that a customary rule of international law had emerged prohibiting all reprisals against civilians.³⁰⁶

Was it appropriate for the Trial Chamber to reach for the Martens Clause in proving customary international law? The influence of the Martens Clause is discussed in Chapter 2. For convenience the wording of the Clause will be repeated:

Until a more complete code of the laws of war has been issued...the inhabitants and the belligerents remain under the protection and the rule...of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.³⁰⁷

³⁰¹In *Prosecutor v Martić* a similar question was addressed. Martić was a leader of the Croatian Serbs. The indictment charged that in May 1995, following a Croatian Government offensive which recaptured the Krajina region of Croatia from Serb forces which had held it since the summer of 1991, he had ordered the bombardment of the Croatian capital Zagreb with rockets delivering cluster bombs. The bombs killed and injured a number of civilians. The Trial Chamber stated that customary international law contained an absolute prohibition on reprisals against civilians in both internal and international conflicts. *Martić* (note 294) para 15-18.

³⁰² Such states would include countries such as the US, France, India, Japan, Indonesia, Israel, Japan, Pakistan and Turkey.

³⁰³ *Kupreskić* (note 294) para 527.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* para 528.

³⁰⁶ *Ibid* para 527.

³⁰⁷ The Martens Clause was first inserted in the preamble of the 1899 Hague Convention II. The English translation of the Clause was reported in JB Scott (ed) *The Hague Conventions and Declarations of 1899 and 1907* (1915) 101-2.

Whether the Martens Clause should be used a source of law creation is debatable. In an article on the origins and significance of the Martens Clause, Cassese writes that the Martens Clause is not only vague and ambiguous but has been interpreted in various, sometimes conflicting, ways.³⁰⁸ In his opinion the clause does not directly transform the laws of humanity and the dictates of the public conscience into international legal standards or sources of international law.³⁰⁹ He rejects the ‘radical’ idea that the clause has a norm-creating character and elevates humanity and the dictates of conscience to a new source of international law. After surveying instances of national case law³¹⁰ in which the clause has been considered, Cassese concludes that mention of the clause was made primarily to ‘pay lip service to humanitarian demands’ rather than for the purpose of supporting the idea that it constitutes a new source of international law.³¹¹ The clause may however be construed as having an indirect impact on traditional sources of international law in that it may be inferred from the clause that the requirement of state practice for the formation of a principle based on the laws of humanity or dictates of the public conscience may not be as high as in the case of principles or rules having a different rationale.³¹² It is generally recognised that the Martens clause loosens the requirement of *usus* while elevating *opinio juris* to a rank higher than normally admitted.³¹³ But it does no more. It is not a magical, instant creator of custom.

Kalshoven describes the discussion of reprisals in *Kupreskic* as ‘out of order’.³¹⁴ Greenwood agrees that it was not necessary for the Tribunal in this case to assert that customary international law contains an absolute ban on reprisals.³¹⁵ He points out that both belligerents in this case were parties to Protocol 1 and bound by its provisions. In addition the Trial Chamber recognised that the attack on Ahmici did not meet the requirements for a lawful reprisal in any event.³¹⁶ It is therefore not clear why the Trial Chamber chose to embark on the controversial

³⁰⁸ A Cassese ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11 *EJIL* 188.

³⁰⁹ *Ibid* 192.

³¹⁰ Cassese discusses the use of the clause in the *Klinge* case (1946 *Annual Digest and Reports of Public International Law Cases* 263) decided by the Supreme Court of Norway in 1946, the *Rauter* case decided by the Dutch Special Court of Cassation (English translation in 1949 *Annual Digest* 541), and the *Martic* decision (note 293) .

³¹¹ *Ibid* 208.

³¹² *Ibid* 214.

³¹³ See Cassese (note 222) 122.

³¹⁴ Kalshoven (note 295) 505.

³¹⁵ C Greenwood ‘Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.’ in: H Fischer, C Krefß, S R Lüder (eds) *International and National Prosecution of Crimes under International Law* (2001) 540.

³¹⁶ There was no evidence that the attack was undertaken for the purpose of deterring future Bosnian violations of the law of armed conflict, that notice of it was ever given to the Bosnian forces as to put pressure on them to end their violations and that any attempt was made to ensure that the attack was proportionate to the wrong which was said to have caused it or that it was undertaken as a last resort. *Ibid*.

question of the state of customary international law on belligerent reprisals. Greenwood finds the Trial Chamber's conclusion that an absolute ban on reprisals against civilian targets had emerged in customary law since 1977, unconvincing. The Trial Chamber cited almost no examples of state practice and those it does cite do not seem to support its conclusions.³¹⁷ The Chamber refers to the number of States that ratified the Additional Protocol, but this in itself does not turn the provisions of the Protocol into rules of custom. The Trial Chamber recognised that the weight of state practice did not support its conclusion³¹⁸ and relied on the Martens Clause in an attempt to fill the gap. Greenwood states that the ICJ, in its treatment of the Martens Clause in the *Legality of the Threat or Use of Nuclear Weapons*³¹⁹ case has made it clear that the ICJ does not treat the Clause 'as relieving it of the need to establish that not only *opinio juris* but also state practice existed'.³²⁰ Meron has commented that 'given the scarcity of practice and diverse views of states and commentators, the invocation of the Martens Clause can hardly justify [the Trial Chamber's] conclusion.'³²¹

The position taken in *Kupreskic*, that an absolute ban on reprisals can be justified by reference to custom, can be considered an example of illegitimate lawmaking. The Tribunal's method of establishing custom by reference to the Martens Clause is questionable. According to Nollkaemper, the Tribunal felt satisfied to draw conclusions on such a thin basis precisely because of the 'moral strength' of the norms it formulated.³²² However, it is doubtful whether the 'moral strength' of the Martens Clause, on its own, can serve as a substitute for state practice. Although employing such innovative reasoning can be seen as an ingenuous way of extending the protection of humanitarian law to civilian targets of reprisals, it is not appropriate for the Trial Chamber to abandon the existing conventional method of determining custom. To do so not only threatens legal certainty but takes lawmaking too far in that it does not fill a gap in the law but it *changes* existing law.

³¹⁷ Greenwood criticises the State practice cited by the Chamber. The Chamber refers to passages from the Netherlands and United States Military Manuals. According to Greenwood the quoted 1956 United States Field Marshal Manual leaves open the question of whether reprisals may be taken against civilians who are not protected persons under Geneva Convention I. Ibid 551.

³¹⁸ The Chamber states: 'Admittedly there does not seem to have emerged recently a body of state practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diurnitas* has taken shape.' *Kupreskic* (note 294) para 527.

³¹⁹ In its Advisory Opinion, the ICJ did not take sides. It did not upgrade the Clause to the rank of a norm establishing new sources of law. It also did not confine itself to 'attaching an exclusively interpretative purport to the clause'. *Legality of the Threat or Use of Nuclear Weapons* (note 2) 66. Cassese (note 309) 211.

³²⁰ Greenwood (note 315) 554.

³²¹ T Meron 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239, 250.

³²² A Nollkaemper 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in G Boas & W Schabas (eds) *International Criminal Law Developments in the Case Law of the ICTY* (2003) 10.

7. Conclusion

From as early as the *Tadic* trial, judges in the ICTY were faced with gaps in the Statute and the existing law. The instances of lawmaking discussed in this chapter indicate that the Tribunal has resorted to different methods or forms of lawmaking. These methods include extending the protection of humanitarian law, the redefinition of certain crimes (or the extension of existing definitions), the use of purposive interpretation, relying on the Martens Clause and *obiter* lawmaking.

From the discussion of the various cases, it seems clear that not all instances of lawmaking can be described as legitimate. The most common and most important reason for illegitimacy is infringement of the principle of legality and the corresponding lack of legal certainty. Another important way in which lawmaking can be described as illegitimate is the inappropriate use of national case law. In almost all cases the judges undertook the task of establishing or proving customary international law. In order to prove the state practice requirement the judges have had to find instances of national case law to support their arguments. Both the establishment of custom by the judges and the use of national case law have often been controversial. Mostly because of a lack of state practice or incorrect understanding of how to prove state practice, judges have often not been successful or convincing in establishing custom.

The extension of the protection of humanitarian law serves as a *rationale* for lawmaking. The extension of such protection can also be seen as one of the most important achievements of the Tribunals. When Sassoli and Olson write of a ‘breathtaking evolution’ of international justice for war victims they refer to the extension of humanitarian law to those not previously protected.³²³ The use of purposive interpretation, the redefinition of crimes and reliance on the Martens Clause are ways of extending the protection of humanitarian law.

With regard to the maximum extension of the protection of humanitarian law *Tadic* provides one of the best examples. In the *Tadic* Appeals Judgment it is stated that Article 4 of the Fourth Geneva Convention is directed at protecting civilians to the maximum extent possible.³²⁴ It seems as if the Appeals Chamber uses the ‘maximum protection’ argument as a justification to extend the law at the possible risk of violating the principle of legality.

The Appeals Chamber in *Tadic* also extended the concept of ‘common purpose’ to cases involving a common design where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of effecting the common purpose.³²⁵ The authority relied on for this extension of the law has been criticised. Many have argued that the ICTY’s interpretation of third category common purpose is over-expansive and an

³²³ Sassoli & Olson (note 7) 13.

³²⁴ *Tadic Appeals Judgment* (note 6) para 168.

³²⁵ *Ibid* paras 204 - 226.

example of illegitimate lawmaking.³²⁶ It has been argued that the enhanced accountability brought about by the acceptance of this category of common purpose comes at the expense of key criminal law principles such as legality and culpability.

One way of extending the protection of humanitarian law is through the use of purposive interpretation.³²⁷ The object and purpose of the ICTY Statute is to provide a criminal forum for the punishment of all those who have perpetrated especially serious violations of international humanitarian law.³²⁸ Consonant with this objective the Tribunals have sought to ensure that such violations are punished despite gaps in either the definition of substantive crimes or in the liability provisions of the Statutes.

In the *Tadic* case the Appeals Chamber decided to abandon the literal definition of protected persons by focusing more on the factor of allegiance than formal nationality in determining the protective regime.³²⁹ By finding that the Bosnian Serbs acted as *de facto* agents of another state (the FRY), the Appeals Chamber expanded the scope of protection of humanitarian law.³³⁰ The ICTY and ICTR have used the teleological purpose of ‘protecting human dignity’ to broaden the definition of the crime of rape.³³¹ In the absence of an express definition of torture in international humanitarian law the *Furundzija* Trial Chamber turned to international human rights law to flesh out the definition.³³² In developing the law on torture the *Furundzija* Trial Chamber referred to the ‘general spirit of international humanitarian law’ and stated that it is the primary purpose of international humanitarian law to safeguard human dignity.³³³

The Tribunals further extended the protection of humanitarian law through the redefinition of crimes. It has been suggested that the expansive definitions adopted by the ICTY and ICTR in the case of rape and torture can be regarded as an example of borrowing human rights law’s most expansive interpretative methodologies as has been done by the ECHR.³³⁴

The respective Appeals Chambers in *Akayesu*, *Furundzija* and *Kunarac* formulated three different definitions of rape in international law. Many have regarded this as a violation of the principle of legality. Especially in the realm of international

³²⁶ See I Bantekas & S Nash *International Criminal Law* 2 ed (2003) 360-5.

³²⁷ For more on how judges find and determine the basic values of a legal system needed for purposive interpretation see Aharon Barak *Purposive Interpretation in Law* (2005) 164, 165.

³²⁸ Danner & Martinez (note 98) 132

³²⁹ *Tadic Appeals Judgment* (note 6) para 163 – 169.

³³⁰ *Ibid* para 168.

³³¹ *Furundzija* (note 106).

³³² *Ibid*.

³³³ *Ibid* para 162.

³³⁴ Danner & Martinez (note 98) 132.

criminal law, it is important that criminal definitions be precise and clear.³³⁵ The formulation of three different definitions does not contribute to consistency in the law.

The judges also made law by relying on the enigmatic Martens Clause. In considering the question of the legality of reprisals the *Kupreskic* judges resorted to the Martens Clause to support its conclusion that there is an absolute ban on reprisals in international humanitarian law.³³⁶ It seems as if the judges elevated *the imperatives of humanity or public conscience* to an independent source of international law. The judges strained to prove that an absolute ban on reprisals can be justified by reference to custom and reached for Martens Clause to justify its conclusion in spite of the lack of state practice. Nollkaemper has suggested that, instead of artificially relying on customary international law to fill gaps, the Tribunal could simply recognise that however reprehensible the acts in the former Yugoslavia might have been, the international community has not yet been able to adopt all the necessary rules criminalising such acts.³³⁷ In the context of *Kupreskic* such an admission would not go against the principle of completeness since it was not necessary to decide on the legality of belligerent reprisals to decide the case.

Kupreskic was therefore an example of *obiter* lawmaking. The best example of an extensive *obiter* pronouncement is Judge Cassese's Separate and Dissenting Opinion in *Erdemovic*. The *Tadic Jurisdictional Decision* is another example of *obiter* lawmaking. its exposition of the relationship between the Security Council and the Tribunal.

The lawmaking in *Erdemovic* occurs mainly in the exposition in the Dissenting Opinion of Judge Cassese on the place and role of national case law in international criminal law.³³⁸ Judge Cassese explains why notions and concepts derived from national law jurisdictions cannot be mechanically transplanted to international law. Secondly, the judges make law when they decide about the role and relevance of policy considerations in international criminal law. In the *Tadic Jurisdictional Decision* the judges went beyond the strict legal question of the legality of the establishment of the ICTY and discussed *inter alia* the possible limitations on the powers of the Security Council.

³³⁵ The definitions of crimes in the ICC Statute are widely considered to improve upon those used in the *ad hoc* Tribunal context. The definitions contain more detail and the definitions are developed further in the 'Elements of Crimes.' Report of the Preparatory Commission for the International Criminal Court, addendum, Finalised Draft of the Elements of Crimes, PCNICC/2000/inf/3/add2.

³³⁶ *Kupreskic* (note 294) para 527

³³⁷ Nollkaemper (note 7) 13.

³³⁸ *Erdemovic* (note 5) Separate and Dissenting Opinion of Judge Cassese paras 4, 5. See the discussion of the treatment of duress as a defence in national systems (both civil law and common law jurisdictions) in the Joint Separate Opinion of Judge McDonald and Vohrah, paras 59 – 62.

The legitimacy of the different instances of lawmaking can be measured by the extent to which the various developments were followed (and therefore endorsed) by the drafters of the ICC Statute. The ICC followed the approach of the ICTY with regard to common purpose, rape and torture.

With regard to the extension of common purpose the *Tadić* Appeals Chamber relied on Article 25 (3) (d) of the ICC Statute which in the view of the Appeals Chamber expresses the *opinio juris* of the States which adopted the Statute.³³⁹

In the ICC Statute crime definitions have been formulated in detail. The definitions are refined further in the 'Elements of Crimes'.³⁴⁰ The specificity of the definition of rape formulated by the ICC Statute seems to reflect the *Furundžija* definition. According to the Draft Elements of rape, the perpetrator must have 'invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'.³⁴¹ The Elements also took the *Kunarac* developments into account since it states that the consent of the victim must have been given voluntarily, taking into account the context of the surrounding circumstances.³⁴²

The ICC Statute defines torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.' The requirement of official involvement is therefore not included in the definition of torture.³⁴³ This is consistent with the way the ICTY developed the law of torture and lends support to the development of the law by the Trial Chamber in *Kunarac*.

The ICC's adoption and implicit endorsement of some of the law made by Tribunal judges is important and lends (retrospective) legitimacy to the work of the judges. Because of the novel nature of the Tribunals the success of its lawmaking initiatives can only be assessed as time passes and more trials are heard. On a normative level however it is important to develop principles and standards

³³⁹ In Article 25 (3) (d) the ICC Statute stipulates that a person shall be criminally responsible for a crime if that person in any way 'contributes to the commission of a crime...by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group... or (ii) be made in the knowledge of the intention of the group to commit the crime'.

³⁴⁰ Report of the Preparatory Commission for the International Criminal Court, addendum, Finalised Draft of the Elements of Crimes, PCNICC/2000/INF/3/Add2.

³⁴¹ Draft finalised text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (2000), 12.

³⁴² *Kunarac* (note 194) para 460. In the *Omarska* case before the ICTY the definition making seemed to come to an end. The judges chose definitions as constructed in *Kunarac* while referring to *Akayesu* for a definition of sexual assault. *Prosecutor v Kvočka et al* IT-98-30/1, 2 November 2001, ('Omarska').

³⁴³ Article 7(2) of ICC Statute. See H von Hebel and D Robinson 'Crimes within the Jurisdiction of the Court' in R Lee (ed) *The International Criminal Court* (1999) 99.

against which the legitimacy or illegitimacy of the judges' lawmaking can be measured.

Because of its implications for the principle of legality and legal certainty the determination of custom is the most controversial aspect of Tribunal lawmaking. Nollkaemper comments that the ICTY has attempted to mitigate the tension between its own reading of the desirable law and its commitment to uphold the principle of legal certainty by justifying and explaining its policy goals in constructs of customary international law.³⁴⁴ Judge Cassese has referred to the Tribunals' 'discovery' of rules of custom as 'revealing the hidden law of custom'.³⁴⁵ The determination of custom should not, however, be shrouded in mystery. The Tribunals need to clearly state and justify their methodology in choosing national case law for the purpose of proving the existence of state practice.

³⁴⁴ Nollkaemper (note 322) 9. In the opinion of Nollkaemper, the *Kupreskic* case is a good illustration of a case where the Tribunal virtually directly translated its policy objectives into customary law. Ibid 10.

³⁴⁵ Interview, 6 June 2003, Florence.

CHAPTER 7

RULEMAKING AT THE TRIBUNALS

1. Introduction

ICTY and ICTR judges make both substantive and procedural law. The judges derive their power to make procedural law from the Statutes of the Tribunals, in terms of which the judges have the power to both draft and amend the Rules of Procedure and Evidence¹ (the Rules or RPE) of the ICTY and ICTR.² This chapter is concerned with various aspects of the judges' rulemaking power as well as with the legitimacy of the rulemaking power itself. The power to make rules, described as a quasi-legislative function, infringes upon the principle of separation of powers and threatens the independence of the judges. It has been argued at different points in this study that the principle of separation of powers³ - the traditional objection to the lawmaking power of judges - does not apply in the field of international law because international law lacks a central legislature and a central enforcement body.⁴ The danger that judges, endowed with rulemaking power, could abuse this power and risk reducing legal certainty remains. The judges violate another principle. They seem to depart further and further from the Tribunal's initial commitment to the principle of legality expressed, *inter alia* in the Secretary General's Report on the establishment of the Tribunal.⁵

Some argue that since the principle of legality is a substantive law principle it does not find application in the field of procedural law. It will be argued here that the principle of legality has relevance to both substantive and procedural law and can

¹ The ICTY Rules of Procedure of Evidence are available at <http://www.un.org/icty/legaldoc-e/index.htm>. The ICTR Rules are available at <http://www.ictor.org/ENGLISH/Rules/260600/1.htm>.

² The Secretary General's Report stated that 'the judges of the international tribunal as a whole should draft and adopt the rules of procedure and evidence'. *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 S/25704* ("Secretary General's Report") para. 21.

