Ad hoc International Criminal Tribunals and the Issue of Lawmaking

Mia Swart, Judges and lawmaking at the international criminal tribunals for the former Yugoslavia and Rwanda


A PhD thesis by Mia Swart, ‘Judges and Lawmaking at the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (published in 2006), discusses the lawmaking by the two ad hoc Tribunals in the context of international criminal law. The object of her study is not to establish whether judicial lawmaking should or should not be permitted, but rather to consider the peculiarities of international criminal law and the particular context of the ad hoc Tribunals. After previously dealing with a number of issues (such as the circumstances under which the Tribunals were created, various types of their jurisdiction, issue of judicial lawmaking, judicial independence at the Tribunals and the institutional culture at the Tribunals, the principle of legality, relevant jurisprudence reflecting lawmaking by the Tribunals as well as rule-making), Swart draws conclusions both supporting and opposing judicial lawmaking at the Tribunals. Among the arguments in favour she considers the unwritten rudimentary nature of international criminal law which contains indeterminate rules and as such creates conditions for judges of the Tribunals to be ‘builders of a system’. Another argument is the humanisation of humanitarian law which extends the application of humanitarian law to new, previously unaffected areas. Also the acceptance of the lawmaking by the Nuremberg and Tokyo Tribunals is a historical argument in favour of accepting the lawmaking by the two ad hoc Tribunals. At the same time a number of arguments in support of judicial caution are offered, for example the fact that lawmaking might pose a direct challenge to the principle of legality; the need for accountability of the Tribunals; and the fact that the ICTY and ICTR are criminal tribunals which ‘merge “profoundly consensual” body of international law with the “profoundly coercive” nature of domestic criminal law’. While one of the cornerstones of criminal proceedings are the rights of accused such a mixed procedure can affect the requirements of fair trial.

The goal of this article is not to provide a systematic and detailed comment on the Swart’s study and to be a book review in its usual sense. Its goal is rather to discuss some of the aspects regarding the concept of lawmaking dealt with by Swart, to identify certain shortcomings and to challenge the author’s perception on some of the particularities of ad hoc Tribunals and their impact on the lawmaking activity.

1. Introduction

Obviously, international lawmaking is one of the most challenging and controversial issues in international law doctrine. It is clear that it concerns constitutive process which brings about the creation of international norms. But there are many other questions which are not quite clear. For example, it is not quite obvious what international lawmaking actually means, in which situations it can take place, who is entitled to be international lawmaker and, what are the consequences of ‘unauthorized’ lawmaking. Unlike in national legal systems, in international legal system there is no division of powers among legislative, executive and judicial branches in which it is the legislative which adopts legislation, the executive which executes and the judiciary which interprets and adjudicates.

International lawmaking has never been an easy or uncomplicated process. This has been the case also when States had a monopolistic position in making international law. Today the complexity of lawmaking is ever increasing. There are various factors which contribute to it, such as the appearance – in addition to States – of other international participants or actors; the broadening of cooperation in many different areas of life (politics, economics, human rights, health, industry development, environment, disarmament, etc); the increasing variety of instruments which are used for that purpose; and the increasing number of different processes for which lawmaking is carried out. ‘The complexity of contemporary international relations and the changing international environment […] have generated arguments in favour of expansion of lawmaking process, as well as of the forms and substance of international regulation.’

Therefore, besides States, international organizations and international (semi-)judicial bodies appear as lawmakers, as well. The influence of international organizations has been especially significant in this respect. They have transformed the sources of international law and their content, the principal lawmaking actors, ‘and even our understanding of what “international law” is and what it means to “comply” with its rules’.

