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Chapter 15

BRIDGING THE GAPS IN THE LAWS OF ARMED CONFLICT? INTERNATIONAL CRIMINAL TRIBUNALS AND THE DEVELOPMENT OF HUMANITARIAN LAW

Shane Darcy*

The codification of the laws of armed conflict has frequently taken place in the aftermath of significant periods of war, or in response to major changes in the nature of contemporary armed conflict. When taken together with the often slow pace of the international treaty-making process and the continued reluctance of states to allow international regulation of internal affairs, this has meant that significant gaps or shortcomings in the protections afforded under international humanitarian law (IHL) have often existed. While implementation and enforcement have been recurrent issues of concern since the inception of laws governing conduct during times of war, there have also been substantive gaps present with regard to, for example, the scope of protections applicable in non-international armed conflicts, the extent to which violations of rules of IHL are to be considered war crimes and the meaning of concepts and principles central to the laws of armed conflict. The recent establishment of a number of international criminal tribunals, including the permanent International Criminal Court (ICC), has served to address both the enforcement deficit of IHL and some of the more significant gaps in the legal regime.

This chapter considers the contribution of international criminal tribunals to the development of the rules of IHL. While the judicial development of IHL, like that of most branches of law, is not new, nor for that matter, uncontroversial, the proliferation of international courts and tribunals over the past 15 years has seen a marked upsurge of such activity.¹ The approach adopted in this chapter is one which exam-

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¹ Consider the following literature on the subject: C. Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia', 2 *MPYUNL* (1998) p. 97; T. Meron, 'War Crimes in Yugoslavia and the Development of International Law', 88 *AJIL* (1994) p. 76; L.C. Green, 'The International Judicial Process and the Law of Armed Conflict', 38 *RDMDG* (1999) p. 13; S. Boelaert-Suominen, 'The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts', 13 *LJIL* (2000) p. 619; A. Marsten Danner,

ines recent judicial attempts aimed at bridging existing gaps in the legal regulation of armed conflict. To the extent that this has been achieved, the question arises as to whether some judgments have gone beyond being a 'subsidiary means for the determination of rules of law'.² Although the process of creating IHL treaties has often been guided by the pronouncements of international courts, the current international criminal tribunals have arguably gone further at times and responded with 'judicial legislation' to meet the challenges for international law presented by modern armed conflict. The chapter considers the role of the international judge in developing IHL and in bridging the gaps that may exist therein.

1. JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

The contribution of the judgments of international courts and tribunals to the development of IHL has often been subtle and understated, yielding a slow but steady influence on the law's progression. On occasion, however, judicial decisions have achieved significant prominence and notoriety, when they have involved profound changes or even paradigmatic shifts in the corpus and meaning of IHL. Commenting on the positive influence that the Nuremberg judgment and process had on the elaboration of various international instruments, Bassiouni noted that it was 'difficult to assess and appraise the impact of the moral, ethical, intellectual and social consciousness dimensions of Nuremberg's legal legacy on the development of law and legal institutions in the fields of international humanitarian law and international human rights law.'³ Examining more discernible and tangible means of judicial development will allow for an assessment of the legal contribution of international courts and tribunals to the laws of armed conflict.

Judicial decisions often clarify the meaning of particular rules, principles or concepts of relevance in times of war and which lack sufficient definition in the various IHL treaties. Concepts such as 'armed conflict', 'occupation', and 'protected persons', basic principles such as proportionality, distinction and military necessity, and many of the catalogue of conventional rules have been subject to judicial discussion, interpretation and analysis. These judgments have added 'flesh to the bare bones of treaty provisions or to skeletal legal concepts.'⁴ Given the pace of the development of modern weaponry, judicial decisions have at times assessed the

'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', 59 *VLR* (2006) p. 1; L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden, Brill 2005); W. Fenrick, 'The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 3 *JACL* (1998) p. 197; T. Meron, 'The Hague Tribunal: Working to Clarify International Humanitarian Law', 13 *AUILR* (1998) p. 1511.