³ The idea that the different functions of government should be divided amongst different organs of state (the *Trias Politica*) originated in the writings of Locke and Montesquieu. See J Locke *Two Treatises of Government* (1690), C de S Montesquieu *De l'esprit des lois* (1738).

⁴ J Dugard *International Law, a South African Perspective* (2001) 2, 3. Dugard explains why the United Nations can not be considered a world government -it lacks the power to direct states to comply with the law; and it lacks a permanent police force to punish violations of the law. The United Nations can raise forces to police certain situations, such as the United Nations Protection Force in Yugoslavia (UNPROFOR) created to oversee the cease-fire in the former Yugoslavia, but there is no permanent force at the disposal of the Security Council that can enforce the decisions of the Tribunals.

⁵ The *Secretary General's Report* (note 2) para. 34 stated that 'the international tribunal should apply rules of the international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise'.

be violated if procedural rules are amended too frequently.⁶ This approach is supported by Knoops who regards the quasi-legislative power of the judges, particularly in respect of judicial amendment to the rules⁷, as problematic from a procedural point of view. He raises the question whether the quasi-legislative role of tribunal judges may infringe upon the doctrine of separation of powers and concludes that because of the close relationship between the separation of powers and the legality principle⁸ it can be said that a violation of one principle often constitutes a violation of both principles.⁹

Since the original adoption of the ICTY Rules on 1 February 1994, new rules have been adopted and amendments have been made on no less than thirty seven occasions.¹⁰ The frequency with which the Rules are being amended has become a matter of widespread criticism and controversy. The proliferation of rules¹¹ and the number of amendments have led to one commentator describing the Tribunal as a 'rogue court with rigged rules'.¹² Frequent amendments run counter to the principle of legality and its cousin, the rule of law. The principle of legality requires that an accused should not be punished without the existence of previous law. The rule of law requires that a society be governed by rules that are fixed, knowable and certain. It is difficult to reconcile the original intention of the ICTY of adhering to the principle of legality with its present zeal for increasing and changing the Rules. An important implication of the amendment of a rule is that certain of the Decisions of Chambers lose their value as precedent insofar as the decision may relate to a Rule that no longer exists.¹³ Since the decisions of the ICTY and ICTR are not subject to review by an outside body the existence and the exercise of the judges' power to make and amend rules must be carefully scrutinised.

⁶ Others have made a similar argument. See R Haveman in "The Principle of Legality" in R Haveman, O Kavran, J Nicholls *Supranational Criminal Law: a System Sui Generis* (2003) 75.

⁷ G J A Knoops *Theory and Practice of International and Internationalised Proceedings* (2005) 343.

⁸ See Chapter 5 above.

⁹ *Ibid*

¹⁰ The latest amendments were made on 29 March 2006.

¹¹ G Boas 'Development in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court' (2001) 12 *Criminal Law Forum* 90.

¹² See J Laughland 'The Anomalies of the International Criminal Tribunal are Legion' (letter) *The Times* 17 June 1999.

¹³ The ICTY does not adhere to the traditional system of precedent accepted in common law jurisdictions. Decisions of other international criminal tribunals are not precedents for the Tribunal. See C Harris 'Precedent in the Practice of the ICTY' in R May, D Tolbert, J Hocking (eds) *Essays on ICTY Procedure and Evidence* (2001) 344. The Trial Chamber regarded judicial decisions as being relevant only as 'subsidiary means for the determination of rules of law, using the expression of the International Court of Justice. Therefore, 'subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries.' *Prosecutor v Kupreskic*, IT-95-16-T, 14 January 2000, para 540.

Fuller has argued that the legitimacy of adjudication derives from the particular moral force of the decisions of an impartial tribunal¹⁴ and that procedural conditions combined to form 'an internal morality of adjudication'.¹⁵ Procedural rules therefore affect the judicial enterprise as a whole. One could argue that the legitimacy of the *ad hoc* Tribunals depend to some extent on the correctness or soundness not only of the procedural rules themselves but also of the procedure and process by which the procedural rules are made.

The Rules are important in that the establishment of judicial norms, procedures and jurisprudence at the *ad hoc* International Criminal Tribunals develop principally through its Rules and case law. Together with the Nuremberg Principles, the Rules of the ICTY combine to be one of the first coherent bodies of principles governing the prosecution of violations of international humanitarian law. It amounts to a code of procedure for international criminal law¹⁶ and it expresses the guarantee of a fair and expeditious trial that is based *inter alia* on article 14 of the International Covenant on Civil and Political Rights.¹⁷ The relevance of the ICTY Rules extends beyond the context of the former Yugoslavia. The ICTY Rules were adopted as the rules of the Rwanda Tribunal.¹⁸ In turn, the ICTR Rules were recently adopted by the Special Court for Sierra Leone.¹⁹ Many of the amendments made to the ICTY Rules have been adopted by the ICTR.²⁰ What happens to the ICTY Rules happens to the ICTR Rules and could potentially happen to the rules of internationalised courts.²¹ In addition the

¹⁴ C Covell *The Defence of natural law: law and justice in the writings of Lon L Fuller, Michael Oakesbott, F A Hayek, Ronald Dworkin and John Finnis* (1992) 44.

¹⁵ L Fuller *The Problems of Jurisprudence* (1949) 706.

¹⁶ Boas (note 11) 41.

¹⁷ The Appeals Chamber has observed that the 'fair trial guarantees in Article 14 of the International Covenant of Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute'. *Prosecutor v Tadic*, IT-94-1-72.

¹⁸ See 'The Rules of the ICTR' below.

¹⁹ Article 14 (1) of the Statute of the Special Court for Sierra Leone states that the RPE of the ICTR obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct before the Special Court. Article 14 (2) states that the judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. The Special Court was established by Security Council resolution 1315 (2000) of 14 August 2000 to prosecute persons for crimes against humanity and other serious violations of international humanitarian law within the territory of Sierra Leone. See *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Document S/2000/915, 4 October 2000.

²⁰ The first eight sets of amendments to the ICTY Rules were incorporated in the initial ICTR Rules adopted in June 1995. During the second and third plenary sessions, the ICTR Rules were amended in response to the amendments to the ICTY Rules. V Morris & M Scharf *An Insider's Guide to the International Criminal Tribunal for Rwanda* (1998) 423. For the text of the amended Rules, see UN Doc ICTR/PLN-10-2-001 (1996) and UN Doc ICTR/3/L.5 (1996). These amendments are reflected in Rules of Procedure and Evidence of the ICTR, UN Doc ICTR/3/Rev.2.

²¹ The term 'internationalised court' applies to courts being set up by joint efforts of the United Nations and national governments to try violations of international humanitarian law as is happening in Sierra Leone, Cambodia and East Timor. However, the effect of amendments to the ICTY Rules and ICTR Rules will most probably be felt only indirectly by these courts.

Rules and jurisprudence of the *ad hoc* Tribunals had an impact on the drafting of the Rules for the International Criminal Court (ICC).

Since the rulemaking procedure of the Tribunals constitutes a clear example of procedural lawmaking by the judges, it merits close attention. The procedure by which the Rules are made and amended will be discussed as well as the limitations on the scope of the Rules. The following questions will be addressed: (a) Are the Rules exhaustive or do the Chambers possess inherent powers not enumerated in the Rules? (b) Can the Rules be *ultra vires* the Statute? (c) Can the judges reverse a decision by enacting a subsequent amendment to the Rules? The nature of and reasons for the frequent amendments made by the judges will be discussed. The question will be posed whether the Rules can not be clarified in ways other than by effecting amendments. Because limited precedent existed for the adoption of the Rules²² and because of the unique nature of the ICTY it is argued that the Rules needed a 'breaking in' period and that it is somehow inevitable that some of the Rules would have to be amended. Judge Cassese, the first President of the Tribunal, listed some seemingly commendable reasons for effecting amendments. These include enhancing the rights of the accused, helping to protect victims and witnesses, taking account of the views of the host country and improving the consistency, clarity and comprehensiveness of the Rules.²³ It is necessary, but often difficult, to distinguish between instances where the judges have made amendments to clarify or elaborate the rules - an ostensibly harmless, even desirable exercise of their powers - and instances where the judges have made amendments because of political pressure. The *Barayagwiza Reconsideration Decision*²⁴, which will be discussed, is an instance of the latter.

There are two ways in which the judges can exercise their power to amend. Having had the benefit of observing how a specific Rule they had drafted had been interpreted, the judges may realise that the Rule did not function in the way they intended, necessitating amendments. This could be uncontroversial, even wise. The decision to amend a rule may however be the direct result of a Chamber Decision that the majority of judges seek to overrule. This would be more suspect. In this regard the *Barayagwiza* case will be examined²⁵ - an example of a case where a precedent set by the Appeals Chamber was overturned by a subsequent amendment of the Rules. The question whether the reasons offered by the

²² The Rules adopted by the International Military Tribunal at Nuremberg offer little guidance since they were few and of a very general nature. The rulemaking procedure of the Nuremberg Trials was governed by Article 13 of the Nuremberg Charter. International Military Tribunal, Rules of Procedure, adopted on 29 October 1945 in (1946-1949) 1 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10*, 19 - 23.

²³ Morris & Scharf (note 20) 423.

²⁴ *Barayagwiza v Prosecutor, Decision (Prosecution's Request for Review or Reconsideration)*, ICTR-97-AR72, ICTR A. Ch, 31 March 2000 ('*Barayagwiza Reconsideration Decision*').

²⁵ *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, 3 November 1999 ('*Barayagwiza Decision*').

Tribunal for the flexibility pursued by the Judges in the making of amendments are satisfactory will also receive attention.

The forum in which the 'Tribunals' Rules are made and amended is the Plenary Sessions of the judges. The fact that the records of the Plenary Sessions are not public makes it difficult to establish the reasons and motives behind such amendments.²⁶ Since the Plenary Sessions are held in private and the minutes of these meetings are not disclosed to the public, it is also not possible to refer to the *travaux préparatoires* of the judges. No other documents referring to the reasoning of the judges are available either. To understand or speculate about the judges' intent when making amendments one has to be satisfied with looking at the chronology of the cases and their public statements.²⁷

The procedure by which the Rules of the ICTY and the ICTR are drafted and amended will be examined as well as the possible motivations of the judges in doing so. In discussing the procedure of drafting and amending rules, the approach of the ICTY and ICTR will occasionally be compared to the approach taken in the Statute and Rules of Procedure and Evidence of the International Criminal Court (ICC).²⁸

2. Rulemaking at Nuremberg and Tokyo

As the first international criminal jurisdiction, the Nuremberg Tribunal provides the benchmark for assessing the international Tribunal and its prospects for success. The Nuremberg Tribunal was guided by a small set of very general rules of procedure and evidence. These rules were contained in the Nuremberg Charter which provided for the elaboration of somewhat more detailed procedural rules in a subsequent instrument.²⁹ The Nuremberg Rules of Procedure consisted of eleven rules comprising little more than four pages of text.³⁰ These rules were adopted shortly after the adoption of the Nuremberg Charter. The Nuremberg Charter entrusted the Chief Prosecutors with the task of preparing draft rules of procedure which the judges of the Nuremberg Tribunal, according to Article 14 (e), were authorised 'to accept, with or without amendment or to reject'.

²⁶ Neither the legal officers at the Tribunal, nor the Press and Information Unit of the ICTY have been able to provide me with an official reason for the confidentiality of these documents.

²⁷ Kavran suggests looking at these two sources. See O Kavran 'The *Sui Generis* Rules of Procedure and Evidence' in R Haveman, O Kavran, J Nicholls (eds) *Supranational Criminal Law: a System Sui Generis* (2003) 34.

²⁸ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, Rules of Procedure and Evidence, UN Doc PCNICC/2000/INF/3/Ad. 1, 12 July 2000 (officially called the 'finalised draft text').

²⁹ Article 13 of the Nuremberg Charter states: 'The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.'

³⁰ The Tribunals under Control Council Law No 10 later adopted the Uniform Rules of Procedure on the basis of these Rules. See International Military Tribunal, *Rules of Procedure*, adopted on 29 October 1945 in (1946-1949) 1. *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10*, 19 - 23.

Some believe that the procedures adopted by the Nuremberg and Tokyo Tribunals (as well as by the various tribunals set up by the Occupying Powers after World War II) were not very instructive since the right to a fair trial was the only recognised principle of international criminal law at the time and this right was defined only vaguely.³¹ Because of the small number of rules in the Charter and possibly also because of the fact that procedural regularity was generally neglected at Nuremberg, the literature on the Nuremberg and Tokyo trials concentrates on the adversarial approach followed by these Tribunals.

An important feature of the rules of procedure adopted by the post-war military tribunals is that they proved to be more flexible than those of national criminal courts. It was believed that procedural questions should never enable the guilty to escape justice.³² The Nuremberg and Tokyo trials were held before the adoption of international instruments specifying more detailed rights for the accused. Important examples of such instruments in the field of humanitarian law are the Geneva Conventions with the Additional Protocols and in the field of human rights law, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights³³.

The Rules of Procedure of the Tokyo Tribunal were also extremely brief, constituting nine provisions.³⁴ Like the Nuremberg Trials the Tokyo Tribunal was not to be bound by technical rules of evidence. It was to apply 'to the greatest extent possible expeditious and non-technical procedure', and was to admit evidence deemed to have probative value.³⁵

3. Adversarial v Inquisitorial Approach

As discussed earlier in this thesis, the judges of the ICTY decided to follow the adversarial approach of the Nuremberg and Tokyo Tribunals.³⁶ According to Morris and Scharf the adversarial system was chosen predominantly because of the role envisaged for the judiciary and Prosecutor in the Statute and the influence of the detailed and comprehensive United States proposal for the Rules.³⁷ With

³¹A-M la Rosa 'A tremendous challenge for the International Criminal Tribunals reconciling the requirements of international humanitarian law with those of a fair trial' (1997) 37 321 *International Review of the Red Cross* 635.

³² One important example is that evidence given by affidavit, which does not permit cross-examination and is generally inadmissible under common law, was widely used. See La Rosa *ibid* 635, 636.

³³ In addition, the right to a fair trial had not yet been made subject to international monitoring by competent international bodies with either regional or universal jurisdiction. *Ibid*.

³⁴ See Rules of Procedure of the International Military Tribunal for the Far East, reprinted in R J Pritchard, S M Zaide (eds.) *The Tokyo War Crimes Trials* (1981).

³⁵ Charter of the International Military Tribunal for the Far East, Article 13, 19 January 1946, TIAS No 1589, 4 Bevans 20 (as amended 26 April 1946, 4 Bevans 27).

³⁶ See Chapter 4.

³⁷ Morris & Scharf (note 20) 416.

regard to the rules it would however, be more accurate to describe the approach as 'mostly adversarial' since there have been some inquisitorial elements introduced right from the start.³⁸

Judge Wald writes that the ICTY employs a sometimes uneasy and frequently awkward blend of the common and civil law systems.³⁹ Though the ICTY Rules initially tilted in favour of the common law adversarial trial it is inevitable that interstitial questions arise in response to which judges from different systems will tend to apply 'what comes naturally'. Judge Jorda is known for steering the ICTY in a civil law direction by supporting many rule amendments reflecting civil law practices during his presidency.⁴⁰ Prominent common law judges such as Judges McDonald, May, Hunt and Wald have similarly left their mark. These judges have all shown particular concern for the fact that rule changes made to expedite trials should not infringe on due process and fair trial guarantees.

According to Boas, the tendency to expedite proceedings at the ICTY has led to the Tribunal implementing more and more civil law innovations into an 'ostensibly adversarial system'.⁴¹ Boas argues that the ICTY has a structure which lends itself more to the process of re-codification of changes in legal practice, stating that 'this characteristically civil law approach' has evolved at the ICTY which has often adopted the approach of amending rules the meaning of which has been clarified in decisions of the Tribunal.⁴²

Since the creation of the Tribunal there has been much discussion about whether the modeling of the Tribunal on the adversarial system has been wise. According to Ackerman and O'Sullivan, the fact that all the accused and most of the lawyers representing them comes from 'inquisitorial' civil law systems have caused tremendous difficulties.⁴³ The making of formal statements by the defendants is

³⁸ Kavran points to the fact that the ICTY has no jury to be protected from prejudicial information and thus no technical rules for admission of evidence. See Kavran (note 28) 134.

³⁹ P Wald 'The International Criminal Tribunal for the former Yugoslavia Comes of Age' (2001) 5 *Journal of Law & Policy* 90.

⁴⁰ The reform programme set forth by Judge Jorda was contained in the 'Jorda Report'. See Letter dated 12 May 2000 from the President of the International Tribunal for the former Yugoslavia addressed to the Secretary General and enclosed report (the 'Jorda Report') Annexure I to UN Doc A/55/382-S/20000/865 14 September 2000.

⁴¹ According to Boas, it is clear from the structure and content of the ICC Statute that the drafters have also opted for a system which is basically adversarial. This means that the prosecutor will be exclusively responsible for searching and collecting evidence to present to the Court and to decide which cases to prosecute or not to prosecute. Other procedural features are more in line with the civil law process, whereby the court maintains significant control over the investigative phase of the proceedings. See Article 15 (3) of the ICC Statute. G Boas 'Comparing the ICTY and ICC, Some Procedural and Substantive Issues' (2000) 47 *Netherlands International Law Review* 281.

⁴² See for example Rule 62 *bis* (ii) requiring that a guilty plea be 'informed', a matter clarified by the Appeals Chamber in the case of *Prosecutor v Erdemovic* IT-96-22-A, 7 October 1999, 20.

⁴³ See the Commentary on Article 15 in J E Ackerman & E O'Sullivan (eds) *Practice and Procedure of the ICTY* (2000).

an example of this. Under the law of the former Yugoslavia, defendants are encouraged to make formal statements. Under the law of the Tribunal, however, giving a statement to the Prosecutor pursuant to rules 42 and 43 has generally been detrimental to the interests of the accused.⁴⁴

Mundis remarks that although the first few trials at the ICTY closely resembled common law trials, the level of control exercised by the Trial Chambers in recent cases resembles the civil law approach and that the practice of the Tribunal, generally, is moving in the direction of a civil law approach.⁴⁵ Since the ICTY Statute contains clear references to adversarial or 'common law' elements⁴⁶ the ICTY will never fully acquire a civil law character but it can be said that a truly mixed jurisdiction is emerging. Examples of rule amendments modeled on the inquisitorial system civil law will be discussed below.

4. Rulemaking at the ICTY

Although the international community has taken great strides forward in the codification and development of international standards with respect to the substantive international law applied at the Nuremberg trials, similar progress has not been made in the codification and development of international standards with respect to the rules of procedure and evidence. The obvious reason for the difference in attention devoted to procedural and substantive aspects of international criminal law since Nuremberg is the fact that no international criminal court was established in the intervening years that would have required considering the procedural and evidentiary rules of law governing its proceedings.⁴⁷ This changed with the establishment of the ICTY in 1993.

Security Council Resolution 827 and Article 15 of the ICTY Statute⁴⁸ clearly laid down the framework for the creation of the Rules of the ICTY. Article 15 of the Statute reads:

⁴⁴ There is no practice at the Tribunal that provides for a sentence reduction for accused that make statements, unless it amounts to 'substantial cooperation with the Prosecutor' under Rule 101. To date, Erdemović is the only accused who has received such credit.