In addition, international organizations have encouraged various actors (such as indigenous peoples, transnational networks and NGO’s) to produce international rules. Similarly, international judicial bodies emerged as important factor in international lawmaking. In 2004 some 125 international judicial bodies and
mechanisms with astonishing diversity have been identified. Many of them have been established by brief constitutional documents and/or in the fields of law which are imprecisely or insufficiently regulated. Even if this has not been the case, the dynamics of social development poses on courts the necessity to take into consideration new social developments taking place on the international scene. These are some of the reasons for their increasing role in lawmaking. This is true also for the ad hoc Criminal Tribunals on Yugoslavia and Rwanda which have appeared as significant lawmakers in the field of international criminal law. It is not yet quite clear which is the scope of the impact of their jurisprudence on the emergence of new international rules. However, it is obvious that they have generated and accelerated an irreversible process in the field of individual criminal responsibility regarding the creation of both norms and institutions such as the permanent International Criminal Court (ICC) and its Statute adopted in 1998.

2. Two views on the law-making function of international courts: principal and accepted

Any discussion on lawmaking by the two ad hoc Criminal Tribunals makes part of a broader story on lawmaking function of international judicial bodies which again makes part of even broader story on international lawmaking. And within these general and more general stories there are some basic and common questions that deserve attention. One of them is the question of the definition of international lawmaking or, in other words, what can be called as international lawmaking. As many terms in international law, this one too has no clearly defined meaning although the authors use it frequently and in different contexts. In its general meaning the term lawmaking is defined as: enacting or making laws, and law-maker is the one ‘who makes or enacts laws; a legislator, also called lawgiver’. Some have defined it as ‘the imposition of binding legal obligations’ and others as ‘the prescription of general rules that are applicable to all, and which are meant to remain in force for an indefinite period of time’. Mia Swart does not discuss the concept of international lawmaking in its broader meaning but goes immediately into discussion about the concept of judicial lawmaking in order to focus further on the issues of relevance for the ad hoc Tribunals. This seems to be a proper approach as ‘it is difficult to generalise about judicial decision-making without regard, inter alia to the particular tribunal, its institutional setting, the context of the dispute, the identity of the parties and the makeup of the decision-making body. […] [A]ny consideration of international lawmaking must take account of this proliferation and consider the contribution of courts and tribunals in very different sectors of international law’.7

2.1. What does judicial law-making mean?

So, what does judicial lawmaking or judicial legislation mean? When and how does it take place? Official instances on international level will never clearly admit that judges of international courts and tribunals make law. This principal or ‘politically correct’ view holds that international courts interpret and apply law but do not make it. ‘It is natural that members of a legal tribunal should incline to dismiss with some vigour the suggestion that they have indulged in acts of legislation.’8 In the time of the Permanent Court of International Justice it was held that doctrine and jurisprudence only assist in determining rules and serve only for elucidation of these rules.9 Decades later similar view was assumed by the International Court of Justice (ICJ). In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1992) it held that the task of the Court is ‘to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles […]’. [1] states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.10 The limits to the law-making function of the Court are clearly posed by Article 58 according to which the decision of the Court has no binding force except between the parties and in respect to that particular case, taken in conjunction with Article 38 (1d) establishing that judicial decisions are subsidiary means for the determination of rules of law. Similarly, States do not accept a lawmaking function of international courts. They are ‘ready to increase the number and scope of tribunals but [are] less willing to acknowledge the possibility of judicial lawmaking’.11 Since judges are not permitted ‘to establish law independently of an existing legal system, institution or norm’; they can only ‘declare what can be logically inferred from the raison d’être of a legal system, institution or norm’.12 Any other capacity attributed to international courts would be incompatible with their basic function to adjudicate and would be, at least declaratory, contrary to the purposes for which they are established and therefore would also be discouraging for States both to submit cases to existing courts and to create new courts in the future.