² Art. 38(1)(d) Statute of the International Court of Justice, annexed to the Charter of the United Nations 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153.

³ M. Cherif Bassiouni, 'The Nuremberg Legacy: Historical Assessment Fifty Years Later', in B. Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York, TV Books 1999) p. 290 at p. 301.

⁴ Fenrick, *supra* n. 1, at p. 197.

compatibility of weapons with the established rules and principles of IHL.⁵ Recent judgments have also looked at the complex relationship between international human rights law (HRL) and the laws of armed conflict, and have clarified the continued relevance of HRL in times of armed conflict.⁶ One of the important undertakings of the International Criminal Tribunals for Rwanda and the Former Yugoslavia has been examining the extent to which criminal liability attaches to individuals for breaches of the various humanitarian law rules and principles.⁷ As the next section demonstrates, this is particularly significant where the primary rules have not been expressly translated into international offences by a multilateral treaty process.

The two principle sources of IHL – treaties and custom – have often been shaped by the judicial process. The post-World War II trials highlighted the insufficiency of the existing laws of war at the time and the need for positive treaty rules governing specific issues. The Tribunal in the *Hostages* case, for example, noted the ‘complete failure on the part of the nations of the world to limit or mitigate the practice [of reprisals] by conventional rule’, and that with regard to the practice and that of hostage-taking, ‘international agreement in this area is badly needed’.⁸ The 1949 Geneva Conventions (GCs) subsequently introduced the first prohibition on the taking of hostages in wartime and several rules outlawing resort to belligerent reprisals.⁹ It will be shown below how jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) noticeably influenced the drafting of the Rome Statute of the ICC. With regard to customary international humanitarian law, judgments have frequently made findings as to the customary status of treaties themselves or of particular rules applicable in times of armed conflict. The International Committee of the Red Cross’ (ICRC) *Customary International Humanitarian Law* study is replete with such references to the jurisprudence of various courts and tribunals on this matter.¹⁰

This is a brief overview of the various ways in which judicial authorities contribute to the development of IHL. Judge Higgins, President of the International Court of Justice (ICJ), has recognised ‘the tradition of using advisory opinions as

⁵ See for example ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, General List No. 95; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber I, Judgment, 12 June 2007, para. 463 (on cluster munitions).

⁶ See for example ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *supra* n. 5, para. 25; *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, General List No. 131, para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116, 19 December 2005, paras. 175-178.

⁷ See generally G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford, OUP 2005).

⁸ *United States of America v. Wilhelm List et al.*, Judgment, 19 February 1948, Case No. 7, XI *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* 757, p. 1252.

⁹ Arts. 33 and 34 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *UNTS* p. 287. See further S. Darcy, *Collective Responsibility and Accountability under International Law* (New York, Transnational 2007) pp. 109-116, 145-148.

¹⁰ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules, Volume II: Practice* (Cambridge, CUP 2005).

an opportunity to elaborate and develop international law.¹¹ While the enforcement of the rules of IHL and the holding of perpetrators accountable for breaches thereof increases the authority of the laws of armed conflict in a general sense, and generates the revival of scholarly work in the field,¹² it is arguably that it is in the realm of judicial development of those laws that international courts and tribunals make their greatest contribution to the progressive evolution of international law. The next section looks at how contemporary jurisprudence has developed the laws of armed conflict with regard to central concepts and principles, the scope of protection and war crimes.

2. BRIDGING THE GAPS IN THE LAWS OF ARMED CONFLICT?

2.1 Key concepts

Precise definition of a number of key IHL concepts and principles has often proved elusive. The notion of an ‘armed conflict’, key to the very application of this branch of law, is a prime example. Common Article 2 GCs simply states that the treaties ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.’¹³ Common Article 3 GCs similarly provides little guidance as to the meaning of ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’¹⁴ The commentaries prepared by the ICRC provide authoritative, although not definitive, interpretations of the concept.¹⁵ The creation of the Additional Protocols (APs) in 1977 extended the application of IHL to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.’¹⁶ It was in Additional Protocol II (AP II), relating to internal situations, that some criteria were first provided on the meaning of ‘armed conflict’:

‘This Protocol...shall apply to all armed conflicts which are not covered by [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable

¹¹ ICJ, *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, Separate Opinion of Judge Higgins, para. 23.