⁴⁵ D Mundis 'From 'Common Law' Towards 'Civil Law': The evolution of the ICTY Rules of Procedure and Evidence' (2001) 14 *LJIL* 368.

⁴⁶ Article 16 (1) of the ICTY Statute, for example, vests in the prosecutor, rather than the judges, the responsibility for investigation and prosecuting functions which ensure that the judges will never fully control the presentation of the cases that they hear. Other examples include Article 21(4) (e) which guarantees the accused the right to cross-examine the witnesses against him.

⁴⁷ The development of international human rights standards in the intervening years did however provide general standards of fair trial and due process in a criminal proceeding before an international court. Morris & Scharf (note 20) 175.

⁴⁸ The ICTY Statute is available at <http://www.un.org/icty/basic/statut.html>. The ICTR Statute is available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>.

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

The Report of the Secretary-General⁴⁹ recommended the preparation and adoption of the Rules by the judges as a whole. The participation of all the judges in the elaboration and adoption of the Rules was meant to ensure consideration of the general principles of criminal procedure and evidence recognised in the different legal systems represented by the judges. In terms of Article 13 of the ICTY Statute the General Assembly has the power to elect eleven judges to reflect the diversity of the world's principal legal systems.⁵⁰

The judges, assisted by the Secretariat and proposals from States and organisations,⁵¹ adopted the Rules in February 1994.⁵² At the time there were suggestions that the adoption should be delayed until April 1994 to allow for more reflection. The Rules were, however, quite hastily adopted because it was believed that the procedures should be in force not only before the first trial, but also before the first investigation and indictment.⁵³ In designing the Rules, the judges took note of patterns of crimes and the forms specific crimes took in the conflict in the Balkans. By doing this they endeavoured to devise a 'purpose-made' set of rules that would facilitate their work in adjudicating justiciable crimes within the context of the crimes committed.⁵⁴ The ICTY has attempted to create a body of rules which reflect the international criminal law jurisdiction under which it operates - rules customised to the prosecution of international crimes.

In addition, several States and organisations⁵⁵ submitted comments and draft provisions for the Rules. Of these the United States submitted by far the most comprehensive set of proposed rules with commentary (numbering approximately 75 pages) many of which found their way into the Rules adopted by the ICTY. The rules that were rejected addressed questions of substantive law that were decided to be beyond the scope of the rules of procedure and evidence as decided

⁴⁹ *Secretary General's Report* (note 2).

⁵⁰ See Chapter 3 on the election of the judges. M C Bassiouni & P Manikas *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 209.

⁵¹ *Ibid* 177.

⁵² The Rules entered into force on 14 March 1994 in accordance with Rule 1 of the ICTY RPE.

⁵³ Morris & Scharf (note 20) 181.

⁵⁴ Report of the International Criminal Tribunal for the prosecution of persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991. A/49/342, S/1994/1007, 29 August 1994, paras 75, 76.

⁵⁵ Submissions were received from Argentina, Australia, Canada, France, Norway, Sweden as well as from the United States and the American Bar Association. Morris & Scharf (note 20) 176.

on by the judges.⁵⁶ Examples of such rules include proposals addressing issues such as the type of war crimes falling within its jurisdiction, the definition of crimes against humanity and the exclusion of the defence of superior orders.⁵⁷

The Rules and Statute of the ICTY and ICTR can be regarded as the guiding norms of the Tribunals. The hierarchy of the norms guiding the ICTY and ICTR rests on their respective Statutes. The Rules were adopted pursuant to and remain subordinate to the Statutes.⁵⁸ In turn, many of the administrative directives and guidelines are specifically authorised by the Rules. This means that all administrative directives must conform to the Rules, which must adhere to the Statute. Bassiouni writes that the ICTY Rules, to some extent, fill gaps in the Statute which was not tailored to the particular characteristics of the conflict in the former Yugoslavia.⁵⁹ This is reflected in rules concerning patterns of conduct⁶⁰ regarding the protection of victims and witnesses⁶¹ and regarding evidence in sexual assault cases.⁶²

5. The Rules of the ICTR

It has been said that the ICTY and ICTR are 'joined at the hip'.⁶³ The Rules provide one more example of this: The ICTY Rules provided a model for the ICTR Rules in order to ensure that the two international Tribunals would function 'harmoniously'.⁶⁴ The judges of the Rwanda Tribunal adopted the Rules of Procedure and Evidence of the Rwanda Tribunal at its first session held from 26 to 30 June 1995. Article 14 of the Statute of the ICTR provided that the judges at the ICTR should adopt the Rules of the Yugoslavia Tribunal 'with such changes as it might deem necessary'. The judges at the ICTR had the benefit of a detailed set of rules which has already been amended several times to reflect the practical needs of the ICTY. Amendments made to the Rules of the ICTR often (but not always) follow directly amendments made to the Rules of the ICTY.⁶⁵ As a result

⁵⁶ V Morris & M Scharf *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia and Rwanda* (1995) 177. A key proposal by the United States that was rejected would have authorised the Prosecutor to grant immunity to defendants in exchange for cooperation. *Ibid.*

⁵⁷ United States Proposal for the Yugoslavia Tribunal Rules, Rules 2.2 and 25.14 and the commentary thereto, reprinted in Morris & Scharf (note 20) 516, 547.

⁵⁸ See Bassiouni & Manikas (note 50) 825.

⁵⁹ *Ibid.*

⁶⁰ ICTY Rule 93.

⁶¹ ICTY Rules 34, 69 and 75.

⁶² ICTY Rule 96.

⁶³ W Schabas *An Introduction to the International Criminal Court* (2nd ed. 2004) 12. The statutes of the ICTY and ICTR are largely similar. In addition the two institutions share a prosecutor and an Appeals Chamber.

⁶⁴ Statement of France, UN The Normative Impact on International Law of the International Tribunal for the Former Yugoslavia' in Y Dinstein, M Taborg (eds) *War Crimes in International Law* (1996) 210 SCOR, 49th Sess, 3453rd meeting. at 4, UN Doc S/PV.3453 (1994) reprinted in Morris & Scharf (note 20).

⁶⁵ The first eight sets of amendments to the Yugoslavia Tribunal Rules were incorporated in the initial Rwanda Tribunal Rules adopted in June 1995. Morris & Scharf (note 20) 422, 423.

the Rules of the two Tribunals are almost identical. As in the case of the ICTY, the ICTR followed a broadly accusatorial approach.⁶⁶

6. The quasi legislative power of the judges

Was it appropriate to grant the judges the power to make the rules they apply themselves? Judge Cassese acknowledged the unusual nature of the judges' rulemaking duty when he said:

Let me also add that the Judges of our Tribunal, besides fulfilling judicial duties, also have a unique legislative task, in that they pass and amend the Rules of Procedure and Evidence, what I would call our 'Code of Criminal Procedure'.⁶⁷

The Statute of the International Criminal Court ('Rome Statute') departed from the ICTY Procedure in not granting the judges the power to draft the Rules of the ICC. Pursuant to Article 51 (1) of the Rome Statute, the ICC Rules must be adopted by a two-thirds majority of the members of the Assembly of State Parties. Only in urgent cases (cases where the ICC Rules do not provide for a specific situation) may the judges, by a two-thirds majority draw up provisional rules.

According to Roberts, there is no doubt that denying the judges of the ICC the power to make rules was the result of a conscious decision. He writes that the antipathy to judge-made rules was in part the result of a perceived difference in circumstances between the permanent court and the *ad hoc* Tribunal.⁶⁸ Roberts repeats the reason often given for the substantial powers and flexibility granted to and exercised by the judges of the ICTY - this reason being the unique nature of the Tribunal and the unforeseen circumstances the Tribunal could not be fully prepared for. He writes that the ICC, having had the benefit of the ICTY experience, is less likely to require the same volume of amendments. Article 51 of the ICC Statute reflects a desire by the drafters to establish certainty in procedure to the benefit of the parties to the proceedings. Legal certainty diminishes when rules are constantly being amended. Even though the ICC Judges will not have drafted the rules themselves, their input before adoption of the Rules has been said to be critical.⁶⁹

⁶⁶ Unlike the approach at Nuremberg, which combined principles of civil and common law, the ICTY judges, in drafting the Rules, decided to follow a largely adversarial, rather than inquisitorial approach. UN Doc IT/30 (1994).

⁶⁷ Speech by A Cassese at the meeting between Secretary-General Kofi Annan and the Judges of the ICTY, 3 March 1997.

⁶⁸ K Roberts 'Aspects of the ICTY Contribution to the Criminal Procedure of the ICC' in May, Tolbert, Hocking (eds.) (note 13) 569.

⁶⁹ [the ICTY] judges wish to encourage the Preparatory Commission to include a provision that would allow judicial participation with the Assembly of State Parties in the adoption of the Rules', Contributions of the Chambers of the ICTY, 13 August 1999, PCNICC/1999/WGRPE/DP 38, para 6.

The difference between the powers awarded to the judges of the ICTY and those of the ICC has been explained on the ground that the drafting of the ICTY Rules were dictated by the circumstances in which the ICTY Statute was drafted which differs significantly from the context in which the ICC is being created. The ICTY derives its powers directly from Chapter VII of the UN Charter and is concerned with a defined conflict in a single region. It was therefore created in a situation that allowed for easier consensus and, some argue, the allocation of greater power than would have been appropriate to grant to the ICC.⁷⁰ It is submitted that the power to adopt and amend the Rules, unaccompanied by review mechanisms or sufficient safeguards exceeds the power the judges of the *ad hoc* Tribunals should legitimately have been granted.⁷¹

7. The amendments

According to Rule 6 of the ICTY Rules, the Rules may be amended with the assent of seven judges at a plenary meeting convened with sufficient notice following a written request for amendment by a judge, the Prosecutor or the Registrar.⁷² An amendment may be approved other than at a plenary meeting of the International Tribunal with the unanimous approval of the judges. Amendments adopted by either procedure enter into force immediately. An amendment may however, not prejudice the rights of an accused in a case that is already pending before the Tribunal.

The first amendments to the Rules of the ICTY took place at the third session of the International Tribunal held from 25 April to 5 May 1994. Since then, the ICTY and ICTR Rules have been amended several times. At the ICTR even the Rule pertaining to amendments, Rule 6, has been amended three times.⁷³

The Rules are amended by the Rules Committee. This Committee is made up of a minimum of three permanent Tribunal judges and considers proposals for amendments received from the President or a judge. The Committee then submits

⁷⁰ Roberts compares the circumstances in which the ICTY was created to that of the ICC and states that, because of the larger number of states representing a broader background of legal systems and the political concerns involved, the drafters of the Rome Statute were more constrained by the need to compromise. Roberts (note 68) 572.

⁷¹ Judge Wald agrees that rulemaking is a legislative task. She finds it problematic that Tribunal judges both draft and apply the Rules of Procedure and Evidence. Interview with Judge Wald, ICTY Chambers, The Hague, August 2001.

⁷² Rule 6 (A) reads:

Amendments of the Rules

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than seven judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all judges.

⁷³ Rule 6 was adopted on 29 June 1995 and was amended on 5 July 1996, 8 June 1998 and 1 July 1999. Whereas the 'original' Rule 6, states that Proposals for amendment of the Rules shall be adopted if agreed to by not less than seven judges at a Plenary Meeting, the amended text of 1 July 1999 states that amendments should be agreed to by no less than ten judges.

a report setting out the proposals and recommendations to the Plenary or to the judges for adoption under Rule 6 (C). Upon agreement by the Plenary of amendment to the Rules, the Rules Committee will, as soon as practicable, issue an official document setting out the amendments and this document shall be submitted for publication in the next issue of the Bulletin of the International Tribunal.⁷⁴

There has been no opportunity for UN bodies, states or NGO's to comment on proposed amendments. According to Bassiouni, a brief period of comment and review might enhance the substantive quality of the Rules.⁷⁵ Ideally, he argues the Rules should have been formulated as part of the entire legal framework of the Tribunal and should have been developed prior to the Tribunal's establishment.

Since rules have important implications for the fairness of proceedings and are sometimes substantive in nature, a procedure for the review of proposed and amended rules should be established.⁷⁶ Bassiouni is of the opinion that approval by the Security Council should be required before proposed rules and amendments are adopted. An important reason for this is that rules could affect substantive issues or could bear on the determination of guilt or innocence.⁷⁷

The need to expedite cases has been offered as a reason or justification for the frequent amendment of the Rules.⁷⁸ One of the greatest obstacles currently facing the Tribunal involves constraints in bringing a case to trial within a reasonable time after the accused has been detained.⁷⁹ In the *Aleksovskii Appeals Decision*⁸⁰ it was stated that 'the purpose of the Rules is to promote a fair and expeditious trial', and Trial Chambers must have the flexibility to achieve this goal. The process of amending the Rules in order to achieve the goal of good case management and

⁷⁴ Judicial Supplement 31 – IT/143/Rev 2, January/February/March 2002.

⁷⁵ Bassiouni & Manikas (note 50) 827.

⁷⁶ Bassiouni writes of the procedural rules that 'insure the substantive aspects of procedural fairness'. These substantive aspects include the right to life, liberty and other civil rights. MC Bassiouni *Introduction to International Criminal Law* (2003) 641. Interestingly, the ILC's draft statute for the ICC provided that the court's rules be drafted by the judges and submitted to a conference of state parties for approval. The ICJ Statute however, does not provide for review of the ICJ's rules by any other body. Bassiouni & Manikas *ibid*.

⁷⁷ *Ibid* 824.

⁷⁸ Proceedings during the pre-trial and trial phases were recently expedited by amending Rule 65*ter* and Rule 92*bis*. Boas (note 11) 45.

⁷⁹ See in this regard *Barayagwiza Reconsideration Decision* (note 24).

⁸⁰ See *Prosecutor v Aleksovskii*, IT-95-14/1-AR73) Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 19.

thereby expedite trials, began at the 18th Plenary held on 9-10 July 1998.⁸¹ At this session six rules were added and 25 others amended.⁸²

In May 2000 a reform programme was put forward by Judge Jorda when he was President of the ICTY, on behalf of the judges. The aim of the programme was to improve the effective functioning of the ICTY.⁸³ It included measures to expedite trials such as improving pre-trial case management and the appointment of *ad litem* judges, and required additional amendments to the Rules. Such amendments included simplifying the form of Status Conferences so that they could be held outside the courtrooms with the senior legal officer presiding and the parties in attendance. Examples of rules that have already been amended in the name of expedition will be examined under the heading 'Amendments to Expedite'.

Next to the justification of expediency, the need for 'flexibility' has become a favourite justification of the ICTY. Boas writes that a high level of flexibility has been pursued by the judges of the ICTY in the process of drafting, amending and interpreting the Rules. This flexibility has been justified by the need to expedite trials and the need to reconcile concepts borrowed from continental and common law systems.⁸⁴

In spite of the emphasis put on expediency and flexibility the Tribunal has been criticised for the frequent amendments as early as 1996. Judge Cassese responded to this criticism when he told the General Assembly in November 1996 that it was 'essential, in the interests of justice, to amend the Rules in light of new problems ... or unanticipated situations...'.⁸⁵ He used the same arguments often used in response to criticism directed at the Tribunal's 'innovative' approach to lawmaking - arguments relating to the new and unique character of the Tribunal:⁸⁶

We have been attacked for amending the Rules of Procedure and Evidence too many times. In reply to this criticism, I would say that our whole enterprise has been very much a step into the unknown. It has been impossible to foresee all the new problems that have arisen, and may well continue to arise during our proceedings. I should also point out that an institution that keeps its internal regulation under review, and constantly seeks to

⁸¹ These amendments were first reflected in Revision 13 of the Rules, which is available on the ICTY website. For the current version of the Rules, see http://www.un.org/icty/basic/rpe/IT32_rev21con.htm, and selected older versions at: <http://www.un.org/icty/basic/e.htm>.

⁸² The following Rules were amended: 11 *bis*, 15, 45, 47(F), 50, 62 *bis*, 65, 66, 72, 73, 77, 85, 86, 87, 88, 88 *bis*, 90, 94, 99, 100, 101, 102, 103, 108 *bis* and 111.

⁸³ See the Jorda Report (note 40).

⁸⁴ Boas (note 11) 41, 42.

⁸⁵ Morris & Scharf (note 20) 423.

⁸⁶ In a similar tone, Justice Robert Jackson, the Chief Prosecutor at Nuremberg in concluding his report on the Nuremberg Trials acknowledged that 'many mistakes have been made and many inadequacies must be confessed. I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future'. See *Report to the President by Mr Justice Jackson*, 7 October 1946.

improve its procedures and the quality of justice it offers to all the parties - accused, defence counsel, prosecutors - should be commended for its fairness, not rebuked.⁸⁷

Morris and Scharf state uncritically that the amendments constitute ‘clarifications or elaborations’ of the general principles contained in the original Rules or address issues raised by those Rules.⁸⁸ As will become clear in the discussion of the case law of the Tribunals, many amendments are made for reasons other than mere clarification. It can also be asked whether clarification should not be sought in the emerging body of case law of the Tribunals itself.

Another important question is whether a Trial Chamber, in interpreting the Rules can effectively amend the Rules although not expressly authorised to do so by the Statute, if the circumstances necessitate such an amendment in order for a Chamber to carry out its judicial functions?⁸⁹ This question is related to the issue of whether a Trial Chamber has the competence to strike out a Rule which is *ultra vires* for which there also does not seem to be a mechanism for the Chambers to abolish rules that are *ultra vires* the Statute.⁹⁰ The judges, when gathered in plenary session, have to decide about the abolition of a rule.

According to Nice the regular changes to the Rules place strain on practitioners and judges alike. The regularity of the need for change points at the imperfection of the system thus far.⁹¹

The principle of legality has been examined in Chapter 5. The Tribunals’ practice of frequently amending the Rules constitutes a clear infringement of the principle of legality. In addition to the substantive legality principle, discussed in Chapter 5, there also exists a procedural legality principle. According to this principle procedural law should adhere to standards of fairness and justice. Just as substantive law should be certain and specific, so procedural law should also be certain. The law of the Tribunals has to adhere to both substantive and procedural legality.

8. Procedural Lawmaking in Domestic Jurisdictions

It is instructive to look at the ways in which rules are made in domestic jurisdictions. In the United States the Federal Rules of Practice and Procedure are made by the federal judiciary. The federal judiciary is authorised by Congress to prescribe the rules, procedure and evidence for the federal courts, subject to the right of Congress to reject or modify any of the rules. The authority for

⁸⁷ Address of A Cassese, President of the ICTY to the General Assembly of the United Nations, 4 November 1997.

⁸⁸ Morris & Scharf (note 20) 423.

⁸⁹ D Mundis ‘The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals’ (2001) 4 *International Criminal Law Review* 12.

⁹⁰ Ibid.