There is, however, another view which admits the lawmaking function of international courts. This view is broadly accepted by individual judges of international courts as well as various authors and in some cases also by States. Tom Ginsburg mentions the example of the ICJ Oil Platform case and the concern expressed in the pleadings by the USA that a decision of the Court might restrict its ability to protect merchant shipping around the world as well as the fact that States often at various times sought the power to intervene in cases to which they are not an immediate party, but might be affected should the principle at issue become law.13 Some authors hold the view that States often tacitly delegate lawmaking authority to courts but they do not want to acknowledge this delegation ‘in order both to perpetuate the fiction of state hegemony over international norm generation and to provide a shield behind which international courts can make law without suffering paralyzing political pressure that would negate their ability to do so’.14
Judges of the International Court of Justice acknowledge the lawmaking function of the Court as well. It is rather impossible, though, to hear a judge saying that the Court lays down mandatory rules in the same way as any national legislature. Hersch Lauterpacht, whose work is a benchmark, an intellectual paradigm encapsulating an approach to international law which has been profoundly influential and who, from 1955-1960, served as a Judge in ICJ, basically held the view that international tribunals ‘when giving a decision on a point of international law [...] state what the law is. Their decisions are evidence of the existing rule of law.’ However, at the same time he admitted that courts have a lawmaking function by saying that ‘[t]he denial on the part of the Court or of individual Judges of any intention to legislate is legitimate and proper. Any contrary attitude would constitute usurpation of powers – doubly dangerous in international sphere. This does not mean that they have been able to avoid decisions of legislative character. [...] Judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable.’ Therefore, ‘the fact remains that judicial law-making is a permanent feature of administration of justice in every society,’ thus in international society or community too. Accordingly Lauterpacht devoted in his writings considerable attention to what he called ‘judicial legislation’ which is conceived not as a process of making new law but ‘as a process of changing the existing law.’

But the discussion on all different views does not explain what judicial lawmaking means. One misses a clear answer to this question also in the Swart’s book, although she makes a number of good points in this respect. It can be inferred from her analysis that lawmaking, among other things, means filling the gaps or lacunae in existing rules that the court needs to apply. Or, it can also be ‘adventurous interpretation’ of existing rules, like the ICTY did in the Tadić case. Accordingly, she notes: ‘Interpretation will only constitute lawmaking if interpretation serves to fill a gap in the law or to extend the law to new areas’ (Swart p. 58).

Obviously, a more concrete conclusion in this respect is needed. It is so that the basic function of international courts is and will be to adjudicate. This includes certain degree of judicial discretion which according to traditional view is the authority to make a choice between two or more conceivable lawful alternatives. The assumption of a lawmaking or legislating function by the courts takes place when they in their decision-making depart from the normative preferences which the legislator had at the time the norm was accepted.

Reasons for such a departure can be different. Judicial lawmaking takes place when the courts cannot find answers in the pre-existing rules. Judges make law in the situations either when the underlying treaties are old and there is little prospect for their revision, or when the underlying conditions have changed, or when there are lacunae or gap in the existing sources of international law. Lauterpacht has identified five such situations in which ICJ legislates: (a) The Court might introduce certain though not drastic judicial novelty while applying a general principle of law; (b) Judicial legislation can also take place by reference to parallel developments in international law – when the Court gives ‘general and articulate formulation to developments implicit, though as yet not clearly accepted, in actual international custom or agreement of States.’ An example of the ICJ lawmaking is the pronouncement of the Court as result of the discrepancy which exists between the predominant doctrine accepting States as the only and exclusive subjects of international law and practice which reveals other entities acting as subjects of international law; (c) The third situation in which the Court legislates takes place when it renders decisions of a general nature in the absence of the rules that can serve as ground for decisions; (d) In some cases the Court legislates by departing from rigid customary or conventional rules because ‘of the flexibility that ought to characterise international relations.’ This takes place mostly with regard to procedural and jurisdictional questions; (e) And, finally, the fifth situation of ICJ judicial legislation concerns adjudication ex aequo et bono (an ancient concept according to which the court decides according to what is fair and in good conscience) by giving interpretation beyond the existing law.