¹² R. Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study’, 11 *JCSL* (2006) p. 239 at p. 239.

¹³ Art. 2(1) GC IV, *supra* n. 9.

¹⁴ Art. 3 GC IV, *ibid.*

¹⁵ See J. Pictet, ed., *Commentary; IV Geneva Convention, Relative to the Protection of Civilian Person in Times of War* (Geneva, International Committee of the Red Cross 1958) pp. 20-21, 35-36.

¹⁶ Art. 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) 1977, 1125 *UNTS* p. 3.

them to carry out sustained and concerted military operations and to implement this Protocol.

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.¹⁷

The definition thus excluded certain incidents from being considered as amounting to ‘armed conflict’ and provided a somewhat high threshold for establishing which armed conflicts would be covered by the Protocol by emphasising organisation, responsible command, control of territory and military operations.¹⁸

Establishing the existence of a particular type of an armed conflict is critical for the application of the relevant IHL framework from the outset of the conflict and for any post-conflict prosecution of alleged breaches of the laws of armed conflict. It was in the latter context that the ICTY Appeals Chamber made the following statement in the 1995 *Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*:

‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’¹⁹

The definition of internal armed conflict put forward here by the Appeals Chamber is broader than that contained in AP II, proposing a lower threshold, which, as will be seen, has significant implications for the application of the protections under the law and for the possible prosecution of breaches thereof. Cassese, who was the Presiding judge on the bench, later described the *Tadic* formulation as ‘an interesting contribution to the clarification of an area of international humanitarian law which is badly in need of judicial refinement.’²⁰ Other commentators have been less sanguine, with one commenting that *Tadic* had overstepped the mark when it ‘tacitly rejected the language painstakingly negotiated by states in the Diplomatic Conference.’²¹ That said, the Rome Statute of the ICC, arguably the most signifi-

¹⁷ Art. 1(1)-(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) 1977, 1125 *UNTS* p. 609.

¹⁸ See A. Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict under International Humanitarian Law’, 183 *MiLLR* (2005) p. 65 at pp. 92-97.

¹⁹ *Prosecutor v. Dusko Tadic*, Case No. IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

²⁰ A. Cassese, ‘The International Criminal Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law’, in L. Condorelli, A.-M. La Rosa and S. Scherrer, eds., *The United Nations and International Humanitarian Law* (Paris, Editions Pedone 1996) p. 229 at p. 235.

²¹ Marsten Danner, *supra* n. 1, at p. 30.

cant codification of IHL in recent decades, reproduces a definition of non-international armed conflicts that is almost identical to that set out in *Tadic*.²² The delegation from Sierra Leone had submitted a proposal based on the *Tadic* formulation, with the minor change of ‘protracted armed conflict’ for ‘protracted armed violence’.²³ It bears noting that at the time of writing, the Rome Statute has over 100 states parties, indicating considerable acceptance of the formulation first proposed by the ICTY.²⁴

A related concept to armed conflict is that of occupation, the existence of which imposes increased obligations upon an Occupying Power when compared with those applying to a party to an international armed conflict.²⁵ The basic formulation of military occupation is set out in Article 42 of the 1907 Hague Regulations which states ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’²⁶ The 1949 GCs did not elaborate or attempt to succeed this definition, confirming that the treaties apply to any ‘partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’²⁷ However, in the context of the continued application of the GC IV after the general close of military hostilities, Article 6 states that an Occupying Power will remain bound by particular provisions ‘for the duration of the occupation, to the extent that such Power exercises the function of government in such territory.’²⁸ The extent to which authority must be exercised over territory and the forms that that may take has not been established with certainty in the treaties of IHL, and is an issue which has recently arisen in the context of Israel’s ‘disengagement’ from the Gaza Strip.²⁹

Several judicial decisions concerning actions taken during situations of occupation provide authoritative guidance as to when a belligerent occupation can be said to exist. In the post-Second World War *Hostages* case, a United States Military Tribunal observed that:

²² Art. 8(2)(f) ICC Statute, 1998, UN Doc A/CONF.183/9, 2187 *UNTS* p. 90.