⁹¹ G Nice ‘Trials of Imperfection’ (2001) 14 *LJIL* 392. Nice suggests that the shortcomings are not the fault of the judges but results from structural inadequacies.

promulgating the rules is set forth in the Rules Enabling Act 28 USC.⁹² Meetings of the rules committees are open to the public and minutes of the committee meetings, comments submitted by the public and transcripts of hearings are all public. It is generally believed that the pervasive and substantial impact of rules on the practice of law demands exacting and meticulous care in drafting rule changes. All interested individuals and organisations are provided with an opportunity to comment on proposed amendments and to recommend alternative proposals.⁹³ What is commendable about the procedural lawmaking by American judges is the openness and transparency of the process. The process by which these federal rules are promulgated has been praised as ‘perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules’.⁹⁴

In South Africa rulemaking in the courts is regulated by Statute, most importantly by the Supreme Court Act⁹⁵, the Magistrates Court Act⁹⁶ and the Rules Board for Courts of Law Act (‘Rules Board Act’)⁹⁷. The Rules Board Act authorises the Rules Board to make rules for the High Court and the Magistrates Court. Section 43 of the Supreme Court Act authorises the Judge President of a provincial division to exercise discretion and to make rules for regulating the proceedings of that division. The Judge President can make rules regulating such matters as (i) the time for holding the courts (ii) the placing on the roll of cases for hearing and (iii) the extension or reduction of any period in which an act is required to be performed. In addition the Rules Board Act authorises the Rules Board to make rules for the efficient administration of justice. The Rules Board is composed of members of the legal profession such as judges, advocates, attorneys and academics.⁹⁸ The Rules Board Act delegates power to the Rules Board to draft the Uniform Rules of Court. Judges cannot amend the Uniform Rules of Court but, under certain circumstances, ‘on good cause shown’ they can deviate from the Rules of Court. Magistrates are not authorised to make the rules of magistrates courts. Everything pertaining to rulemaking in Magistrates Courts is regulated by the Magistrates Court Act. The Magistrates Courts are creatures of Statute whereas the High Court has inherent jurisdiction to regulate its own procedure.

9. The Rules and Inherent Powers

An important question is whether the Chambers possess powers not enumerated in the Rules or the Statute to deal with matters that arise during the course of proceedings. Assuming that in municipal systems all courts possess the inherent

⁹² www.uscourts.gov/rules/proceduresum.htm

⁹³ *Ibid.*

⁹⁴ Committee on Long Range Planning, Judicial Conference of the US, Proposed Long Range Plan for the Federal Courts recommendation 30 (1995).

⁹⁵ Act 59 of 1959.

⁹⁶ Act 32 of 1944.

⁹⁷ Act 107 of 1985.

⁹⁸ *Ibid* section 1.

powers necessary to perform their judicial functions, are the Chambers competent to define and exercise such inherent powers? According to Buteau and Oosthuizen Chambers can resort to what is commonly referred to as the 'inherent powers' or 'inherent jurisdiction' of the Tribunal.⁹⁹ The main reason for the need to resort to such powers lies in the relatively rudimentary nature of the Statute, Rules and other formal documents.¹⁰⁰ It would of course also have been impossible for the drafters to foresee and regulate every matter that may arise.

The above question was discussed by the *Tadic* Appeals Chamber in the context of determining the legality of the establishment of the Tribunal. The Chamber rejected the Trial Chamber's narrow definition of the concept of jurisdiction.¹⁰¹ The *Tadic* Appeals Chamber distinguished between what is stated in international law as 'original', 'primary' or 'substantive' jurisdiction and 'incidental' or 'inherent' jurisdiction which derives automatically from the exercise of the judicial function.¹⁰² The Appeals Chamber also referred to these powers as 'residual powers which may derive from the requirements of the 'judicial function' itself'.¹⁰³

In the context of the power of a court to establish its own competence¹⁰⁴ the Chamber stated that this power, known as *la competence de la competence* is a major part of the incidental or inherent jurisdiction of any judicial or arbitrary tribunal. The Chamber stated that this power is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those Tribunals.¹⁰⁵

The inherent power of the Tribunal has been referred to in several other cases of the ICTR and ICTY. In the *Tadic Contempt Judgment*,¹⁰⁶ Mr Vujin, former defence counsel for Tadic stood accused of having committed contempt of the Tribunal by knowingly and willfully interfering with the administration of justice: The allegations against him were made in accordance with Rule 77(E) which states that 'Nothing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and willfully interfere with its administration of justice.' The Chamber stated in this regard: 'As an international criminal court, the

⁹⁹ M Buteau & G Oosthuizen 'When the Statute and Rules are Silent: The Inherent Powers of the Tribunal' in May, Tolbert & Hocking (note 13) 65.

¹⁰⁰ One example of such document would be the Directive on the Assignment of Counsel (IT/73/Rev 63)

¹⁰¹ *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995 ('*Tadic Appeal Jurisdiction Decision*') paras 9 -12.

¹⁰² *Ibid* para. 14.

¹⁰³ *Ibid*.

¹⁰⁴ The Chamber quoted and supported, Judge Cordova: 'the first obligation of the Court - as of any other judicial body - is to ascertain its own competence'. See the Advisory Opinion on Judgments of the Administrative Tribunal of the ILO upon complaints made by UNESCO, 1956 *ICJ Reports*, 77, 163, Advisory Opinion of 23 October 1956, (Judge Cordova dissenting).

¹⁰⁵ *Tadic Appeal Jurisdictional Decision* (note 101) paras 15 -17.

¹⁰⁶ *Prosecutor v Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, AC*, IT-94-1-A-R77, 31 January 2000 ('*Tadic Contempt Judgment*').

Tribunal must therefore possess the inherent power to deal with conduct which interferes with the administration of justice'.¹⁰⁷ The Chamber further rejected the Respondent's arguments that the kinds of conduct that would amount to contempt had been increased by the amendments made to Rule 77.¹⁰⁸ It was argued by the Respondent that the nature of the conduct which amounts to contempt had been greatly increased to the prejudice of his rights by the amendments made to Rule 77 both after the commencement of the relevant period in this case and after its conclusion.¹⁰⁹ The Respondent argued that his rights had therefore been prejudiced. The Chamber stated that 'the inherent power of the Tribunal to deal with contempt has necessarily existed since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules'. The Chamber added that the amendments made to Rule 77 in December 1998 did not increase the kinds of conduct that would amount to contempt.¹¹⁰

The Security Council could not have exhaustively spelt out the Tribunal's powers. From the Trial Chamber judgments it seems clear that the judges agree that when the Statute and the Rules are silent the Tribunal's inherent power may be invoked. Oosthuizen and Buteau suggest that, by invoking the inherent power the Chambers fill both substantive and procedural *lacunae* in the Statute.¹¹¹ In relying on inherent powers, there is always potential for arbitrariness. The inherent powers of the Tribunal should not be used by the Chambers to depart in any direction they wish without sound justification.

10. Limitations on Scope of the Rules

In spite of this wide delegation of legislative power the authority given to the judges to promulgate procedural and evidentiary rules was subject to limitations. Most importantly, being a subsidiary organ of the Security Council, the ICTY must perform all its functions in conformity with the relevant provisions in the United Nations Charter. This means that the Rules must be consistent with principles of justice and international law as the guiding principles of the United Nations.¹¹² The Security Council's Report emphasised the importance of the ICTY respecting internationally recognised standards of human rights particularly those contained in the International Covenant on Civil and Political Rights. Furthermore the Rules of Procedure and Evidence must be consistent with the

¹⁰⁷ Ibid para 13.

¹⁰⁸ Ibid para 12.

¹⁰⁹ Ibid para 27.

¹¹⁰ Ibid paras 27-28.

¹¹¹ It is not clear what the authors mean when they state that 'substantive' lacunae can be filled. See Buteau & Oosthuizen (note 99) 80.

¹¹² See T Meron 'The Normative Impact on International Law of the International Tribunal for the Former Yugoslavia' in Y Dinstein, M Taborg (eds) *War Crimes in International Law* (1996) 211. See also UN Charter, Article 1 (1).

Statute - the Statute being the constituent instrument of the ICTY and the exclusive basis for its competence and authority.¹¹³

It is clear that the Rules cannot be contrary to the express language or purpose of the Statute.¹¹⁴ The extent to which they may address matters not expressly provided for in the Statute is however less clear. According to Morris and Scharf, some judges favoured a more innovative approach to the drafting of the Rules, following the spirit of the Statute and the principle of justice as guiding principles, whereas other judges favoured a more cautious approach. The limited competence of the International Tribunal, its unprecedented character and its influence on subsequent Tribunals and the ICC, were factors which, some believed, called for caution. Because the minutes of the Plenary Sessions are confidential UN documents, one can only speculate about which judges favoured the more cautious approach and which favoured a more innovative approach and what their reasons could have been.

Although the procedure by which States are to comply with their obligations under the Statute may be addressed in the Rules, the judges are not authorised to create new substantive law or impose new obligations on States under the guise of procedural rules.

A further limitation on the scope of the rules result from the independence of the Office of the Prosecutor as a separate organ of the ICTY with the exclusively responsibility for the investigation and prosecution of cases. The Rules were to govern the judicial proceedings from the pre-trial phase through to final appeal rather than matters relating to the investigation and prosecution of cases. However the responsibility of the judges to ensure a fair trial, extends to ensure the rights of a suspect or accused during the investigation or before trial.¹¹⁵ These limitations also apply to the scope of the Rules of the ICTR.¹¹⁶

11. Are the Rules Binding?

Rule 89 (A) mandates that the evidentiary rules are binding on the Chambers. With the exception of the evidentiary rules, it remains unclear whether the Rules are mandatory or discretionary. According to the Rules, non compliance with the Rules will not automatically invalidate the act concerned.¹¹⁷ Whereas some see the flexibility afforded by the Rules of Procedure and Evidence as a positive aspect of

¹¹³ The Nuremberg Charter contained an express provision to this effect. It was not however considered necessary to include a similar provision in the ICTY Statute or the ICTR Statute. Nuremberg Charter Article 13.

¹¹⁴ It goes without saying that the Rules must also not conflict with the peremptory norms of international law. In the event that a rule violates a norm of *jus cogens* the judges in Plenary could remedy the deficiency. See Mundis (note 89) 3.

¹¹⁵ Morris & Scharf (note 20) 420, 421.

¹¹⁶ Ibid 419, 420.

¹¹⁷ Rule 5 states that it may provide grounds for an objection by a party who seeks to invalidate the act by decision of a Chamber.

the practice of the *ad hoc* Tribunals, this flexibility and the possible discretionary nature of the Rules could also reduce legal certainty and adversely affect the rights of the accused. This problem could be addressed by inserting a provision in the Rules indicating that their application is mandatory. Because of the prescriptive nature of rules, one could argue that the very existence of the Rules implies that they should be binding.

12. Ultra Vires Rules

Bohlander has argued that it is questionable whether judges have the authority to adopt punitive sanctions for conduct outside of the criminal offences for which the Tribunal has subject matter jurisdiction. He is of the opinion that Rule 77 and Rule 91 may be *ultra vires* to the extent that they seem to criminalise conduct that is not provided for in the Statute.

With respect to Rule 77 and Rule 91, Bohlander correctly points out that the ICTY Rules governing contempt and the giving of false testimony set forth a scheme whereby violators can face lengthy incarceration and fines. He writes: ‘There can be no debate that [Rule 77] which allows a contemnor to be incarcerated for up to 7 years creates a criminal offence, and not some kind of administrative sanction’. Bohlander argues that Rule 77 is vulnerable to a challenge regarding its legality under the Statute.

Judge Hunt argues that ICTY Rule 47 (B), which is *ultra vires* the Statute, sets out what constitutes a *prima facie* case for purposes of confirming an indictment¹¹⁸ He writes:

It necessarily follows that - if a *prima facie* case for the purposes of determining whether the accused has a case to answer means that the evidence, if accepted, is such that a reasonable Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused - it must mean the same thing for the purposes of presenting an indictment to a Judge of the Trial Chamber in accordance with Article 18 (4),¹¹⁹ of confirming the indictment in accordance with Article 19.¹²⁰ If this be so, it inevitably follows that ICTY Rule 47 (B) is *ultra vires* the Statute.¹²¹

¹¹⁸ Rule 47 (B) reads:

The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence that to provide reasonable grounds for believing that a suspect had committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

¹¹⁹ ICTY Article 18(4), which concerns investigations and the preparation of an indictment, reads:

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the fact and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

¹²⁰ ICTY Article 19, governing Review of the indictment reads:

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it.

If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

Judge Hunt concludes that since Rule 47(B) provides a less onerous task for the Prosecutor than does Article 18(4), it is inconsistent with the Statute to the detriment of fundamental rights of the accused.

According to Mundis there are further examples of Rules that are *ultra vires* the Statute. He writes that one can conclude from Article 17 of the Statute, which governs the responsibilities of the Registry as well as from Article 11 which describes the Registry as a separate organ that the intention of the Statute was to create three independent organs.¹²² The Registry is an independent organ of the Tribunal. According to Mundis there are several examples of rules that impinge upon the independence of the Registry and which consequently may be *ultra vires* the Statute. Rule 19 (A), for example, provides that the President shall supervise the activities of the Registry. In addition, Rule 33 describes the functions of the Registrar and includes a provision putting the Registrar under the authority of the President.¹²³ Mundis suggests that there is no reason why guidelines pertaining to the functioning of the Registry need to be addressed in the Rules. In his opinion these provisions could be re-evaluated to ensure compliance with the Statute and could be placed in administrative directives or internal regulations.¹²⁴

Thus far, no rule has been struck down by a Trial Chamber or the Appeals Chamber on the ground that it is *ultra vires*. It remains to be seen whether a Trial Chamber or the Appeals Chamber would do so. The Rules relating to the contempt provisions and sanctions are the most likely Rules to be challenged on the grounds that they may be *ultra vires*.

Although the ICTY has not yet been faced with significant contemptuous behaviour, the possibility of a challenge remains. Since the judges before whom the argument was made may have themselves adopted the Rules in question it could be argued that it is unlikely that they will find they exceeded their authority by doing so.

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2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor , issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be requested for the conduct of the trial.

¹²¹ D Hunt "The Meaning of a "prima facie case" for the purposes of confirmation" in R May (et al) (eds.) *Essays on ICTY Procedure and Evidence I Honour of Gabrielle Kirk McDonald* 146 (emphasis in original; footnotes added).

¹²² Mundis (note 89) 17.

¹²³ Mundis speculates that the reason for the difficulty with the Rules relating to the functioning of the Registry concerns the issue of whether the Rules should regulate this matter at all. Although Article 15 is broad enough to include 'other appropriate matters' within the ambit of the Rules it is argued that matters pertaining to the administrative or internal functioning of the Tribunal are best left to internal directives or other administrative guidelines. *Ibid*.

¹²⁴ *Ibid* 19.

Another interesting case in this regard is the *Vujin Appeals Chamber* decision.¹²⁵ In this case, the ICTY Appeals Chamber held, with Judge Wald dissenting, that it had jurisdiction to hear an appeal on the merits from one Appeals Chamber bench to another, notwithstanding the fact that the ICTY Statute does not provide for such jurisdiction. Mr Vujin appealed the decision made by the Appeals Chamber, sitting as court of first instance, which found him to be in contempt and levied the fine of f15, 000 against him. This forced the issue of whether a right of appeal existed in the event that the Appeals Chamber had been the original body to render the judgment. The Appeals Chamber, relying on general principles of law that all judicial decisions be subject to a right of appeal, determined that an appeal was possible. Judge Wald dissented on the grounds that she could find no legal basis for permitting an appeal from one Appeals Chamber bench to another.¹²⁶

Short of plenary action, there appears to be no mechanism for the Chambers to abolish rules that may be *ultra vires*.

13. The *Barayagwiza Appeals Chamber Decision*

The clearest example of a case in which the judges amended the Rules for political reasons is the case of Jean-Bosco Barayagwiza. Barayagwiza was accused of six counts of violations of international humanitarian law stemming from his acts during the Rwandan genocide.¹²⁷ He was a member of the radical Hutu party 'Coalition for the Defence of the Republic' and one of the founders of 'Radiotelevision Libre des Mille Collines', which incited hatred against the Tutsi population. It was Barayagwiza's prolonged pre-trial detention that caused controversy.¹²⁸

Barayagwiza was arrested in the Cameroon pursuant to international arrest warrants issued by Rwanda and Belgium on 15 April 1996. On 16 May 1996, the Prosecutor of the ICTR notified Cameroon that the Tribunal was no longer interested in Barayagwiza's transfer. On 17 February 1997, Cameroon's courts denied Rwanda's extradition request and ordered Barayagwiza's release. On the same day, however, the Prosecutor again asked that Barayagwiza be held pending a decision on the transfer request. On 24 February 1997 the Prosecutor decided to follow through with her transfer request. However, Barayagwiza was not sent to Arusha, the seat of the ICTR, until 19 November 1997. On 23 February 1998 he pleaded guilty to all counts against him. On the next day, Barayagwiza filed an

¹²⁵ *Prosecutor v Tadic* IT-94-1, Appeal Judgment on Allegations of Contempt against prior counsel, Milan Vujin, 27 February 2001.

¹²⁶ Judge Wald found that the majority of the court decided that the judgment of the first Appeals Chamber was a ruling in the 'first instance' and did not rectify what she called a 'fatal omission' in the Rules and Statute. See *Prosecutor v Tadic* IT-94-1, Separate Opinion of Judge Wald Dissenting from the Finding of Jurisdiction 2.

¹²⁷ Amended Indictment *Prosecutor v Barayagwiza* ICTR-97-19, 11 April 2000.

¹²⁸ For more on the 'halting pace of adjudication at the ICTR' see Eric Husketh 'Pole Pole: Hastening Justice at UNICTR' (2005) 3 *Northwestern University Journal of International Human Rights*.

‘extremely urgent motion’ that sought to throw out his arrest because he claimed, *inter alia*, that he had been illegally detained. The Trial Chamber of the ICTR denied the motion¹²⁹ and an appeal was filed as a preliminary motion pursuant to Rule 72. But on 3 November 1999, in the *Barayagwiza Appeals Chamber Decision*, the Appeals Chamber reversed this decision and ordered that Barayagwiza be returned to Cameroon because the length of his detention has been far beyond what would be allowed by international human rights standards. The Appeals Chamber decided that the fundamental rights of the Appellant had repeatedly been violated and that the prosecution’s failure to prosecute the Appellant was tantamount to negligence. The indictment against Barayagwiza was dismissed and the Appeals Chamber ordered his immediate release. He was however not set free immediately since the prosecution submitted a motion for review.¹³⁰

In the *Barayagwiza Appeals Chamber Decision* the court stated that Rule 40 and 40 bis had to be read together. Rule 40 sets forth in great detail, the provisions for the transfer and provisional detention of suspects. The Appeals Chamber proceeded to read the two provisions together and concluded that these Rules must be interpreted restrictively. The Chamber stated:

Rule 40 permits the Prosecutor to request any state, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40 *bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40 *bis* places time limits on such detention if the suspect is detained at the Tribunal’s detention unit.¹³¹

The Appeals Chamber undertook an analysis of the two Rules and discussed the time frame under which the provisional detention of a suspect was permissible. With respect to Rule 40, the Appeals Chamber found that the facts of the case notes that the time frame set out in Rule 40 *bis* (C) did not begin to run until the day after the suspect had been transferred to the Tribunal’s detention unit.¹³² The Appeals Chamber came to the conclusion that the purpose of Rule 40 and Rule 40 *bis* is to limit the time that a suspect may be provisionally detained without the issuing of a warrant. The Chamber concluded that if the time limits set forth in Rule 40 and Rule 40 *bis* (H) are not complied with, the Rules mandate that the suspect must be released.¹³³

¹²⁹ *Prosecutor v Barayagwiza Decision on Extremely Urgent Motion by the Defense for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect*, ICTR-97- 19, 17 November 1998.