Are other international courts different in this respect from the ICJ? Not really! If faced with similar situations regarding the pre-existing law and the requirements posed upon them they will embark on legislation in order to fulfil their duties. This goes also for the ad hoc Tribunals. The international criminal law system with which the ad hoc Tribunals are concerned, is a young legal order in constant flux and with lacunae and gaps in the pre-existing law. Swart mentions briefly that the Tribunals have applied general principles of law and have drawn from parallel developments in other areas. This has happened most frequently with regard to developments in international humanitarian law and human rights law. The Tribunals have also often relied on the flexible nature of international criminal law and when ‘there has been no generally accepted rule in international law (such as the definition of rape for example) they have gone beyond the interpretation of existing law to create new law.’ Similarly, in the Tadić case ‘[b]y finding that the Bosnian Serbs acted as de facto agents of another state [the Federal Republic of Yugoslavia], (that was necessary to qualify the conflict as international), the Appeals Chamber [of the ICTY] expanded the scope of protection of humanitarian law’ that was of a crucial importance in order to try Dušan Tadić for grave breaches of Geneva Conventions (Swart, p. 63-64).

But only departing from the legislator’s preferences is not enough to create or develop a new or different norm of international law. The survival of so created norm will depend very much on the authority that the lawmaking court enjoys and on its acceptance by the international community. The acceptance can be reflected in States’ expression of support and in the decisions of other
International (including judicial) bodies and institutions. So, if one comes to the (correct) conclusion that the ad hoc Tribunals have assumed law making function in certain cases because they interpreted the existing norms of humanitarian or human rights law by departing from the legislator’s normative preferences, it still does not mean that they have created an international rule or that their lawmaking is significant. The following step is needed and that is to see whether and to which extent there will be international acceptance of that law. It can happen that ‘states routinely ignore the norms pronounced by international courts, then their source as generator of international rules becomes much less promising’ or ‘decisions by international judges push far beyond what states are willing to tolerate and states begin to reject the newly-created rules, then an international court’s usefulness as a lawmaking device evaporates’. In other words, ‘[i]f States (and other international actors) accept the decisions of international courts and build practice around them then their lawmaking impact is substantial, […] if they do not, the decision may become marginalized, seen as exceptional and have minimal lawmaking effect.’ The discussion on the evidence concerning the acceptance or refusal of adjudication by the ad hoc Tribunals is an aspect which one misses in the Swart’s publication.

2.2. Judicial lawmaking, judicial legislation or judicial activism?

Swart emphasizes that judicial lawmaking is often (negatively) described as judicial legislation. The process of lawmaking through legislating requires value judgments, which by nature of their subjectivity, is also political. She starts from the premise that there is a sharp division of functions comparable to national legal systems in which the legislature makes the law, the executive enforces it and the judiciary interprets it. Accordingly, she considers that ‘because legislating is political it should be done by elected officials operating under a norm of accountability to their constituencies’. Adjudication, on the other hand, ‘must be justified in two ways: First, by appeal to a norm produced by the democratic decision-making process embodied in legislation and, secondly, by the application of a norm to the facts in a process that is independent of the decision-making process that generated it’. In her view, judicial legislation is problematic because it violates these requirements (Swart, p. 57–58). ‘[L]awmaking, 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 […] where development ends and legislating begins’ (Swart, p. 82).