²³ UN Doc A/CONF.183/C.1/L.62. See generally T. Graditzky, ‘War Crimes Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court’, 5 *UCDJILP* (1999) p. 199.

²⁴ Website of the International Criminal Court <<http://www.icc-cpi.int/about.html>> (accessed June 2008).

²⁵ As set out, for example, in Part III GC IV, *supra* n. 9.

²⁶ Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, *reprinted in* A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd edn. (London, OUP 2000) p. 69.

²⁷ Art. 2(2) GCs, *supra* n. 9.

²⁸ The relevant articles are Arts. 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143 GC IV, *supra* n. 9.

²⁹ See *Jaber al Bassiouni Ahmed et al. v. The Prime Minister and Minister of Defence*, HCJ 9132/07, Judgment, 27 January 2008; I. Scobbie, ‘An Intimate Disengagement: Israel’s withdrawal from Gaza, the Law of Occupation and of Self-Determination’, 11 *YIMEL* (2004-5) p. 3; Y. Shany, ‘Faraway, so Close: The Legal Status of Gaza after Israel’s Disengagement’, 8 *YIHL* (2005) p. 369.

‘Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.’³⁰

The Tribunal had to consider whether the organisation and intensity of the resistance against the German forces in Greece and Yugoslavia was sufficient to change their status from that of an Occupying Power:

‘It is clear that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.’³¹

More contemporary jurisprudence has elaborated on the requirements for an occupation to be said to exist, and on the obligations of an Occupying Power. The ICTY has laid out the following instructive guidelines:

- the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
- the enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.³²

It has been claimed that the criteria requiring a sufficient presence of troops, or an ability to send troops at short notice in order to make authority felt, ‘was not a legal innovation created by the Yugoslav Tribunal but simply re-stated *established law* [emphasis added], following the U.S. Military Tribunal at Nuremberg in the *List* case.’³³

³⁰ *United States of America v. Wilhelm List et al.*, Judgment, *supra* n. 8, at p. 1243.

³¹ *Idem.*

³² *Naletilić et al.*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 217 [footnotes omitted].

³³ Scobbie, *supra* n. 29, at p. 31.

The ICJ, in *Democratic Republic of Congo v. Uganda*, held that what needed to be ascertained was whether authority was ‘established and exercised by the intervening State in the areas in question’ and that armed forces were not only stationed in those areas, but that they had ‘substituted their own authority for that of the Congolese Government’.³⁴ The Court found that any justification for such presence would be irrelevant, as would the issue of whether or not Uganda had ‘established a structured military administration of the territory occupied’.³⁵ It is worth noting the Court’s finding that an occupying power’s obligations set out in Article 43 of the Hague Regulations ‘comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.’³⁶ These judgments have contributed to understandings and perhaps even meanings of the concept of belligerent occupation under IHL.