¹³⁰ For a summary of the facts see JK Cogan ‘International Criminal Courts and Fair Trials: Difficulties and Prospects’ (2002) 27 *Yale Journal of International Law* 134, 135.

¹³¹ *Barayagwiza Decision* para 46. Footnote 127 in the decision discusses the principle of effective interpretation (*ut res magis valeat quam pereat*) which the Appeals Chamber relied upon in deciding to read the two Rules together and restrictively.

¹³² *Ibid* para 53.

¹³³ *Ibid*.

The Appeals Chamber concluded that the Appellant was detained at the behest of the Prosecutor from 21 February onwards, notwithstanding the fact that he was only transferred to the Tribunal's detention unit on 19 November 1997.¹³⁴ The judges concluded that Cameroon was 'holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority'.¹³⁵

According to Mundis, the interpretation given by the Appeals Chamber to Rule 40 *bis* resulted in a *de facto* amendment to that Rule.¹³⁶ This was the case notwithstanding the language of paragraph 60 of the *Barayagwiza Decision* which purports to limit the decision to the facts of this case. Since the Appeals Chamber has no authority to change the Rules, it is unlikely that it would explicitly state that it was effecting an amendment. Mundis explains why he regards this 'interpretation' as a *de facto* amendment: It is almost impossible to imagine a scenario where the procedure set out in Rule 40 and Rule 40 *bis* would not meet the constructive custody criteria as set out in the *Barayagwiza Decision*. In other words, whenever a State holds a suspect pursuant to Rule 40 that State will always be doing so as an agent of the Tribunal and consequently, the accused will always be in the Tribunal's custody.¹³⁷ There will never be a case where the accused is kept in the custody of the Cameroon (or another country) and not *also* be kept in the custody of the Tribunal. The important result of this is that Rule 40 *bis* (C) which provides that the time limits set out in Rule 40 *bis* do not start to run until after the suspect has been transferred to the detention unit has been rendered meaningless. Because the Appeals Chamber does not have the authority to amend the Rules, it will seek to limit its decision to the specific case in front of it. Yet, when confronted with two 'irreconcilable' Rules, as in the *Barayagwiza* case, the interpretation agreed upon by the judges might result in an 'amendment' which would inevitably affect other similar cases.

It is submitted that interpreting rules in a way that could have the same effect as an amendment is more acceptable than changing a rule in a plenary session and less of an infringement on the principle of legality. Judges interpret law every time they decide on the meaning of a law. Interpretation is considered less of a usurpation of the 'legislative' role than explicit acts of lawmaking.¹³⁸

14. The *Barayagwiza* Reconsideration Decision

The first decision of the Appeals Chamber to release Barayagwiza unleashed a storm of criticism by the Rwandan Government against the Tribunal and the Rwandan Government threatened to withhold all forms of cooperation with the

¹³⁴ Ibid para 54.

¹³⁵ Ibid paras. 55-60.

¹³⁶ Mundis (note 89) 13.

¹³⁷ Ibid

¹³⁸ Judge Wald agrees that rulemaking is a legislative task (note 71).

ICTR.¹³⁹ Without the cooperation of the Rwandan Government the ICTR could not have continued its work. The ICTR Prosecutor was confronted with the very real possibility that the ICTR would disintegrate and assured the Rwandan government that she would do everything in her power to convince the Appeals Chamber to reverse its decision.

While the *Barayagwiza Reconsideration Decision* was pending, the ICTR judges met in Arusha at the seventh ICTR Plenary meeting and amended Rule 72. The judges added Rule 72 (H) to further define what constitutes ‘an objection based on the form of the indictment’, thereby limiting appeals under Sub-Rule 72 (B)(i) and Sub-Rule 72 (D). Sub-Rule 72 (I) was added which requires a bench of three Appeals Chamber judges to review appeals brought under Sub-Rule 72 (D) to ensure that the new requirements set out in Sub-Rule 72 (H) were met.¹⁴⁰

The effect of this amendment was that whereas under the original Rule, an accused could file an interlocutory appeal as of right from a Trial Chamber decision regarding the legality of his arrest, the amendments made to Rule 72 made such an appeal virtually impossible. Rule 72 D states that preliminary motions are *without* interlocutory appeal except under very limited circumstances. Fear that other accused could challenge the legality of their arrest which would lead to similar problems, might have prompted the judges to amend this Rule in such a restrictive and conservative manner. The procedural precedent set by the *Barayagwiza Decision* whereby an accused could challenge the legality of his arrest, detention and transfer to the custody of the Tribunal, was reversed by the amendment to Rule 72. Any future appeal under Rule 72 concerning issues surrounding unlawful arrest, detention or transfer would fail under the new test set forth in ICTR Sub-rule 72 (H) and (I).

On 31 March 2000, following a rehearing in light of the Prosecutor's Motion for Review,¹⁴¹ the Appeals Chamber reversed the holding of the *Barayagwiza Decision*. On the basis of new information before it, the Appeals Chamber found that the

¹³⁹ Rwanda refused to grant a visit to the ICTR Prosecutor and Rwanda refused to allow sixteen Rwandan witnesses to travel to the court to testify. See ‘Rwanda Bars UN Tribunal Prosecutor; Visa Refused After Court Freed Genocide Suspect’ *Washington Post* 23 November 1999 at A24.

¹⁴⁰ As amended on 21 February 2000, Sub-Rules 72 (H) and (I) read as follows:
72(H) For the purpose of Rule 72 (B) (i) and (D), an ‘objection based on lack of jurisdiction’ refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute,
- (ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
- (iii) any of the violations indicated in Articles 2,3,4 and 6 of the Statute

(I) An appeal brought under Rule 72 (D) may not be proceeded with if a bench of three judges, assigned by the Presiding Judge of the Appeals Chamber, decides that the Appeal is not capable of satisfying the requirements of paragraph (H), in which case the Appeal shall be dismissed.

¹⁴¹ The Review was filed pursuant to Article 25 of the ICTR Statute.

Appellant was already aware of the general nature of the charges against him by 3 May 1996 (an earlier date than the date claimed by the Defence) and that the delay in transferring the Appellant to the seat of the Tribunal could not be attributed to the Prosecutor but was due to the attitude of the Cameroon.¹⁴²

This is an example of a case where the judges in Plenary reversed a decision of a Trial Chamber by enacting a subsequent amendment to the Rules. It is submitted that an amendment to the Rules should only be made in exceptional circumstances and not to change the effect of a single judgment. Several other detainees have also been arrested and transferred in circumstances similar to those forming the basis of the *Barayagwiza* appeal. In light of the strong reaction of the Rwandan government to the *Barayagwiza* decision it would be safe to assume that the amendment made to Rule 72 was made in response to this decision. It is of course undesirable to amend rules because of political considerations. However it could be argued that this was a case of political *necessity* and that the law is often influenced by policy considerations.

In a dissenting opinion to the *Barayagwiza Reconsideration Decision*, Judge Shahabuddeen stated that the way the Appeals Chamber interpreted Rule 40 and Rule 40 *bis* was ‘directed at changing the substance of the purpose of the text’ and amounted to legislation instead of interpretation.¹⁴³ In his commentary on the case, Swart writes that the conclusions reached by the Appeals Chamber are not warranted by a literal reading of these Rules.¹⁴⁴ According to Swart it is obvious from the text of Rule 40 that the relevant time periods start to run from the moment a suspect is transferred to the Tribunal and no earlier.¹⁴⁵ If one interprets the Rule in this way no violation of the rights of the accused had occurred. It seems that the Appeals Chamber, worried by the implications of a literal interpretation, which could mean that an accused could be held in provisional detention in a State for an indefinite period, borrowed the ‘constructive custody’ concept from the case law of the United States on interstate extradition to solve the problem. It could also be argued that amending rules could be undesirable in itself (as it threatens legal certainty) regardless of whether the amendment may benefit the accused. According to Swart the Tribunal could have found solutions, other than amendment, to protect the suspect against unwarranted delays, for example by referring to Article 20 of the ICTR Statute which is concerned with

¹⁴² The Appeals Chamber also found that the initial appearance of the Appellant was deferred with the consent of his counsel. In the opinion of the Appeals Chamber all of these facts diminished ‘the role played by the failings of the Prosecutor as well as the intensity of the violations of the rights of the Appellant’. It was decided that if the Appellant was found not guilty he should receive financial compensation for the violation of his rights. On the other hand, if he were to be found guilty, his sentence should be reduced to take account of the violation of his rights. See the Commentary by B Swart in A Klip, G Sluiter (eds) *Annotated Leading cases of International Criminal Tribunals, The International Criminal Tribunal for Rwanda* (1999) 207.

¹⁴³ Separate Opinion of Judge Shahabuddeen, 3 November 1999.

¹⁴⁴ *Ibid* 199.

¹⁴⁵ *Ibid*.

the rights of the accused.¹⁴⁶ It could also be argued that amending rules could be undesirable in itself (as it threatens legal certainty) regardless of whether the amendment may benefit the accused.

15. Abuse of discretion? The *Kupreskic* Deposition Decision

The Appeals Chamber Decision on depositions in *Kupreskic and Others*¹⁴⁷ provides a good example of a situation in which the judges disapproved of a decision on the grounds of the application of a rule. In this case, the Appeals Chamber was faced with an interlocutory appeal from a decision of the Trial Chamber relating to depositions taken pursuant to Rule 71.

The facts of the *Kupreskic Deposition Decision* are as follows: During the trial proceedings the Presiding Judge informed the parties that one of the judges was ill and was unlikely to attend the hearings for the remainder of the week. Following prompting by the Presiding Judge the Prosecution requested that depositions be taken pursuant to Rule 71 from the defence witnesses scheduled to be heard during this time period. Counsel for the accused opposed this motion on the ground that the full trial Chamber should hear such evidence since the witnesses were going to give evidence /testify on specific facts relating to the charges against the accused. The Presiding Judge made a written ruling the following day overruling the defence objection. The grounds were that the circumstances were exceptional and that the interests of justice demanded a fair and expeditious trial.¹⁴⁸ Two defence witnesses proceeded to testify by way of deposition. As a third defence witness was about to depose, the defence filed an application for leave to appeal under Rule 73 and the deposition proceedings were discontinued.

The Appeals Chamber, with Judge Hunt filing a separate opinion but concurring in the result, reversed the Trial Chamber, relying *inter alia* on the *plain and ordinary meaning* of Rule 71, Article 12 and Rule 15 (E).

Rule 71 provides that a Trial Chamber may order that a deposition be taken, whilst article 12 of the Statute stipulates that a Trial Chamber shall be composed of three Judges. Given the plain and ordinary meaning of the latter provision, a Trial Chamber is only competent to act as a Trial Chamber *per se* if it comprises three Judges. The Appeals Chamber, therefore, finds that the ruling was null and void since it was rendered without jurisdiction with regard to [the defence witnesses] heard pursuant to the ruling.¹⁴⁹

The rules underlying the *Kupreskic Deposition Decision* were subsequently amended at the twenty-first Plenary, held on 15- 17 November 1999 - four months after the decision was rendered. Sub-rule 15 (e) and (F) were deleted and a new rule, Rule 15 *bis* was adopted covering situations where the judges are absent for a period of

¹⁴⁶ Ibid.

¹⁴⁷ *Prosecutor v Kupreskic and Others*, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, IT-95-16-AR73.3, 15 July 1999 (*'Kupreskic Deposition Decision'*).

¹⁴⁸ Mundis (note 89) 11.

¹⁴⁹ *Kupreskic Deposition Decision* (note 147) para 14.

less than three days. Rule 71 was also amended, removing some of the procedural hurdles in adopting the deposition procedure.¹⁵⁰

The judges abused their discretion by amending Rule 71. Does the illness of a judge really constitute ‘exceptional circumstances’? It is submitted that the defence was entitled to have the depositions heard by the full Trial Chamber and that the judges amended this Rule because it resulted in an *unsatisfactory* outcome. It must be asked whether the judges should always be satisfied by the outcome of a Rule. Is it not the function of a judge to apply a Rule even if it is inconvenient or does not suit his purposes?

16. Amending to Expedite

The ICTY has often been criticised for the slow pace at which the trials are proceeding. In their current preoccupation with expediting trials the judges are faced with the challenge of reconciling the human rights guarantees enshrined in the Statute of the ICTY with the competing need to expedite proceedings. The ICTY judges have publicly acknowledged the need to expedite trials.¹⁵¹ Apart from considerations of procedural fairness, an important reason for expediting trials is the rapid growth in the number of accused at the ICTY. According to Mundis there has been an evolution of the Rules from a system driven primarily by the parties to a system in which judges play a more active role.¹⁵²

An example of an amendment that had a drastic impact on the expedition of trials is the amendment of Rule 89 and the adoption of Rule 92 *bis*. At the twenty-third Plenary session of the ICTY in December 2000, the judges adopted Rule 92 *bis* entitled ‘Proof of Facts other than by Oral Evidence’. The purpose of this Rule is to enable a Trial Chamber to admit into evidence written statements containing evidence which would otherwise be led in testimonial form.¹⁵³ Rule 92 *bis* has already had a dramatic impact on the way parties present their cases. Another good example is the application made to the Registrar in the *Plavsic* case, in which the prosecution identified 170 witnesses from whom it wished to present written statements pursuant to Rule 92 *bis* (A).¹⁵⁴

¹⁵⁰ One of the consequences of this amendment was to override a decision of the Appeals Chamber that a Chamber could not sit in deposition with less than a full bench over an objection by one of the parties.

¹⁵¹ See the seventh Annual Report of the ICTY, A/55/273-S/2000/777, 7 August 2000. The ICTY judges brought the issue to the attention of the ICC PrepComm in the hope that the ICC will not be troubled by similar difficulties. See the remarks of Judge Richard May at Fourth Session of the ICC PrepComm released as ICTY Press Release JL/PIS/479-E available at <http://www.un.org/icty/pressreal/p491-e>.

¹⁵² Mundis (note 45) 369.

¹⁵³ Boas (note 11) 73.

¹⁵⁴ *Prosecutor v Plavsic and Krajcanik* IT-00-39 & 40-PT, Application to the Registrar for Presiding Officers Pursuant to Rule 92*bis*, 7 May 2001.

Amendments were also made to Rule 89, entitled 'General Provisions' which amended the preference for live witness testimony. Prior to the amendments, Rule 90 (A) indicated a preference for live testimonial evidence: 'Subject to Rule 71 and 71 *bis*, witnesses shall, in principle, be heard directly by the Chambers'. At the Plenary, Rule 90 (A) was deleted and Rule 89 (F) created: 'A Chamber may receive the evidence of a witness orally, or where the interests of justice allow, in written form'. It is not yet clear what is meant by the words 'in the interests of justice' in this context¹⁵⁵.

The judges were given the power to control the amount of evidence received during a trial. The Trial Chambers have exercised their power to control the evidence that will be admitted into proceedings.¹⁵⁶ Rule 90(G), a new provision, was added¹⁵⁷ which specifically provides that a Trial Chamber 'may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C)'. As a result the judges now not only see the witness list but, where a party seeks to present a witness not previously agreed to, the judges may refuse the evidence. This provision, and other similar provisions, give judges substantial power over the conduct of the proceedings. The idea was to narrow the facts in issue at the pre-trial stage.

The judges also amended rules regarding pre-trial management. At the twenty first Plenary session the judges overhauled the pre-trial case management provisions at the Tribunal. Rule 65*ter* was amended in November 1999 so as to increase the pre-trial judge's powers in the conduct and preparation of the pre-trial proceedings. The amendments in this context broaden the powers and functions of the pre-trial judges. It was believed that better pre-trial management will result in speedier trials.¹⁵⁸ The pre-trial judge may submit a file to the Trial Chamber which will form the basis of orders given by the trial chamber to the prosecution or the defence to reduce the list of witnesses.¹⁵⁹ Judge Jorda's reform programme proposed that some of the powers of the pre-trial judge with regard to judicial administration be delegated to the senior legal officers of the Trial Chambers and the adoption of *ad litem* judges.¹⁶⁰ To achieve this, Rule 65 was amended on 17 November 1999. Rule 65 *ter* (D) (i) states that a pre-trial judge may be assisted in the performance of his duties by one of the Senior Legal Officers assigned to Chambers.

Amendments were also made to restrict the amount of witnesses parties may call. Rule 73 *bis* and Rule 73 *ter* were amended to enable the Trial Chamber to set the

¹⁵⁵ For an extensive discussion of the history of this amendment, see Boas (note 11) 73-78.

¹⁵⁶ See the discussion of case management in Boas (note 11) 60-72.

¹⁵⁷ At the extraordinary session of the plenary in April 2001.

¹⁵⁸ Encompassing Rule 72, 73*bis*, 73 *ter* and 90

¹⁵⁹ The file might include a report by the pre-trial judge, highlighting the issues which truly warrant litigation at trial. This is intended to give more teeth to the Trial Chamber's case management.

¹⁶⁰ Jorda Report (note 40) paras 93 – 95.

number of witnesses parties may call as well as the length of time available to the parties to conduct their case.¹⁶¹ Rule 65 *ter* (D) provides that the pre-trial judge must establish a work plan setting forth the pre-trial obligations of the parties. The pre-trial judge will order the parties to meet and discuss questions relating to the preparation of the case.¹⁶²

Another time-saving device is Rule 87 (C). This rule was added to permit the Trial Chamber to render one combined verdict which includes sentence.¹⁶³ This obviated the need for a separate sentencing hearing. This means that the parties are permitted to introduce evidence that is relevant for sentencing purposes during the trial and prior to conviction.¹⁶⁴

One of the measures implemented to improve efficiency at the Tribunals was the appointment of *ad litem* judges. Provision was made for the appointment of a pool of 27 *ad litem* judges to increase the capacity of the Trial Chambers to hear cases. Twenty three rules were amended to bring the Rules in line with the statutory limitations on the duties of *ad litem* judges and to limit their role to trial functions.¹⁶⁵

The Rules of the ICC have been influenced by the ICTY Rules. The ICC Rules mirror the ICTY and ICTR Rules in many respects.¹⁶⁶ The ICC Statute, for example, establishes a pre-trial division of six judges,¹⁶⁷ imbues the pre-trial judge with many powers, including the power to authorise the Prosecutor to conduct an investigation¹⁶⁸ and making orders dealing with the investigation, victims and witnesses and the preservation of pre-trial evidence.¹⁶⁹ The ICC Statute and Rules, do not however contain some of the radical provisions under the ICTY Rules which gives far-reaching powers to the pre-trial judges.

The judges of the ICC might opt for a more jurisprudential oriented development of its Rules. Instead of re-codifying the developments as has happened at the *ad hoc* Tribunals, the ICC, if it wants to amend its Rules, may do so through the development of precedent as part of the interpretation and application of its

¹⁶¹ Rule 73*bis* (E); Rule 73*ter* (E). Parties may be granted additional time 'if this is in the interest of justice'. Rule 73*bis* (F); Rule 73*ter* (F).