Such a conclusion might suggest that there is a difference between the concepts of judicial lawmaking and judicial legislation and – one can add to this – judicial activism, as well. This difference should be reflected in the lawmaking intensity in substantive sense. According to this, a low-level lawmaking which is short of creation of new a law, but is maybe a slightly different interpretation of the existing law ‘by applying or extending established rules to novel circumstances and by altering the content of legal rules in accordance with changed economic and social circumstances’, can be called ‘development of law’. Beyond that, courts would act as judicial legislators or, even worse – judicial activists. According to Ronald Sackville in Australia ‘the expression “judicial activism” has become a political slogan, carrying distinctly pejorative overtones. In contemporary discourse […] the expression is frequently used in a derogatory sense to describe judicial lawmaking, especially of constitutional dimensions, which reflects the personal (usually liberal) policy preferences of unelected judges rather than a neutral application by them of established principles. […] The expression implies that activist judges exceed the proper limits of the judicial function and indeed, usurp the democratic authority of elected Parliaments.’ This might be comparable to the notion of judicial legislation or activism of international courts where similar factors might play role. The problem with all these ‘nuances’ of judicial lawmaking is that it is difficult to establish, as Swart correctly mentions, when one stops and the other begins. For the ad hoc Tribunals it is difficult to say whether in the exercise of their power they make law, legislate or act as judicial activists. There is no monitoring mechanism or criteria that could be used to establish the situations of far-reaching judicial lawmaking. There is also no system of accountability for judicial aspects of functioning of international courts. The qualification will depend on the public perception. The only possibility for States is, as above pointed out, to individually or collectively (through different institutions) provide an appropriate reaction to judicial lawmaking in case of their disagreement or agreement with it, expressed by ignoring or enhancing a decision of the court. This goes also for the ad hoc Tribunals. In the literature there is a notable criticism on their work and judgements. They are seen as too costly, too inefficient and too ineffective and it seems impossible today to envisage the establishment a tribunal of the same type in new situations. But there are many more of those who support the Tribunals and see them as legitimate and their decisions as exemplary and binding.

3. The creation of the Tribunals and their lawmaking function

Unlike other courts and tribunals the ad hoc Tribunals present an interesting and unique case with respect to both the manner of and the purposes for which they were created. An international court is usually created with an agreement or treaty. The Tribunals were, however, established by resolutions of the UN Security Council. The basis for their creation is Chapter VII (Enforcement action) and Article 29 of the UN Charter that gives the power to Security Council to create ‘such subsidiary bodies as it deems necessary for the performance of its functions’. This unique manner of their establishment has been chosen by the Security Council for the specific purpose which the Tribunals were supposed to fulfil in the field of peace and security.

With regard to a number of features the Tribunals can be compared to ICJ. All three – the two ad hoc Tri-
circumstances and conditions under
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set as measures of enforcement but as adjudicatory bodies. Obviously, their creation is surrounded by peculiarities regarding the circumstances and conditions under which they were established. Do all these facts have some impact on the legislative function of the Tribunals? Yes and no.

One could assume that such a position of the Tribunals imposes upon them a requirement for less caution or judicial hesitation with regard to applicable law. This notwithstanding the fact that it was clearly emphasized by the Secretary General that being of judicial nature the Tribunals have to perform their functions independently of political considerations and are not subject to the authority or control of the Security Council with regard to performance of judicial functions.35

This is one of the points that calls for analysis and comments missing in the Swart’s study. While she discusses in Chapter One the creation of the Tribunals and the challenges to the legality of their creation, she does not offer a view on whether or how the manner of their creation and their position of subsidiary bodies of the Security Council has affected their lawmaking function. What one would be interested to read is how come that the Security Council could create a subsidiary body to which it explicitly delegated, albeit limited, lawmaking power. In the broad discussion that has taken place in the past on the legality of the Security Council decisions regarding the creation of Tribunals as bodies carrying out judicial functions which it itself does not have, one easily forgets that the UN, its bodies and its specialized agencies neither were conceived to have any legislative powers themselves. Their objectives would be carried out mainly through recommendations aimed at coordinating or harmonizing the actions of their member States.36 So, in the past the Security Council limited itself to the debates and it was only when it started with a broader analysis of the factors influencing peace and security that it started to broaden its mandate and ‘is now assuming not only powers of action but also legislative powers in the interest of international peace and security’.37 Some recent examples of the exercise of legislative powers by the Security Council are its resolution 1373 (2001) adopted in the field of counter-terrorism and resolution 1540 (2004) on non-proliferation of weapons of mass destruction both creating general obligations for all States. So, considered in the light of new realities and threats to peace and security, the assumption of legislative powers by the Security Council in the field of peace and security is not necessarily negative. As Judge Tanaka pointed out ‘we […] must recognize that social and individual necessity constitutes one of the guiding factors for the development of law by the way of interpretation as well as legislation’.38