The general system of civilian protection established under GC IV covers individuals who, during an international armed conflict or an occupation, find themselves ‘in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’³⁷ The emphasis on nationality presented difficulties in the trials of individuals by the ICTY for actions committed during the various conflicts arising out of the break up of Yugoslavia in the early 1990s. In 1997, a majority of the Trial Chamber in the *Tadic* case found the accused not guilty of a number of charges on the basis that the victims could not be considered ‘protected persons’ under the GC IV. The judgment read:

‘[...] after 19 May 1992 the armed forces of the *Republika Srpska* could not be considered as de facto organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in Opstina Prijedor or more generally. For that reason, each of the victims of the acts ascribed to the accused in Section III of this Opinion and Judgment enjoy the protection of the prohibitions contained in Common Article 3, applicable as it is to all armed conflicts, rather than the protection of the more specific grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals, which falls under Article 2 of the Statute.’³⁸

The Appeals Chamber, however, took an ‘original approach’ to the issue,³⁹ finding that ‘substantial relations’ rather than ‘formal bonds’ were more important in present-day international armed conflicts:

³⁴ *Case Concerning Armed Activities on the Territory of the Congo*, *supra* n. 6, at para. 173.

³⁵ *Idem*.

³⁶ *Ibid.*, at para. 178. Art. 43 of the Hague Regulations reads: ‘The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’ Hague Regulations, *supra* n. 26.

³⁷ Art. 4(1) GC IV, *supra* n. 9.

³⁸ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 607. See Greenwood, *supra* n. 1, at pp. 126-127.

³⁹ W.A. Schabas, *The UN International Criminal Tribunals* (Cambridge, CUP 2006) p. 247.

‘While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.’⁴⁰

The Appeals Chamber found that the Trial Chamber had erred in acquitting the accused on the basis that the grave breaches regime could not apply.⁴¹

The move beyond a strict reading of the nationality requirement of the GC by the Appeals Chamber may have been influenced by the writings of Meron, who was subsequently appointed as a judge at the ICTY. After the *Tadic* Trial judgment, he opined that that it would be ‘the height of legalism’ to enforce this nationality requirement in the context of the former Yugoslavia, claiming that the requirement of a different nationality could be satisfied in this particular instance ‘simply by being in the hands of the adversary’.⁴² Subsequent judgments have invoked this broader interpretation of ‘protected persons’ and, as Schabas notes, have resisted criticism of this ‘judicial innovation’.⁴³ The ICTY Appeals Chamber in the *Celebici* case rejected the Defence argument that the expansive interpretation of the nationality requirement would ‘constitute a rewriting of Geneva Convention IV or a “re-creation” of the law.’⁴⁴ In the trial of Tihomir Blaškić, the Trial Chamber held that ‘[i]n an inter-ethnic armed conflict, a person’s ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons.’⁴⁵ Defence contentions at the appeal stage that such findings amounted to the creation of new law, thus violating the principle of legality, were dismissed as ‘unpersuasive’.⁴⁶ ‘There is nothing in that principle that prohibits the interpretation of the law through

⁴⁰ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 166.

⁴¹ *Ibid.*, at para. 170.

⁴² Meron, *supra* n. 1, at pp. 1516-1517.

⁴³ Schabas, *supra* n. 39, at p. 248.

⁴⁴ *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 73.

⁴⁵ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 127. In the trial of Ivica Rajic, an ICTY Trial Chamber gave a similarly broad construction to the meaning the phrase ‘in the hands of a Party to the conflict or an Occupying Power of which they are not nationals’, holding that although the Bosnian civilians in question were not directly or physically in the hands of Croatia, the facts of the case meant that they could be treated as being ‘constructively’ so. *Prosecutor v. Ivica Rajic*, Case No. IT-95-12, Trial Chamber, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, paras. 34-37.

⁴⁶ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 180.

decisions of a court and the reliance on those decisions in subsequent case', the Appeals Chamber held.⁴⁷ The ICTY's official website commends the Tribunal's expansion of 'the boundaries of international humanitarian law', including its provision of this 'extended and exact definition of *protected persons* under the Conventions.'⁴⁸

2.2 Scope of protections

The ICTY's clarification of the meaning of protected persons also serves to expand that category of persons, thus increasing the scope of the protections of IHL. The most well-known judicial attempt at the Tribunals to increase the scope of IHL protection also came in the *Tadic* case, wherein rules of so-called 'Hague law' were found to equally apply to non-international armed conflicts. International law applicable to situations of internal violence and conflict has been notoriously limited.⁴⁹ Common Article 3 GCs provides a short list of, admittedly, fundamental guarantees, without, however, any reference to conduct of hostilities, use of weapons or concrete means of enforcement, while the efforts at expansion in AP II were beset by recalcitrance and disagreement at the Diplomatic Conference,⁵⁰ and compounded in the end by the high threshold of application discussed above. The ICTY in *Tadic* sought to redress the imbalance between international and internal conflicts under the laws of armed conflict.