¹⁶² Rule 65*ter* (D) (v).

¹⁶³ See Mundis (note 45) 372.

¹⁶⁴ Rule 86 has been clarified to permit the parties to address sentencing matters in their closing arguments.

¹⁶⁵ The following rules were amended to indicate the distinction between permanent and *ad litem* judges: 2, 6, 7*bis*, 17, 18, 20, 22, 23, 24, 25, 26, 27, 28, 30, 40*bis*, 45, 55, 59*bis*, 62, 65*bis*, 65*ter*, 9*bis* and 124. See D. Mundis 'The Election of *Ad Litem* Judges and Other Recent Developments at the International Criminal Tribunals' (2001) 14 *LJIL* 858.

¹⁶⁶ Boas (note 41) 277.

¹⁶⁷ Rome Statute of the International Criminal Court Article 39 (1).

¹⁶⁸ *Ibid* Article 15 (4).

¹⁶⁹ Rome Statute of the International Criminal Court Articles 57 and 58.

Rules.¹⁷⁰ Such an approach would be less likely to infringe upon the principle of legality. Since the ICC Rules are more comprehensive than the ICTY and ICTR Rules, they may escape the need for significant re-evaluation and amendment.

It should be noted that expedition is not necessarily in favour of the accused if the amendments made to expedite trials infringe on the rights of the accused in other ways. Hurried justice could also be justice denied. It is important that, when a trial has already started, an amendment should only be made if it is ultimately in favour of the accused. The accused should benefit from such an amendment both procedurally and substantively. Pre-trial management should not lead to pre-judging. Doubt can be cast on the practice of extending powers traditionally held by judges to senior legal officers. Legal officers are not subject to the same requirements of independence and impartiality expected of judges. There is no doubt that expeditious trials are important but it can be asked whether the ICTY is not overzealous in its amendment of the Rules in an attempt to compensate for its earlier inefficiency and delays.¹⁷¹ In 1998 Judge Gabrielle Kirk McDonald warned against rushed trials: 'We should not force ourselves into a grand prix race. Our goal is not to try cases with lightning speed, but to try cases making efficient use of court time.'¹⁷²

17. Conclusion

What happens to the rules is important. According to Franck it is the object of the Rules of Procedure and Evidence to manifest the fairness of the judicial process in dispute resolution.¹⁷³ Changes to the Rules should be made with sensitivity to procedural fairness and the principle of legality. The principle of legality requires rules to be fixed, clear and certain. Although it is possible that some amendments could fill gaps in the Statute, eliminate shortcomings and illuminate obscurities, frequent amendments clearly pose a serious threat to legal certainty. The accused should be in a position to prepare a defence without fearing that his trial may be upset by the making of amendments.

The 'Tribunals' response to objections regarding the frequency and nature of amendments has been unsatisfactory, almost dismissive. Their pronouncements are often highly rhetorical with continued emphasis being laid on the 'inevitability' of changing the Rules and 'the need for flexibility'. In spite of the 'Tribunals' alleged concern for procedural fairness it is feared that prodigious procedural lawmaking may result in inadequate protection of the rights of the accused.

¹⁷⁰ Boas (note 41) 276.

¹⁷¹ Judge Patrick Robinson wrote: 'The challenge facing the Tribunal is to ensure that it does not overreact to concerns of the international community about the slow pace of trials, by devising procedures that facilitate expeditiousness, but which infringe the rights of the accused.' See P Robinson 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *EJIL* 589.

¹⁷² ICTY Press Release, 16 July 1998.

¹⁷³ T M Franck *Fairness in International law and Institutions* (1995) 327

In light of the controversial, some say thin, basis for their authority,¹⁷⁴ the judges should be more circumspect when making and amending rules. Alternative solutions could be found to the making of amendments. In a case such as the *Barayagwiza Decision* where the Tribunal was confronted with seemingly conflicting rules, the judges may make use of rules or conventions of interpretation to solve the conflict. Introducing a procedure for the review of proposed and amended rules will help the judges maintain their authority and credibility. The current practice of frequently changing rules could strengthen the perception that the judges are the creators and not the adjudicators of substantive rights at the Tribunals.

¹⁷⁴ See the questions relating to the legality and legitimacy of the establishment of the Tribunals in Chapter 1. The ‘political’ nature of judicial appointments, discussed in Chapter 3, could also taint the legitimacy and authority of the judges at the Tribunals.

CONCLUSION

May Tribunal judges make law? The Report of the Secretary General is unambiguous on this matter. It states that the ICTY can apply only *lex lata*, existing law.¹ This is consistent with how the Tribunals have interpreted their mandate. It was argued in *Tadic* that the Security Council could not create criminal liability on the part of individuals.² Since the Tribunals were created by the Security Council the *ad hoc* Tribunals could similarly not *create* such liability.

If however one interprets 'law' broadly, as including both written and unwritten law, substantive and procedural law, hard law and soft law, it is difficult to maintain that Tribunal judges have not made law. If, moreover, one compares the function and position of Tribunal judges to the functions of ICJ judges and if one interprets the mandate and role of the Tribunals liberally one has to allow for some judicial creativity. The need for judicial lawmaking has long been recognised at the ICJ. To repeat the words of Judge Tanaka: 'We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm.'³ Since the *ad hoc* Tribunals, similar to the ICJ, are legal organs of the United Nations what is true for the ICJ must be true *a fortiori* for the *ad hoc* Tribunals who face the additional obstacle of having to apply the underdeveloped system of international criminal law.

What are the arguments in favour of and against judicial lawmaking at the Tribunals? What are the arguments in favour of judicial restraint? It is argued here that these questions cannot be considered without considering the peculiarities of international criminal law as well as the particular context of the *ad hoc* Tribunals.

There seems to be many arguments in favour of accepting or permitting judicial lawmaking in the sphere of international criminal law and specifically at the Tribunals. The most important arguments addressed in this study are the following:

(i) International criminal law is a rudimentary form of law.⁴ It has been argued that the unwritten rudimentary nature of international criminal law affects the lawmaking of international judges. The unwritten nature of rules of international

¹ *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) (presented 3 May 1993) (S/25704) para 34.

² *Prosecutor v Tadic* IT-94-1-T [Decision on the Defence Motion on Jurisdiction](#), 10 August 1995, para 2.

³ *South West Africa, Second Phase*, Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka, *ICJ Reports* 1966, 277.

⁴ See A Cassese *International Criminal Law* (2003) 17.

criminal law makes these rules relatively indeterminate.⁵ It also makes the rules more flexible and easy to manipulate. Because there is less law and less precedent in international criminal law, making law would be more appropriate than in a system of written rules. Instead of being passive law appliers, Tribunal judges must be understood as builders of a system.

(ii) The humanisation of humanitarian law is an argument in favour of extending the protection of humanitarian law to areas that have previously been unaffected by humanitarian law. In this regard Meron writes of the ‘strong pull towards normativity’.⁶ In the spirit of the Martens Clause one would argue that international humanitarian law should be interpreted consistently with the principles of humanity. This idea is reflected in Shahabuddeen’s Opinion in the *Nuclear Weapons* case in which he stated that ‘in effect the Martens Clause provided authority for treating the principles of humanity and the dictates of the public conscience as principles of international law’.⁷

Tadic provides one of the best examples of the maximum extension of the protection of humanitarian law. In the *Tadic* Appeals Judgment it is stated that Article 4 of the Fourth Geneva Convention is directed at protecting civilians to the maximum extent possible.⁸ It seems as if the Appeals Chamber uses the ‘maximum protection’ argument as a justification to extend the law at the possible risk of violating the principle of legality.

The protection of humanitarian law has also been extended through the use of purposive interpretation. This mode of interpretation advances the purpose of the ICTY Statute: to provide a criminal forum for the punishment of those who have perpetrated especially serious violations of international humanitarian law.⁹ In the *Tadic* case the Appeals Chamber decided to abandon the literal definition of protected persons and (in the spirit of purposive interpretation) focused more on the factor of allegiance than formal nationality in determining the protective regime.¹⁰ By finding that the Bosnian Serbs acted as *de facto* agents of another state (the FRY), the Appeals Chamber also expanded the scope of protection of humanitarian law.¹¹

(iii) The Martens Clause also influences the formation of custom. Cassese writes that, because of the influence of the Martens Clause *usus* and *opinio juris*, elements

⁵ Ibid.

⁶ T Meron ‘The Martens Clause, Principles of Humanity and the Dictates of the Public Conscience’ (2000) 94 *American Journal of International Law* 78.

⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, Dissenting Opinion of Judge Shahabuddeen, ICJ Reports, 1996, 226, 406.

⁸ *Prosecutor v Tadic* IT-94-1-A, 15 July 1999 para 168.

⁹ A M Danner & J S Martinez ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 *California Law Review* 132

¹⁰ *Tadic* (note 8) para 163 – 169.

¹¹ Ibid para 168.

of customary law, play a different role in humanitarian law than in international law generally.¹² According to him it seems 'logically permissible' to infer that the requirement of state practice does not need to apply to the formation of a principle or rule based on the laws of humanity or dictates of public conscience.¹³ This has a dramatic impact on the sources of international criminal law and leads to a loosening of the standards applied to determine the existence of custom. This 'loosening' of the criteria for establishing custom facilitates and encourages lawmaking.

The *Kupreskic* case is an example of a case in which the judges resorted to the Martens Clause in the absence of sufficient state practice for the determination of custom. In considering the question of the legality of reprisals against civilians, the Trial Chamber in *Kupreskic* examined whether states not party to Protocol 1 were nevertheless bound by the rules on reprisals. The Trial Chamber conceded that state practice did not support the proposition that custom had evolved on this subject but nevertheless found that in this area *the imperatives of humanity or public conscience* weighed heavily in its favour and that from those imperatives it was possible to deduce *opinio necessitatis*, which was sufficient to establish customary law.¹⁴

(iv) Some argue that in the context of international adjudication judges need not be as constrained by the principle of legality as would be the case in national jurisdictions. With regard to the applicability of *nullum crimen sine lege*, Bassiouni and Manikas point to various factors that need to be taken into account specifically in the context of international criminal law.¹⁵ These factors include the lack of international legislative policies and standards, the *ad hoc* process of technical drafting and the assumption that international criminal law norms will be embodied in the national criminal norms of various states.¹⁶ Bassiouni writes that the principle of legality should be adjusted in international criminal law and should take the form of *nullum crimen sine iure* – no crime without *some* law.¹⁷ What is still required is the existence of a legal prohibition arising under conventional or customary international law declaring certain conduct to be prohibited or punishable. Somewhat similarly, Triffterer argues that it is only the 'core' of the principle of legality that applies in international law.¹⁸ According to Triffterer this 'core' is the principle that, in order to prevent arbitrariness every state

¹² A Cassese *International Law* (2001) 122.

¹³ *Ibid.*

¹⁴ *Prosecutor v Kupreskic* IT-95-16, 14 January 2000

¹⁵ M C Bassiouni & P Manikas *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 265.

¹⁶ *Ibid.*

¹⁷ *Ibid.* 290.

¹⁸ O Triffterer 'Bestandsaufnahme zum Völkerrecht', in G Hankel & G Stuby (eds) *Strafgerichte gegen Menschengenichtsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (1995) 169 – 269, 219.

infringement on the liberty of individuals must be bound to an existing norm.¹⁹ Bassiouni and Triffterer suggest that the principle of legality can be loosened or relaxed in the context of international criminal law.²⁰ This shows an acceptance of a measure of judicial activism.

(v) An ‘historical’ argument can be made that because lawmaking took place (even to the extent of infringing the *nullum crimen* principle) at Nuremberg and Tokyo, lawmaking should similarly be acceptable at the *ad hoc* Tribunals. The inclusion of the crime against the peace (the ‘supreme crime’) in the Nuremberg Charter, was very controversial and would be one of the best examples of an innovative Charter provision which violated the principle of legality.²¹ It is argued here that because of the historical, symbolic and moral authority of the Nuremberg trials lawmaking at Nuremberg set a precedent for lawmaking at the ICTY and ICTR.

(vi) Lauterpacht writes that it is the indirect purpose of the ICJ to develop international law.²² This view is supported by pronouncements made by other ICJ judges. Judge Shahabuddeen disagreed with the idea that the ICJ may only develop the law in the limited sense of bringing out the true meaning of existing law in relation to particular facts.²³ Judge Alvarez finds it difficult to say where development ends and where the creation of law begins.²⁴ Judge Tanaka similarly stated that the line between declaring the law and making the law is very fine and difficult to determine.²⁵ He makes provision for some creative element and for the filling of some lacunae in the law. It may be argued that the ICJ, as an organ which can be expected to develop international law should take a wide interpretation of the scope of its task.²⁶ It is argued that the increasing importance and relevance of the jurisprudence of the Tribunals also calls for ‘wider application’ of the scope of the task of the Tribunals. It is argued here that development of international criminal law can be seen as one of the *purposes* of the Tribunal. This is an argument in favour of bold judicial action at the Tribunals.

Judges avoid the use of terms suggesting that they make law and prefer to use terms which indicate that all they are doing is to work out the true meaning of existing legal principles – they are just interpreting or developing the law. However, when judges interpret law or do what they consider to be ‘developing’

¹⁹ Ibid.

²⁰ Ibid.

²¹ M Boot *Genocide, Crimes Against Humanity, War Crimes, Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2001)186, 187.

²² H Lauterpacht *The Development of International Law by the International Court* (1958) 66.

²³ M Shahabuddeen *Precedent in the World Court* (1996) 68.

²⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, Individual Opinion by Judge Alvarez, *ICJ Reports*, 1949, 190.

²⁵ *South West Africa, Second Phase*, Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka *ICJ Reports* 1966, 277

²⁶ Lauterpacht (note 22) 83.

the law they are often making law. In this study the term 'lawmaking' has not covered every application and interpretation of the law. The term 'lawmaking' was understood as covering instances where the Tribunals extended the law to new areas or filled legal gaps.

(vii) If one accepts Lauterpacht's view that the finding of a *non liquet* in international law is prohibited, such prohibition could also operate in favour of judicial activism. The *non liquet* doctrine is premised on the idea of international law as a complete system and arises when a court refuses to give a decision after it has already assumed jurisdiction and when the refusal is based 'on the absence or insufficiency of the applicable substantive law'.²⁷ Some, such as Lauterpacht, believe that it follows from the prohibition of a *non liquet* in international law that a judge has a duty never to refuse to give a decision 'on the ground that the law is non-existent, or controversial, or uncertain and lacking in clarity'.²⁸ If one agrees that there exists a prohibition on declaring a *non liquet* in international law it follows that judges have no choice but to make law when gaps arise in the law.

(viii) It has been argued that the *raison d'être* of general principles as a source of international law is to provide for judicial lawmaking. The role of general principles is to provide guidelines for the proper interpretation of the law when specific rules prove insufficient. According to Starke general principles were inserted into the ICJ Statute in order to provide an additional basis for a decision if there were no other materials to rely on.²⁹ Lauterpacht claims that Article 38 (1), stating that the ICJ is bound to apply 'the general principles of law recognised by civilised nations', was drafted in order to prevent the possibility of a *non liquet*.³⁰

In *Furundzija* the ICTY Trial Chamber held that the definition of rape as a crime against humanity resulted from the convergence of the principles of the major systems of the world.³¹ The Trial Chamber stated that these principles may be derived 'with all due caution' from national law.³²

(ix) The fact that judges make law in domestic jurisdictions, especially in common law jurisdictions is an argument in favour of accepting judicial lawmaking in the international sphere. Tribunal judges come from different backgrounds and systems and to an extent, continue to do what they did at home. It is only natural for common law judges to understand their function as developing and to some extent 'making' law.³³

²⁷ H Lauterpacht 'Some Observations on the Prohibition of '*Non Liquet*' and the Completeness of the Law' in *Symbolae Verzijl* Vol 2 (1958) 199.

²⁸ *Ibid* 216.

²⁹ J G Starke *Introduction to International Law* (1989) 32.

³⁰ Lauterpacht (note 22) 205-6.

³¹ *Prosecutor v Furundzija* IT-95-17, 10 December 1998 para 174 -181.

³² *Ibid*.

³³ H Abraham *The Judicial Process* (1998) 9.

(x) Adventurous lawmaking by the judges has often been justified by the claim that the Tribunals, being new and *sui generis*, need a certain flexibility³⁴ and the opportunity to correct errors and shortcomings in the drafting of the Statutes and Rules and in the institutional structure and conception of the ICTY and ICTR. Cassese has, for example, explained the frequent amendments made to the rules by stating that ‘our whole enterprise is a step into the unknown’.³⁵

(xi) An argument in favour of judicial activism can also be made by relying on the status of *ius cogens* norms. The crimes that the accused before the Tribunals are charged with are often so severe that they shock the conscience of the international community and violate *ius cogens*. A measure of judicial activism could be justified if it results in effectively prosecuting crimes of such magnitude. The *Eichmann* court justified its non-adherence to the principle of legality by emphasising that one’s sense of justice should recoil from the non-punishment of a person who participated in outrages such as the odious crimes committed by Eichmann.³⁶ The moral repulsion expressed by the judges at the Tribunals is often used as a justification for not adhering to strict principles of justice.

Such are the arguments for judicial activism. Compelling arguments for judicial restraint at the ICTY and ICTR have also been made in this study. The most important are:

(i) First and foremost, international judges should exercise caution because of the critical role the principle of legality plays in international criminal law. According to Mettraux judicial creativity poses a direct challenge to the principle of legality.³⁷

This principle of legality occupies a central place in the criminal law of civil law jurisdictions and in international human rights instruments. In national law the rationale for the principle of legality is that it acts as a safeguard against the arbitrary exercise of authority by the state over its subjects. The rationale in international criminal law is that individuals should not be punished or deprived of their freedom by international courts without prior warning in the form of prior written law.³⁸ In international criminal law the applicability of the *nullum crimen* principle may be a matter of debate but it is important that the Tribunal respects its original intentions in this regard. The importance of the ICTY’s adherence to the legality principle is expressed not only in the Secretary General’s Report but

³⁴ See G Boas ‘Development in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court’ (2001) 12 *Criminal Law Forum* 1.

³⁵ Address of Antonio Cassese, President of the ICTY, to the UN General Assembly (4 November 1997).

³⁶ *Attorney General of Israel v Eichmann*, Israel Supreme Court (1968) 36 ILR 282.

³⁷ G Mettraux *International Crimes and the Ad Hoc Tribunals* (2005) 17.

³⁸ F Allen *The Habits of Legality* (1996) 5.

also in Article 25 (1) of the ICTY Statute³⁹ and in the first case before the ICTY, *Prosecutor v Tadic*.⁴⁰ It was initially understood that the law of the Tribunal must come from existing international criminal law or the national law of the *situs* of the conduct alleged to be criminal.⁴¹ It is submitted that the founding principles and pronouncements of the Tribunals regarding their adherence to the legality principle do not correspond to their current practice.⁴² The various definitions of rape formulated in the *Furundžija*,⁴³ *Kunarac*⁴⁴ and *Akayesu*⁴⁵ cases provide vivid examples of an infringement of the principle of legality. An accused in Rwanda or the former Yugoslavia could not have been in a position to know that forced oral penetration, for example, constitutes rape and not sexual assault.