During the preparatory stage of the creation of the ICTY the UN Secretary General has stressed that the Tribunal would have a task to prosecute persons responsible for serious violations of conventional and customary international humanitarian law and not to legislate that law.39 In his Report issued in 1993 he emphasized that in order to respect the principle of legality which is reflected in the Latin maxim nullum crimen sine lege, the Tribunals should apply rules of 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’.40 Further in the Report the Secretary General specified that the part of the conventional international humanitarian law which has beyond doubt become part of customary law is the law applicable to armed conflict and embodied in the 1949 Geneva Conventions for the protection of war victims, the 1907 Hague Convention (IV) respecting the Laws and Customs of War and the Regulations annexed thereto, the 1948 Convention on the Punishment of the Crime of Genocide and the 1945 Charter of the International Military Tribunal.41 Suggestions to apply domestic law in so far it incorporates international humanitarian law were not accepted as it was considered that the existing rules of international humanitarian law embodied in the above-mentioned documents provide sufficient basis for subject-matter jurisdiction. The Canadian proposal to specify the ICTY Statute as to include the exact offences under the laws of war and the mens rea to be proved by the Prosecutor in each of the crimes,
was also refused. So, the Statutes of both Tribunals remained brief, with a rather limited number of provisions and do not contain any but one provision on the law which the Tribunals should apply. ‘As enacted by the Security Council, the ICTY [and also ICTR] Statute resembled the bold outlines of a coloring book: much remained for judges to fill in.43 The only exception in that sense was made with regard to penalties in determining of which the Trial Chambers shall have recourse to the general practice regarding prison sentences in the national courts of the former Yugoslavia or Rwanda. Identical approach was taken with regard to the ICTR.44 However, both Statutes contain a provision (Articles 15 ICTY and 14 ICTR) explicitly delegating lawmaking function to the Tribunals giving them capacity to adopt rules of procedure and evidence.

So, one can ask whether it was the intention of the Security Council to delegate the lawmaking power to the ad hoc Tribunals? No doubt that the Security Council – acting on behalf of the international community – was aware of the rudimentary nature of international criminal law that would make the lawmaking by the Tribunals unavoidable and probably also desirable. States present in the Security Council were most likely conscious that the Tribunals would engage in lawmaking even if they did not specifically create them for that purpose. However, they did not react either because the Tribunals were of an ad hoc nature with limited temporal and territorial jurisdiction or ‘States’ public refusal to recognize this possibility [...] provided them with the ability to denounce the Tribunals later on, should the courts reach a decision with which States disagreed.45 The Preliminary Report of the Independent Commission of Experts on the humanitarian situation in Rwanda established by the UN Secretary General in 1994 noted that the creation of the Tribunal was not only a matter of ensuring justice in respect of atrocities that have already been perpetrated, but also a matter of deterrence for the future. It also noted that ‘[t]he coherent development of international criminal law better to deter such crimes from being perpetrated in future not only in Rwanda but anywhere would best be fostered by international prosecution rather than by domestic courts.46 During the discussion of the ICTR in the Security Council Argentina highlighted that the tribunal was ‘not authorized’ to create rules of international law or to legislate as regards such law, but rather it is to apply existing law.47 However ‘[t]here is little legislative history for the ICTR, so it is not clear on what basis the Security Council made determination that customary international law provides for individual criminal responsibility in civil wars’, which brings us to the conclusion that ‘[i]n the light of the ground-breaking nature of the idea of the international prosecution of crimes committed in civil wars, [the statement of Argentina] was either breathtakingly disingenuous or profoundly ill-informed’.48 This all indicates to the fact that by not specifying in great detail the provisions of the Statutes (because of the urgency of the issue, the absence of interest and will of the States sitting in the Council or because of its own inability) the Security Council in a way demanded the law to be created at some later date, like sometimes happens in national legal systems.49

All the above-said carries the message that, despite the fact that the Tribunals live now their own ‘judicially independent life’ the manner of their creation and their perceived function and purposes can still not be explained and considered isolated from their parent body, the Security Council and the role it (has) played. It is pity that Swart did not devote some attention to this question in her thesis.