The Appeals Chamber in the *Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* felt that the distinction between interstate wars and civil wars was 'losing its value as far as human beings are concerned'.⁵¹ It asked:

'Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.'

Having reviewed the existing laws, various examples of State practice, and the statements of intergovernmental and other organisations, the Appeals Chamber held that:

⁴⁷ *Ibid.*, at para. 181.

⁴⁸ ICTY, 'Tribunal's Core Achievements – The Achievements in International Law', <<http://www.un.org/icty/glance-e/index.htm>> (accessed June 2008). See however M. Sassòli and L.M. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadic* Case', 839 *IRRC* (2000) p. 733.

⁴⁹ See generally L. Moir, *The Law of Internal Armed Conflict* (Cambridge, CUP 2002).

⁵⁰ See K. Suter, *An International Law of Guerrilla Warfare; The Global Politics of Law-Making* (London, Frances Pinter 1984) pp. 128-174.

⁵¹ *Prosecutor v. Tadic*, *supra* n. 19, at para. 97.

‘Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inadmissible in civil strife.’⁵²

General principles of customary international law have also evolved with regard to methods of warfare in the area of internal armed conflicts, the Chamber found.⁵³ It was keen to stress, however, that only a number of rules and principles covering international conflicts have been extended to internal conflicts and that, moreover, ‘this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.’⁵⁴

The Appeals Chamber’s conclusion, a statement that has been lauded for its progressive approach to this matter, summarises those areas of internal conflict now regulated by international law:

‘[...] it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.’⁵⁵

Greenwood commented that

‘the confirmation by the Appeals Chamber of the existence of a body of customary, Hague law regarding internal armed conflict is of the greatest importance and is likely to be seen in the future as a major contribution to the development of international humanitarian law. [...] a development which is bound to influence any future consideration of the law of internal armed conflicts.’⁵⁶

Hampson commended the common sense approach adopted by the Tribunal and noted that ‘with one swipe, they were able to change the perception of what the law was, and in fact, since then, the treaty regime has kept pace.’⁵⁷ In fact, the codification of war crimes in the Rome Statute although reaffirming the distinction between

⁵² *Ibid.*, at para. 119.

⁵³ *Ibid.*, at para. 125.

⁵⁴ *Ibid.*, at para. 126.

⁵⁵ *Idem.*

⁵⁶ Greenwood, *supra* n. 1, at p. 130.

⁵⁷ F. Hampson, ‘Relevance for the Prosecution of Violations of International Humanitarian Law’, in L. Maybee and B. Chakka, eds., *Custom as a Source of International Humanitarian Law* (New Delhi, ICRC 2007) p. 103 at p. 109.

international and non-international armed conflicts, arguably goes further than the treaty prohibitions set out in Common Article 3 GCs and AP II, which included a number of Hague-type rules.⁵⁸ Interestingly, the recently adopted Convention on Cluster Munitions, 2008 does not distinguish between international or non-international armed conflicts in the application of its provisions.⁵⁹ Outside the realm of treaty-making, a member of the Inter-American Commission on Human Rights has spoken of the influence ‘progressive developments and interpretations’ of this and other Tribunal jurisprudence on that body’s application of IHL:

‘The Commission has followed the Tribunal’s jurisprudence, and it has weighed heavily in our deliberations in these areas. Moreover, the Commission is taking its cue from that part of the *Tadić* case, which indicated that it is nonsensical to think that common Article 3 and Protocol II conflicts the fundamental rules of Hague law governing the conduct of hostilities somehow do not apply.’⁶⁰