The principle of legality requires rules to be fixed, clear and certain. The proliferation of the Rules of Procedure and Evidence and the many amendments the judges have made to the Rules form an important example of a violation of the principle of legality. It is of course problematic for judges to not only apply, but also make and amend rules. Amendments were even made for political reasons. The most vivid example of such an amendment was the amendments made as a result of political pressure by the Rwandan government in the *Barayagwiza* case.⁴⁶

The rationale for many of the amendments (such as the amendments to Rule 65*ter*) was to expedite trials. Some of these amendments dramatically increase the powers of the pre-trial judge in the conduct and preparation of the pre-trial proceedings. In order to expedite trials Tribunal judges have also indicated a preference for written evidence instead of oral evidence.⁴⁷ It is doubtful whether these amendments comply with the requirements of procedural justice. The argument that considerations of expedience and flexibility calls for amendments to the rules does not outweigh the importance of the procedural justice and the principle of legality.

³⁹ Although the ICTY and ICTR Statutes do not explicitly refer to the principle of legality, Article 25 states that in determining the penalties imposed by the Tribunal, the Trial Chambers shall have recourse to 'the general practice regarding prison sentences in the courts of the former Yugoslavia'. The ICTR Statute contains a similar provision. The word 'Rwanda' replaces 'former Yugoslavia'. The principle of legality has however been included in the ICC Statute in Article 22.

⁴⁰ *Tadic* (note 2) para. 72-74.

⁴¹ Bassiouni & Manikas (note 15) 266.

⁴² It has been argued that the purpose of the statement of the drafters of the ICTY Statute that the Tribunal should apply customary international law was to avoid violating this principle. It can be asked whether the problems surrounding the application of the principle of legality are adequately dealt with in this way.

⁴³ *Furundžija* (note 31) para 185.

⁴⁴ *Prosecutor v Kunarac et al* IT-96-23-T, 22 February 2001 paras 453 - 460.

⁴⁵ *Prosecutor v Jean Paul Akayesu* ICTR-96-4-T, 2 September 1998 para 597.

⁴⁶ *Barayagwiza v Prosecutor, Decision (Prosecution's Request for Review or Reconsideration)*, ICTR-97-AR72, 31 March 2000 ('*Barayagwiza Reconsideration Decision*').

⁴⁷ Examples include the amendments to Rule 89 and the adoption of Rule 92*bis*.

(ii) Considerations regarding the *accountability* of the Tribunals are important arguments for judicial restraint. The accountability of the Tribunals is affected by questions such as the funding and independence of the Tribunals. Independence includes both the independence of mind of the judge (what Franck calls ‘internal independence’⁴⁸) as well as the independence of the judges from the countries that nominated them and the institutional independence of the Tribunals from the Security Council (‘external independence’). Independence can refer to formal or ‘structural’ independence or real, substantive independence. Doubts have been raised about the independence of certain Tribunal judges.

It is clear that the question of funding has *some* impact on the independence of the Tribunals. The fact that the Tribunals are funded by the United Nations means that they are not completely independent from the Security Council.⁴⁹ According to Megret the fact that the ICTY is dependent on the United Nations for its funding means that there is a risk that the Tribunal could be controlled by it. Although the first ten years of the Tribunals’ practice have proved that the Tribunals have not been *controlled* by the United Nations, the risk remains. It has been argued in this thesis that the expense of international criminal tribunals place greater responsibility and accountability on the shoulders of the judges.⁵⁰ As bearers of such responsibility the judges should be more cautious in their application of the law. It is argued here that the Tribunals will only enjoy legitimacy if the judges are seen to be independent.

Some believe that the financing of the ICTY could be an obstacle to achieving impartiality and independence.⁵¹ Apart from the UN contribution, the United States has made the biggest financial contribution to the ICTY. The United States has also made significant voluntary contributions towards different projects.⁵² Trifunovska writes that some sources indicate that the ICTY has been the recipient of corporate patronage and routinely works in tandem with the departments overseeing US foreign policy.⁵³ According to Trifunovska, the manner of the financing of the Tribunal through private donors and ‘intermeshing of NATO governments’ indicates the influence which some countries might exercise on ICTY activities and the lack of independent review of the whole system.⁵⁴

The fact that judges are not ‘permanently’ assigned to either a Trial Chamber or the Appeals Chamber is problematic. This makes it possible for judges who sat on the bench of a Trial Chamber in a specific case to also sit on the appeal or

⁴⁸ T Franck *Fairness in International Law and Institutions* (1995) 320.

⁴⁹ *Ibid.*

⁵⁰ See ‘The Cost of Justice’ in Chapter 1.

⁵¹ S Trifunovska ‘Fair Trial and International Justice: The ICTY as an example with special reference to the Milosevic case’ *Rechtsgeleerd Magazijn Themis* (2003) 1, 11

⁵² The United States has also provided significant intelligence information to the ICTY to support its investigations. In addition they have provided ‘political support’.

⁵³ Trifunovska (note 51) *ibid.*

⁵⁴ *Ibid* 11.

interlocutory appeal in that same case.⁵⁵ This could clearly influence the independence and impartiality of a judge. It is unlikely that a judge would be impartial when reviewing his or her own decision. There are other structural features which could affect independence at the Tribunals. Two of the most important are the absence of a separate, structurally independent Appeals Chamber and the fact that the Office of the Prosecutor and Chambers are housed in the same building. These structural deficiencies make the *ad hoc* Tribunals seem less independent than they should be.

In addition, it is argued that the political nature of the appointment process and work of Tribunal judges could influence independence and could militate against an activist approach to lawmaking at the Tribunals.⁵⁶

(iii) Closely connected to the question of accountability are considerations of legality and legitimacy of the Tribunals. The question of the legality of the establishment of the *ad hoc* Tribunals has attracted much debate and is important because it affects the authority and credibility of the judges of the Tribunals and of the Tribunal as an institution. Many believed that the Tribunals should have been established by treaty and not by Security Council Resolution. Academic commentators have been critical of the reasoning of the Trial and Appeals Chambers in the jurisdictional challenge raised in *Tadic*.⁵⁷ Alvarez wrote that the *Tadic* Appeals Chamber Decision was not sufficiently reasoned to legitimise a Tribunal with such grand aims as the ICTY.⁵⁸ Because of the controversial method of the establishment of the Tribunals it is argued that judges should err on the side of caution.

(iv) A critical argument in favour of judicial restraint is that the ICTY and ICTR are *criminal* tribunals. The Tribunals attempt to merge the 'profoundly consensual' body of international law with the 'profoundly coercive' nature of domestic criminal law.⁵⁹ In criminal proceedings great emphasis should be placed on the rights of the accused and fairness of procedure. Whereas lawmaking might be an appealing intellectual and academic exercise to some of the judges, lawmaking might not be equally appealing to the accused. It has repeatedly been emphasised in this thesis that the jurisprudence of the Tribunals be perceived as fair even (or particularly) by the accused. In the *Tadic Jurisdictional Decision* the Appeals Chamber stated that the Tribunal was established by law because it has been established in accordance with appropriate procedures under the United Nations Charter and

⁵⁵ Rule 27 makes provision for the rotation of judges between Trial and Appeals Chambers.

⁵⁶ See the sections on the Election of Tribunal judges, ICC judges and ICTY judges in Chapter 3.

⁵⁷ J E Alvarez 'Nuremberg Revisited: The *Tadic* Case' (1996) 7 *European Journal of International Law* 245.

⁵⁸ *Ibid* 245.

⁵⁹ L Arbour 'Progress and Challenges in International Criminal Justice' (1997) 21 *Fordham International Law Journal* 531.

provides all the necessary safeguards for a fair trial.⁶⁰ The Appeals Chamber referred to the fair trial guarantees contained in international instruments such as those set out in Article 14 of the International Covenant on Civil and Political Rights.⁶¹ However practices such as the extensive pre-trial detention (as seen in *Barayagwiza*⁶²) at the Tribunals indicate that the Tribunals are not always true to their founding provisions and intentions.

(v) The determination of custom at the Tribunals has been criticised.⁶³ A military court at Nuremberg once noted: ‘We may wish the law were otherwise but we must administer it as we find it.’⁶⁴ The Tribunals have often found custom even in the absence of sufficient state practice. The substitution of state practice by, *inter alia*, considerations of humanity has been questioned. The Tribunals need to clearly state and justify their methodology in choosing national case law for the purpose of proving the existence of state practice. As a result the determination of customary law at the Tribunals has often been arbitrary and not neutral.⁶⁵

(vi) An institutional or structural reason why judges should exercise restraint is the fact that the Tribunals are ‘self-contained systems’⁶⁶ and function in the absence of a supervisory body. There is no legislative arm or body with the power of correcting decisions of the International Criminal Tribunals.

(vii) The importance and impact of the jurisprudence of the Tribunals may operate as arguments in favour of caution. If the Tribunals are to serve as models for the ICC, and if their case law is to serve as precedent for national courts it may be prudent of the judges to exercise caution and not depart too strongly from pre-existing law. Although there is no formal system of precedent at the Tribunals and in international law generally, it is in the interest of consistency and legal certainty that the ICC follow the precedent set by the Tribunals.⁶⁷ The Appeals Chamber in the ‘*Celibici*’ case agreed that ‘so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is

⁶⁰ *Tadic Jurisdictional Decision* IT-94-1-AR72 2 October 1995 para 47.

⁶¹ *Ibid* para 45.

⁶² See note 45.

⁶³ See Mettraux (note 37). A Nollkaemper ‘The legitimacy of International law in the case law of the International Criminal Tribunal for the former Yugoslavia’ in T A J A Vandamme & J-H Reestman, (eds) *Ambiguity in the Rule of Law, The Interface between National and International Legal Systems* (2001).

⁶⁴ *United States v Von Leeb* US Military Tribunal sitting at Nuremberg, Judgment of 28 October 1948, in *Law Reports of Trials of War Criminals*, XI (‘High Command’ Case) 563.

⁶⁵ See the view of Mettraux (note 37) 15

⁶⁶ In the *Tadic Jurisdictional Decision* the ICTY Appeals Chamber referred to the centralised structure of international law and stated that: ‘every tribunal is a self-contained system’. See *Tadic Jurisdictional Decision* (note 60) para 11.

⁶⁷ On the question of precedent at the ICTY, see *Prosecutor v Zlatko Aleksovski* IT-95-14/1-A, 24 March 2000, para 89.

none of its concern.⁶⁸ According to Alvarez, adjudicative lawmaking raises a number of problems – the most prominent of which is the prospect of conflicting interpretations of public international law. The ICTY and ICJ have for example openly differed concerning the requisite test to apply to determine a state's responsibility for the conduct of rebel forces – as can be seen in the *Tadic* decision finding the ICJ's test as applied in the *Nicaragua* case to be 'unpersuasive'.⁶⁹ The ICTY and ICTR have also differed in their respective interpretations of crimes. Different Trial Chambers of the ICTY have also come to different conclusions on the same point of law. The best example is the different definitions of rape arrived at in *Akayesu* and *Furundzija*. In addition the symbolic importance of the Tribunals and its epic goals of achieving peace and reconciliation in the Balkans might be more easily achieved if the judges exercise restraint and are guided by national case law and the principle of legality.

(viii) Many have questioned whether lawmaking should happen through international tribunals instead of through domestic prosecutions. According to Alvarez it may be desirable to leave the development of international crimes to Rwandan (or national) judges because such judges can act more readily and more legitimately fill in gaps through resort to established domestic criminal law.⁷⁰ It might ultimately lead to greater uniformity of the law, believes Alvarez, if progressive development of international humanitarian law is left to domestic courts.⁷¹

The foregoing arguments in favour of a cautious approach seem more specific to the Tribunals and more particular to international criminal law. It is therefore argued that the considerations in favour of judicial caution should weigh more heavily than those in favour of judicial activism. The aims of the *ad hoc* Tribunals, that of serving peace, deterring future crimes, advancing reconciliation and establishing an accurate historical account of the time and events under its jurisdiction⁷² may be furthered both by conviction and acquittal. A public perception of fairness could only be created if due process guarantees and the principle of legality are respected even if it leads to acquittal.

⁶⁸ *Prosecutor v Delalic* IT-96-21-A, 20 February 2001, para 24, quoting Separate Opinion of Judge Shahabuddeen in fn 35, appended to Decision, *Le Procureur v Laurent Semanza*, ICTR-97-20-A, 31 May 2000, para 25.

⁶⁹ See *Prosecutor v Tadic* IT-94-1-A, 15 July 1997, paras 115-145.

⁷⁰ J E Alvarez 'Crimes of State/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 409.

⁷¹ *Ibid* 390.

⁷² For more on the goals of the Tribunals see P Akhavan 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *AJIL* 7. J.L Snyder 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (Winter 2003/2004) 28 3 *International Security* 5.

The conclusion seems inevitably cautious: international judges and specifically Tribunal judges cannot avoid making law. An important reason is that this is a system of law in which legislative opportunities for modifying rigid, unjust and obsolete rules are nominal.⁷³ According to Lauterpacht the need for judicial lawmaking is intensified by the strong inducement to supplement and remedy the deficiencies and inconsistencies in an imperfect system of law.⁷⁴ If one accepts that it is part of their mandate to develop international humanitarian law one could argue that, to some extent, it is their *duty* to make law. For all the reasons stated above they have to develop the law cautiously showing respect for the accused, fair trial guarantees and the principle of legality.

Some degree of lawmaking on the part of international courts and tribunals is necessary to bring precision to international law. If such lawmaking increases the efficacy of international criminal law and is exercised with due regard to the principle of legality it may be acceptable. The credibility and acceptability of international norms and standards depend to a large extent on the readiness of states and individuals to comply with these norms and standards. States will not easily do so in relation to norms that ignore their position on a given issue or practice in a certain regard. Mettraux reminds us that the Tribunals also risk losing the trust states have placed in them if they assume too much discretion when determining what the law is.⁷⁵

In 1999 Alvarez wrote that the Trial Chamber judgments in *Tadic* and *Akayesu* show that international judges do not always choose expansive interpretation of existing international humanitarian law.⁷⁶ He predicted that Tribunal judges might avoid expansive holdings because they might want to avoid the accusations of judicial legislation and the imposition of *ex post facto* criminal liability.⁷⁷ The many and varied instances of lawmaking discussed in Chapters 6 and 7 indicate that Alvarez's early assessment was incorrect. Tribunal judges have, on the contrary, been criticised for developing and expanding international humanitarian law too much.

The most important reason why certain instances of lawmaking can be described as illegitimate is the infringement on the principle of legality and the corresponding lack of legal certainty. Lawmaking can also be described as illegitimate because of the inappropriate use of national case law. The inappropriate use of case law has usually taken place in the context of determining custom. Tribunal judges have attempted to prove custom in almost every case. It can be argued that custom has been the main vehicle of Tribunal lawmaking. This

⁷³ Lauterpacht (note 22) 77.

⁷⁴ Ibid 155.

⁷⁵ Mettraux (note 37) 16.

⁷⁶ Alvarez (note 57) 389.

⁷⁷ Ibid.

is consistent with the statement in the Report of the Secretary General that the ICTY should apply rules of the international humanitarian law which are beyond any doubt part of customary law.⁷⁸ It is however argued that the judges have often *strained* to find customary law when presented with insufficient evidence of state practice and *opinio juris*. It might have been more acceptable if the judges had admitted to making law rather than cloaking their actions with the language of custom.

But to condemn all lawmaking by the Tribunals is to diminish their work and achievements. It is predicted that the instances of legitimate lawmaking by the Tribunals will form an important part of their legacy. The judges and prosecutors at Nuremberg had an acute sense of the significance and epoch-making nature of that trial.⁷⁹ It is possible that the judges at the Tribunals may have a similar sense of the importance of their work. The introduction of the category of crimes against humanity has been described as a 'great moral and legal achievement'.⁸⁰ Instances of lawmaking such as the criminalisation of sexual offences and the extension of the protection of humanitarian law can similarly be seen as moral and legal achievements. In a similar way to Nuremberg, the Tribunals have extended the rule of law through their work. Since not all Tribunal lawmaking can be described as legitimate (primarily because of infringements on the principle of legality) the legacy of the Tribunals may be described as ambiguous.

Lachs, a former President of the ICJ saw the World Court as 'a great international experiment' that will require time and experience to mature.⁸¹ Although it has been said that the tribunals have now 'come of age', they still represent a fairly novel experiment in international justice.⁸² Judicial lawmaking at the Tribunals can only gain legitimacy and international acceptance if the independence and impartiality of the judges are beyond doubt.

Sassoli and Olson write that any manipulation of the law has to be avoided, even if it is done for a just cause.⁸³ The end, however desirable, cannot justify the means. In order to give genuine protection to the victims of war crimes and to foster reconciliation in the Great Lakes Region and the Balkans, the jurisprudence of the Tribunals has to be perceived as fair, not only procedurally but also substantively. This is precisely why the lawmaking power of the judges can not be taken for

⁷⁸ See note 1.

⁷⁹ Luban writes that 'those who conducted the trial at Nuremberg viewed their own words and deeds from the perspective of a distant and more pacific age'. D Luban 'The Legacies of Nuremberg' (1987) 54 *Social Research* 779.

⁸⁰ *Ibid* 781.

⁸¹ RY Jennings *Oppenheim's International Law* (1992) 56.

⁸² See the title of Judge Wald's article 'The International Criminal Tribunal for the former Yugoslavia Comes of Age' (2001) 5 *Washington University Journal of Law & Policy* 87.

⁸³ M Sassoli & L M Olson 'The judgment of the ICTY Appeals Chamber on the merits of the *Tadic* case' (2000) 82 *International Review of the Red Cross* 769.

granted and why, if one acknowledges that Tribunal judges can make law, it is necessary to distinguish between legitimate and illegitimate exercises of this power.

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SAMENVATTING

Dit proefschrift betreft de vraag naar rechtsvorming door de rechterlijke macht bij het ad hoc Joegoslavië Tribunaal, International Criminal Tribunals for the former Yugoslavia (ICTY) en Rwanda (ICTR). In de Nederlandse context wordt ook wel gesproken over de rechter als ‘wetgever-plaatsvervanger’.

Rechters van Tribunalen hebben zich vaak beroepen op het nieuwe en *rudimentaire* karakter van de Tribunalen om de behoefte te rechtvaardigen tot het maken van materiële en procesrechtelijke regels bij de Tribunalen. Het feit dat deze Tribunalen kunnen worden omschreven als op zich zelf staande systemen, zonder toezichthoudend orgaan met de bevoegdheid om de beslissingen van de Tribunalen te herzien, vraagt om strikt en nauwkeurig onderzoek, en zou kunnen pleiten tegen wetgevende activiteiten

Sommigen menen dat internationale strafhoven een inherente partijdigheid tegen gedaagden hebben. Zij uiten hun bezorgdheid over *het feit dat* er politieke druk op de Tribunalen wordt uitgeoefend om vonnissen uit te spreken waarin de gedaagden schuldig worden bevonden en dat bij veel zaken om politieke redenen en vanwege de zwaarte van de delicten de uitkomst van tevoren vastligt. De druk om te veroordelen zou de wetgevende activiteiten van de rechters verhogen, aangezien het bestaan van dergelijke druk het zeer onwaarschijnlijk maakt dat rechters het *non liquet* uitspreken.