4. Conclusion

Finally, a small critical remark on the publication as such, is needed. The subject of the study prepared by Mia Swart is not only interesting but also very important. There is an obvious tendency towards global expansion of judicial power both on national and international levels. However, in the book a reader will only partly find the things he expects to read. Swart understands lawmaking by the ad hoc Tribunals in its broadest meaning that includes discussion on all different aspects of the working of the Tribunals, such as the financing of the Tribunals (and for some reasons also of ICC) or the ‘courtroom aesthetics’ explaining how the ICTY courtroom looks like. On a number of places the reader does not get the message about the importance of the chapter or discussion she includes for the topic of the thesis. Such an example is the discussion about the ‘common law lawmaking’ (Chapter Two, under 6). Missing a strict focus on lawmaking the publication is in a way about everything what concerns the work of the Tribunals. But there are also valuable chapters such as the one discussing the principle of legality and the detailed analysis of the case law of the Tribunals.

Notwithstanding these critical remarks one can appreciate the book’s contribution to the opening of the academic discussion on judicial lawmaking in the field of international criminal law. At this moment it is the only monograph that has been published on the particular topic of lawmaking function of the ad hoc Tribunals.50 And, in general, ‘there has been little sustained scholarly examination of law-making’.51 Most attention has been focused on internal consistency of the body of national law, namely whether the proliferation of tribunals threatens the coherence of international law.52 So, it should be expected that the judicial lawmaking of the criminal tribunals will gain increasing attention in the future due to the commencement of the ICC work and genuine interest of States to strengthen the norms of international humanitarian law and of individual criminal responsibility.

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Nijmegen, April 2008

to clarify the meaning of the formulated

rule. This is granting him a rather wide
to become a tool for
making blossom or confusing the device
submitted to his assessment. But he
can also apply to draft a new norm
beyond the words of the law, or even
against the words of the law he does
not hesitate to neutralize or tilt... for
getting in passing, that law making does
not come within his empire.’
(www.philosophie-droit.asso.fr/Sum-
mary-06.html).

33. Allison Marston Danner, ‘When the Courts Make Law: How the Interna-
tional Criminal Tribunals Recast the Laws of War’, Vol. 59 Vanderbilt Law

34. Hersch Lauterpacht, The Development of International Law by the Interna-
tional Court, Stevens & Sons Limited 1958, p. 173.


36. For a detailed analysis of the situations in which judicial legislation by ICJ ta-
takes place see, Hersch Lauterpacht, The Development of International Law,
Stevens & Sons Limited 1958, Part Three. See also p. 155-223.

37. Trial against Dušan Tadić was the first international war crimes trial which
took place since the Second World War. Tadić was charged by the grave brea-
ches of the Geneva Conventions, se-
rious violations of laws and customs of
wars and crimes against humanity.
Documents of the case can be found at:
(www.un.org/icty/cases-e/index-
e.htm).

38. Marston Danner, ‘When the Courts Make Law: How the International
Criminal Tribunals Recast the Laws of War’, Vol. 59 Vanderbilt Law

University Press 2007, p. 626.

South Africa), Second Phase, ICJ Judg-
ment of 18 July 1966, p. 277.

41. Tom Ginsburg, ‘International Judicial
Lawmaking’ Virginia Journal of Inter-
national Law Spring 2003, Vol. 45 (pub-
lished on-line).