Not all attempts at the Tribunals to increase the scope of the protections under IHL have met with similar success. In the *Martić* and *Kupreškić* cases, the ICTY sought to expand the protections provided under the laws of armed conflict against belligerent reprisals.⁶¹ The doctrine of reprisals, which essentially allows for a breach of the laws of war in order to coerce an opponent into observance of those same laws, has proved a thorny issue in a legal regime of limited enforcement.⁶² The *Martić* Trial Chamber claimed that ‘the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.’⁶³ In *Kupreškić*, the Trial Chamber held that the prohibition of reprisals against civilians in AP I was part of customary international law, despite the objections of numerous states expressed at the Diplomatic Conference and in the form of reservations upon ratification of the instrument.⁶⁴ Attempts to legislate against reprisals in non-in-

⁵⁸ Cf., Art. 8(e)(i)-(xii) ICC Statute with Arts. 7-17 AP II, *supra* n. 17.

⁵⁹ Convention on Cluster Munitions, *Diplomatic Conference for the Adoption of a Convention on Cluster Munitions*, Dublin, 19-30 May 2008, CCM/77 <<http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf>> (accessed June 2008).

⁶⁰ R.K. Goldman, ‘Panel Commentary: War Crimes Tribunals: The Record and Prospects: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law’, 13 *AUJLR*(1998) p. 1509 at p. 1535.

⁶¹ *Prosecutor v. Milan Martić (Rule 61)*, Case No. IT-95-11-R61, Trial Chamber I, Decision, 8 March 1996, 108 *ILR* 39; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000.

⁶² See generally F. Kalshoven, *Belligerent Reprisals* (Leyden, Sijhoff 1971).

⁶³ *Prosecutor v. Martić (Rule 61)*, *supra* n. 61, paras. 16-17.

⁶⁴ *Prosecutor v. Kupreškić et al.*, *supra* n. 61, para. 531. See F. Kalshoven, ‘Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal’, in L. Chand Vohrah, et al., eds., *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague/London/New York, Kluwer Law International 2003) p. 481; C. Greenwood, ‘Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, in

ternational armed conflicts have proved notoriously difficult.⁶⁵ The most recent military manual of the United Kingdom has rejected the findings in *Kupreškić* as ‘unconvincing’, and stated that ‘the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment.’⁶⁶

2.3 War crimes

Undoubtedly, it is in the area of war crimes that the *ad hoc* international criminal tribunals have made the most significant strides in bridging existing gaps in the laws of armed conflict. Throughout the 20th century judicial bodies contributed immensely to the development of the laws of war crimes – the concept of command responsibility, for example, was essentially a judicial creation.⁶⁷ The push of the law in this area is somewhat paradoxical, as it is in the very context of criminal prosecution of violations of the laws of war that one would expect courts and tribunals to exercise restraint in deference to the principle of legality and the rights of the accused, issues which will be turned to in the final section of this chapter.

Prior to the creation of the tribunals for Rwanda and the Former Yugoslavia, international agreement on the concept of war crimes was by and large limited to the grave breaches provisions of the GCs and AP I and to the affirmation of the principles of international law in the Nuremberg Charter and judgment by the United Nations in December 1946.⁶⁸ The Statute of the ICTR, adopted in 1994, for the first time gave an international criminal tribunal jurisdiction over serious violations of Common Article 3 and AP II.⁶⁹ This had not been explicitly provided for in the GCs or the APs, and the ICTY Statute spoke only of grave breaches of the GCs and ‘violations of the laws or customs of war.’⁷⁰ When challenged by the Defence that it lacked subject-matter jurisdiction in the *Tadić* case, the ICTY interpreted this latter phrase so as to allow it to also exercise jurisdiction over violations of the laws of internal conflict as war crimes.

H. Fischer, C. Kress and S.R. Lüder, eds., *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin, Arno Spitz 2001) p. 539.