Het is niet het doel van dit proefschrift om vast te stellen of wetgevende activiteiten door de rechterlijke macht al dan niet zou moeten zijn toegestaan. Het doel is eerder om de bijzonderheden van het internationaal strafrecht en de specifieke context van de ad hoc Tribunalen te overwegen en de vraag te stellen: wat zijn de argumenten voor en tegen wetgevende activiteiten door de Tribunalen?

De idee dat internationaal recht een humanitaire functie zou moeten hebben, zou kunnen dienen als een acceptabele rechtvaardiging voor de vergaande wetgevende activiteiten van het Joegoslavië Tribunaal. Theodor Meron heeft beargumenteerd dat de humanitaire principes, zoals neergelegd in de Martens Clause, voorzien in een machtiging om het internationale humanitaire recht te interpreteren in overeenstemming met de humanitaire principes en hetgeen wordt “voorgescreven door het publieke geweten”. Sommigen, zoals Sassoli en Olson, hebben beargumenteerd dat de wetgevende activiteit van het Tribunaal gerechtvaardigd is vanwege het feit dat de bescherming van het humanitaire recht wordt uitgebreid ten aanzien van hen die voordien niet beschermd waren. Het Hof van Beroep in *Tadic* vertrouwde op het doel van artikel 4 van de Vierde Geneefse Conventie, gericht op de bescherming van burgers tot het maximaal haalbare, om de bescherming van het humanitaire recht uit te breiden.

Hoe de voortgaande ontwikkeling van het internationale humanitaire recht plaatsvindt is belangrijk. Internationale advocaten wijzen er op dat de groei en interpretatie van internationaal-strafrechtelijke normen moeten worden verenigd met de eerlijke behandeling van de gedaagden, inclusief respect voor het legaliteitsbeginsel en het daarmee samenhangende verbod op de terugwerkende kracht van strafbepalingen (ten nadele). Volgens Alvarez is de spanning tussen de doelen van enerzijds een verdere ontwikkeling van het internationale humanitaire recht en anderzijds de plicht om zich te houden aan het legaliteitsbeginsel toegenomen vanwege het feit dat de internationale gemeenschap steeds vaker grijpt naar het politiek opportune middel van de instelling van *ad hoc* Tribunalen. De spanning is ook in zoverre vergroot dat men zich verlaat op wetgevende activiteiten van de rechters gedurende de looptijd van de strafzaken om het recht een duwtje in een nieuwe richting te geven of om leemten op te vullen.

Dit proefschrift houdt zich met name bezig met de vraag naar de rechtmatigheid en *verantwoordelijkheid* van de ICTY en de ICTR. De ICTY moet, terwijl zij haar rechterlijke functies uitoefent, bijdragen aan het vastleggen van de grotere vraagstukken betreffende de *toerekenbaarheid*, verzoening en het vaststellen van de waarheid met betrekking tot de gebeurtenissen in het voormalige Joegoslavië. Er zal worden beargumenteerd dat door de vragen omtrent de rechtmatigheid van de oprichting van de Tribunalen, de rechters bijzondere terughoudendheid zouden moeten betrachten bij het maken van nieuwe rechtsregels. De onafhankelijkheid van de rechters van de Tribunalen is in dit opzicht ook van belang. Rechterlijke onafhankelijkheid speelt een grote rol bij het in stand houden van de geloofwaardigheid en van de onafhankelijkheid van internationale tribunalen. De kosten van het opzetten van internationale tribunalen zorgen voorts voor een verhoging van de behoefte aan rechterlijke *verantwoordelijkheid*.

Nollkaemper heeft zelfs gesuggereerd dat het Tribunaal, in plaats van kunstmatig te steunen op internationaal gewoonterecht om de gaten op te vullen, eenvoudigweg zou moeten erkennen dat de internationale gemeenschap nog niet in staat is om alle noodzakelijke regels *aan te nemen* om bepaalde gedragingen strafbaar te stellen.

Als men accepteert dat rechters van Tribunalen geen andere keuze hebben dan het nieuwe rechtsregels te ontwerpen, dan is het belangrijk dat deze wetgevende activiteiten worden onderworpen aan beperkingen, waarvan dan het legaliteitsbeginsel de belangrijkste beperking is. In het Rapport van de Secretaris Generaal over de oprichting van de ICTY is het belang benadrukt dat het Tribunaal zich houdt aan de vereisten van het legaliteitsbeginsel. Het Rapport zegt dat: “het internationale tribunaal regels moet toepassen van het internationale humanitaire recht die zonder enige twijfel onderdeel zijn van het gewoonterecht, zodat problemen doordat sommige maar niet alle Staten zich houden aan de specifieke conventies niet kunnen ontstaan”. De Secretaris Generaal legt uit dat

“bij het opdragen aan het Internationale Tribunaal van de taak om personen te vervolgen, die verantwoordelijk zijn voor ernstige schendingen van het internationale humanitaire recht, de Veiligheidsraad *niet wil dat nieuwe rechtsregels worden gevormd of de indruk gewekt wordt dat nieuwe rechtsregels worden gevormd*. De Tribunalen zouden eerder de taak hebben om het bestaande internationale humanitaire recht toe te passen.” Het recht dat wordt toegepast door de Tribunalen moet afkomstig zijn van bestaand internationaal strafrecht of het nationale recht van de plaats waar de handelingen hebben plaatsgevonden waarvan wordt beweerd dat deze strafbaar zijn.

Dit proefschrift houdt zich voorts bezig met zowel het maken van materieelrechtelijke als procesrechtelijke rechtsregels door de rechters. Het maken van materieelrechtelijke rechtsregels is problematischer en moeilijker te definiëren dan procesrechtelijke rechtsregels. Het maken van materieelrechtelijke rechtsregels heeft immers betrekking op de ontwikkeling van het recht dat behoort tot de jurisdictie van de Tribunalen (strafbare feiten die zijn opgenomen in de Statuten van de Tribunalen). Het maken van materieelrechtelijke rechtsregels heeft ook betrekking op de interpretatie en definitie van de bestanddelen van de strafbare feiten en de interpretatie en de definitie van (wijzen van) aansprakelijkheid voor strafbare feiten. Het maken van procesrechtelijke regels daarentegen heeft betrekking op het maken en aanpassen van de rechtsregels met betrekking tot procedure en bewijsmateriaal. Het verschil tussen materieel recht en procesrecht is niet altijd duidelijk. Wijzigingen in het procesrecht kunnen tot gevolg hebben dat de materiële rechten van de gedaagde worden aangetast. Dit is eens te meer een reden waarom de macht van de rechters om met nieuwe regels te komen zeer zorgvuldig moet worden onderzocht.

De Tribunalen zijn ook betrokken bij indirect wetgevende activiteiten. De “Dissenting Opinion” van rechter Cassese in de *Erdemovic* zaak over de plaats die de nationale jurisprudentie zou moeten innemen in het internationale strafrecht, is daar een goed voorbeeld van. Indirecte wetgevende activiteiten vinden plaats wanneer de rechters verklaringen afgeven over zaken die niet de centrale juridische vraag die voor hen ligt betreffen. Deze vorm van wetgevende activiteiten vindt incidenteel plaats als onderdeel van een “obiter”- verklaring.

Eén van de meest interessante kenmerken van de *ad hoc* Tribunalen is de samenstelling en combinatie van de groep rechters. De rechters van de Tribunalen worden beroepen vanuit zowel “*common law*” als “*civil law*” systemen en, alhoewel het recht en de procedures van de ICTY en ICTR voornamelijk “*adversarial*” zijn, hebben veel invloeden van “*civil law*” hun weg gevonden naar de jurisprudentie van het tribunaal. Het verschil tussen *civil en common law* lijkt beslissend voor de houding van de rechters en de publieke acceptatie van wegevende activiteiten. In *common law* systemen is het geaccepteerd dat *hogere rechters*, binnen zekere grenzen, niet alleen het recht toepassen, maar ook vormen. De implicaties voor het domein van het strafrecht in het bijzonder zullen worden onderzocht. De vraag hoe de *civil*

of *common law* achtergrond van de rechters hun houding ten opzichte van wetgevende activiteiten beïnvloedt, zal worden behandeld.

Rechters die niet bang zijn of zich verontschuldigen over hun rechtsvorming kunnen worden omschreven als actief. In de context van de Tribunalen kan men steun vinden voor zowel rechterlijke terughoudendheid als rechterlijk activisme. Het kan beargumenteerd worden dat zowel het fragiele karakter van de Tribunalen, hun nieuwe en *sui generis* karakter, als het *rudimentaire* karakter van het internationale strafrecht in het algemeen vragen om juridische terughoudendheid. Maar degenen die voor juridisch activisme zijn, hebben zich ook verlaten op de nieuwigheid en het fragiele karakter van de Tribunalen, om hun argumenten voor activisme te ondersteunen. Gedurfde wetgevende activiteiten worden gerechtvaardigd door de wijzen op het *sui generis* karakter van het rechtssysteem van het Tribunaal.⁸⁴ In verband hiermee zullen de handelingen van de rechters van het Internationaal Gerechtshof, the International Court of Justice (ICJ) in de praktijk en hun visie worden besproken. Ondanks het feit dat er een sterke traditie van rechterlijke terughoudendheid is bij de ICJ, zijn er toch een aantal belangrijk voorbeelden van rechterlijk activisme.

Naast de bovengenoemde redenen voor rechterlijke terughoudendheid is ook de instutionele competentie van de internationale tribunalen om rechtsregels te maken in twijfel getrokken. Een belangrijke reden waarom internationale rechters terughoudend zouden moeten zijn om nieuwe rechtsregels te maken is dat, in tegenstelling tot de binnenlandse sfeer, er geen mogelijkheid is om de rechtsregel die door de rechters is gevormd te corrigeren door de wetgever, als later de rechtsregel onbevredigend blijkt te zijn. Degenen die beargumenteren dat internationaal recht geen recht is, hebben zich traditiegetrouw beroepen op de afwezigheid van een internationale wetgevende macht en een handhavende macht binnen het internationale recht. Dit betekent dat het leerstuk van de scheiding der machten niet van toepassing is, in elk geval niet zoals deze in eerste instantie is geformuleerd. De afwezigheid van een centrale wetgevende macht of van een vergelijkbaar toezichthoudend orgaan in het opkomende systeem van het internationaal strafrecht plaatst de rechters in de positie van de ultieme wetgevers – een positie die om terughoudendheid vraagt.

Internationaal strafrecht is een *rudimentair* rechtssysteem. Lauterpacht, een groot aanhanger van een volledig internationaal recht en van de ontoelaatbaarheid van *non liquet*, heeft beargumenteerd dat het “gebrekkige” karakter van internationaal recht vraagt om rechterlijke terughoudendheid en zelfs de verklaring van een *non liquet*.

⁸⁴ Zie de mening van Cassese over de amendementen op de Rules of Procedure and Evidence, Adress of Antonio Cassese, President van het ICTY aan de *Verzamelde Vergadering* van de Verenigde Naties, 4 november 1997.

Bij de tribunalen lijkt het erop dat overwegingen als het politieke karakter van de procedure voor benoemingen en de internationale politiek, de benoemingen van rechters beïnvloeden. Er is gezegd dat de politiek de nominatie en de procedure voor de verkiezingen bij het ICTY heeft beïnvloed en dat de rechters die zijn gekozen niet eenvoudigweg zijn gekozen op basis van hun geschiktheid voor de baan.

Bij de bespreking van het verschijnsel van de wetgevende activiteiten van de Tribunalen kijkt dit proefschrift zowel naar de toekomst als naar het verleden. Vergelijkingen worden getrokken met de wetgevende activiteiten en het procesrecht van de Tribunalen van Nürnberg en Tokyo, evenals met de wetgevende activiteiten van de ontwerpers van het statuut en de regels voor het Statuut van Rome van het Internationaal Strafhof.(ICC). The ICTR en de ICTY zijn ook beschreven als modellen of als mogelijke blauwdrukken voor the ICC. Sommigen hebben gesteld dat de Tribunalen de weg hebben vrijgemaakt voor de ICC en dat er bij de ICC minder noodzaak zal zijn voor wetgevende activiteiten.

In hoofdstuk 1 wordt de oprichting en organisatie van de *ad hoc* Tribunalen besproken. De geschiedenis van de pogingen om een internationaal strafhof op te richten zal worden getraceerd vanaf de eerste voorzichtige wortels tot te oprichting van de ICTY, ICTR en ICC. Het is belangrijk dat de Tribunalen worden gezien als legitiem opgerichte Tribunalen. De uitdaging om tot legitimiteit van de oprichting van Tribunalen te komen zal daarom worden besproken.

In hoofdstuk 2 worden het concept en de theorie van de wetgevende activiteiten beschreven, de invloed van het *rudimentaire* karakter van het internationale strafrecht op de wetgevende activiteiten van de rechters van de Tribunalen wordt bediscussieerd en het verschil tussen rechterlijke wetgeving en de ontwikkeling van internationaal recht wordt belicht. De betekenis van het “gat” of *lacuna* in het recht zal worden onderzocht. De vraag of een vonnis van *non liquet* kan worden gezien als een alternatief voor wetgevende activiteiten zal worden onderzocht. Omdat rechters terughoudend zijn in het toegeven dat zij nieuwe rechtsregels schrijven, is het moeilijk om te analyseren wat zij doen. Rechter Cassese lijkt de enige rechter te zijn die zich niet verontschuldigd heeft en die open is over rechtsvorming bij de ICTY.

Omdat de statuten van de ICTY en ICTR geen rechtskeuze bevatten of in bronnen voorziet die lijken op artikel 38 van het statuut van ICJ, zal worden onderzocht op welke bronnen rechters zich kunnen beroepen als zij nieuw recht vormen voor het internationale strafrecht. Bijzondere aandacht zal worden gegeven aan het gewoonterecht en algemene rechtsbeginselen als methodes om nieuw recht te vormen. De rechters van Tribunalen hebben gekeken naar het gewoonterecht om vast te stellen wat de bestanddelen zijn van misdrijven die worden vermeld in de Statuten. Cassese stelt dat *usus* en *opinion juris*, als bestanddelen van het gewoonterecht, een andere rol spelen in het humanitaire

recht dan in het internationale recht in het algemeen onder invloed van de Martens clause. De rechters van de Tribunalen hebben ook vaak hun toevlucht genomen tot algemene rechtsbeginselen als methode om rechtsregels te maken. Er is gesteld dat het steunen op algemene rechtsbeginselen, voor zover dit wordt gebruikt om gaten op te vullen in de toepassing van de bestaande rechtsregels, de vraag op kan roepen van legitimiteit aangezien de waarschijnlijkheid groot is dat de toepassing van “algemene rechtsbeginselen” resulteert in algemeenheid in plaats van in specificiteit.

Hoofdstuk 3 gaat over degenen die de rechtsregels maken: de rechters als een groep van individuen. Frank schrijft dat elke rechtbank zijn eigen “culturele omgeving” scheidt. Verschillende aspecten van de culturele omgeving van de ICTY en de ICTR krijgen in het boek aandacht. Vragen over onder andere het ontwerpen van het proces en het belang van “dissenting opinions” worden besproken. Het argument dat juridische realisten gebruiken is dat, omdat dat rechters geen automaten zijn, het onvermijdelijk is dat zij worden beïnvloed door hun persoonlijke en professionele achtergronden.

De onafhankelijkheid van de rechters van de Tribunalen is het onderwerp van hoofdstuk 4. Dit hoofdstuk behandelt de vraag wat impact heeft op de onafhankelijkheid van de rechters van de ICTY en de ICTR, zoals bijvoorbeeld de manier waarop de rechters worden gekozen. De vraag of de rechters Odio Benito, Florence Mumba en Richard May zich hadden moeten terugtrekken in specifieke zaken vanwege beweerde vooroordelen zal eveneens aandacht krijgen.

Hoofdstuk 5 spitst zich toe op het belang van het legaliteitsbeginsel binnen de context van het internationale strafrecht in het algemeen en in het bijzonder binnen de context van de Tribunalen. Er wordt gesteld dat binnen de context van het internationale strafrecht, het legaliteitsbeginsel zich opwerpt als de belangrijkste beperking van de rechterlijke wetgevende activiteiten door de rechters. Omdat Duits recht de oudste traditie heeft voor wat betreft het erkennen en de toepassing van het legaliteitsbeginsel, zal de wijze waarop dit beginsel is toegepast binnen het Duitse recht uitgebreid aandacht krijgen. De status van het legaliteitsbeginsel in *common law* jurisdicties zoals de Verenigde Staten, wordt ook besproken. Het schijnt dat er een algemene consensus is dat de context van het internationale strafrecht vraagt om een meer toegevend en flexibel aanpak met betrekking tot de toepassing van dit legaliteitsbeginsel dan wanneer dit wordt toegepast in systemen *binnen een staat*.

In hoofdstuk 6 wordt een aantal gevallen van het maken van rechtsregels in de jurisprudentie van de ICTY en de ICTR besproken. Het maken van rechtsregels moet worden gezien als het ontwikkelen van het recht en het uitbreiden van het recht naar nieuwe gebieden. Verschillende methodes van rechtsvorming zullen worden beschouwd. De geselecteerde jurisprudentie laat onder andere zien hoe de tribunalen definities formuleerden en uitbreidden, telologisch interpreteren en

gaten opvulden in de Statuten. Dit hoofdstuk laat zien hoe de Tribunalen zowel het concept van interne tegenover internationale conflicten heeft ontwikkeld als het concept van *gemeenschappelijke doelen*, vergelding en beschermde personen heeft uitgebreid en ontwikkeld. Aandacht zal worden gegeven aan het indirecte of *obiter* rechtsvorming Cassese in *Erdemovic*. De rechters hebben ook misdrijven zoals foltering en verkrachting gedefinieerd en geherdefinieerd. Deze gevallen van rechtsvorming hebben aanleiding gegeven tot veel academisch debat. Dit hoofdstuk onderzoekt de vraag of dat tot gevolg heeft dat het maken van rechtsregels legitiem of niet legitiem is.

De rechters hebben bij verschillende gelegenheden de procedureregels aangepast en nieuwe regels gevormd. De rechtsvorming wordt besproken in hoofdstuk 7. Het maken van procesrecht door de tribunalen heeft de vorm aangenomen van het maken en aanpassen van de regels van het procesrecht en het bewijsrecht. Het is de opvatting dat de rechters niet de bevoegdheid hebben om nieuwe materiële rechtsregels te ontwerpen of om nieuwe verplichtingen op te leggen op staten onder de dekmantel van het procesrecht. Er kan worden gesteld dat de frequente aanpassingen het legaliteitsbeginsel schenden. Alternatieve oplossingen worden voorgesteld.

CURRICULUM VITAE:

Mia Swart was born in Johannesburg on 2 November 1973. She studied law at the University of South Africa (BA) and the University of Cape Town (LLB). In 2001 she was admitted as an Attorney of the High Court of South Africa. In 1999 she obtained an LLM (magna cum laude) from Humboldt University in Berlin. She is a senior lecturer at the University of the Witwatersrand in Johannesburg where she teaches international law and constitutional law. She has published in the fields of international criminal law and South African constitutional law.