42. Allison Marston Danner, ‘When the Courts Make Law: How the Interna-
tional Criminal Tribunals Recast the Laws of War’, Vol. 59 Vanderbilt Law

43. Ian G.M. Schobie, ‘The Theorists as
Judge: Hersch Lauterpacht’s Concept of
the International Judicial Function’,
Vol. 8 European Journal of Inter-

44. Hersch Lauterpacht, The Development of International Law, Stevens & Sons

45. Idem, Part Three. See also p. 155.

46. Idem, Part Three. See also p. 155.

47. Dan Kahn defines interpretive lawmak-
ing as ‘the authority to issue presumpti-
vably binding interpretations of am-
biguous or generally worded regulatory
statutes.’ (Dan M. Kahn, ‘Relocating
Interpretative Criminal-Lawmaking
Power within the Executive Branch’,
Vol. 61 Law and Contemporary Prob-
47.

48. Ola Wiklund, ‘The Role of Ideology in
Adjudication’, Juridica International

49. Idem, at p. 62. The concept of lawmak-
ing was very nicely described by Ber-
nard Teysé in Case Law and Labour
Law: ‘Law has a wealth of words it re-
frains to define. It leaves it to the judge
to clarify the meaning of the formulated

Boekbeschouwingen

4. Alan Boyle and Christine Chinkin,
Idem, p. 264.

5. <www.thefreedictionary.com/lawmak-

6. See, Panel 1 of the series ‘The Role of
the Security Council in Strengthening
a Rules-Based International System’,
held on the occasion of the Internation-
al Law Week 2004 at the Institute for
International Law and Justice at New
York University School of Law (4 No-
vember 2004).

7. Alan Boyle and Christine Chinkin, The
Making of International Law, Oxford
University Press 2007, p. 266.

8. Hersch Lauterpacht, The development
of International Law by the Internation-
al Court, Stevens & Sons Limited 1958,
p. 155.

9. See, Proces-Verbaux of the Proceedings
of the PCIJ Advisory Committee of
Jurists of 16 June – 24 July (The Hague,
1920), quoted from Alan Boyle and
Christine Chinkin, Ibid., p. 267.

10. Legality of the Threat or Use of Nu-
clear Weapons, ICJ Advisory Opinion
of 8 July 1996, par. 35.

11. Alan Boyle and Christine Chinkin, The
Making of International Law, Oxford

12. Dissenting Opinion of Judge Tanaka in
South West Africa case (Ethiopia v.
South Africa), Second Phase, ICJ Judg-
ment of 18 July 1966, p. 277.

Lawmaking’ Virginia Journal of Inter-
national Law Spring 2003, Vol. 45 (pub-
lished on-line).

14. Allison Marston Danner, ‘When the
Courts Make Law: How the Interna-
tional Criminal Tribunals Recast the
Laws of War’, Vol. 59 Vanderbilt Law

15. Ian G.M. Scobie, ‘The Theorists as
Judge: Hersch Lauterpacht’s Concept of
the International Judicial Function’,
Vol. 8 European Journal of Inter-

16. Hersch Lauterpacht, The Development of
International Law, Stevens & Sons

17. Idem, Part Three. See also p. 155.


20. Dan Kahn defines interpretive lawmak-
ing as ‘the authority to issue presumpti-
vably binding interpretations of ambigu-
sous or generally worded regulatory
statutes.’ (Dan M. Kahn, ‘Relocating
Interpretative Criminal-Lawmaking
Power within the Executive Branch’,
Vol. 61 Law and Contemporary Prob-
47.

21. Ola Wiklund, ‘The Role of Ideology in
Adjudication’, Juridica International

22. Idem, at p. 62. The concept of lawmak-
ing was very nicely described by Ber-
nard Teysé in Case Law and Labour
Law: ‘Law has a wealth of words it re-
frains to define. It leaves it to the judge
to clarify the meaning of the formulated

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51. The monograph of Alan Boyle and Christine Chinkin (The Making of International Law, 2007) as well as the monograph of José E. Alvarez (International Organizations as Lawmakers, 2006) present in that respect valuable exceptions. See also in this respect a very important and often quoted study of Hirsch Lauterpacht, ‘The Development of International Law by International Court’, Stevens & Sons Limited 1958.


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