⁶⁵ See further Darcy, *supra* n. 9, at pp. 148-175.

⁶⁶ UK, Ministry of Defence, *The Manual of Law of Armed Conflict* (Oxford, OUP 2004) p. 421, n. 62.

⁶⁷ See S. Darcy, ‘The Doctrine of Superior Responsibility’, in O. Olusanya, *Rethinking International Criminal Law: The Substantive Part* (Groningen, Europa 2007) p. 131.

⁶⁸ ‘Affirmation of the Principles of International Law recognised by the Charter of the Nürnberg Tribunal’, G.A. Res. 95(I), 55th plenary meeting, 11 December 1946.

⁶⁹ Art. 4 Statute 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 1994, UN Doc S/Res/955.

⁷⁰ Arts. 2 and 3 Statute 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, UN Doc S/25704 at 36, Annex (1993) and S/25704/Add.1, (1993) UN Doc S/RES/827.

The Tribunal's competence, according to the Trial Chamber, extended to any serious violations of IHL that are part of customary international law.⁷¹ Common Article 3 was considered custom and the Trial Chamber held that '[i]mposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.'⁷² The Chamber viewed the acts prohibited by Common Article 3 as 'criminal in nature', and quoted the writings of Meron, that 'the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.'⁷³ In this connection, it was held that the individual criminal responsibility of the violator need not be explicitly stated in a convention in order to give rise to criminal liability. The Trial Chamber gave the example of the use of the 1907 Hague Regulations and the 1929 Geneva Prisoners of War Convention as the basis for prosecutions Nuremberg, despite neither having any reference to criminal liability.⁷⁴ The Trial Chamber stressed the customary nature of Common Article 3 in holding that the incorporation of its norms into Article 3 of the ICTY Statute did not violate *nullem crimen sine lege*.⁷⁵

The Appeals Chamber provided a more thorough consideration of the matter in its *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*. It found that Article 3 of its Statute functioned 'as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.'⁷⁶ The Chamber set out the following requirements for an offence to be subject to prosecution under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];
- (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...]; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁷⁷

If these criteria are met, then it would not matter whether the violation had taken place in the context of an international or an internal armed conflict.

The Appeals Chamber then reviewed IHL applicable in non-international conflicts, holding, as shown above, that both Hague and Geneva-type laws were of

⁷¹ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber II, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 60.

⁷² *Ibid.*, at para. 65.

⁷³ *Ibid.*, at paras. 68-69.

⁷⁴ *Ibid.*, at para. 70.

⁷⁵ *Ibid.*, at para. 72.

⁷⁶ *Prosecutor v. Tadic*, *supra* n. 19, at para. 91.

⁷⁷ *Ibid.*, at para. 94.

relevance as a matter of custom. Turning to the question of individual criminal responsibility in internal armed conflicts, the Chamber noted how Common Article 3 lacked an ‘explicit reference to criminal liability for violation of its provisions’, but invoked the Nuremberg precedent in order to overcome this.⁷⁸ The International Military Tribunal had highlighted state practice indicating an intention to criminalize breaches of the established rules of warfare in international law and the punishment of such violations by national courts and military tribunals. The Chamber also cited a few examples of state practice indicated or implying criminalisation of breaches of Common Article 3 or AP II, and two Security Council Resolutions relating to Somalia.⁷⁹ That serious violations of IHL applicable in internal armed conflicts should entail individual criminal responsibility is also fully warranted, the Appeals Chamber held, from the perspective of ‘substantive justice and equity’.⁸⁰

The Appeals Chamber’s decision on war crimes in internal armed conflicts has been described as ‘one of the most important rulings on war crimes since the Nuremberg Judgment.’⁸¹ Schabas has viewed it as ‘one of the great accomplishments of the *ad hoc* tribunals,’ ‘a rather bold and dramatic step in terms of progressive judicial development,’ albeit one in which the reasoning is not always convincing.⁸² The point to be borne in mind here of course, as Schabas points out, is that this judicial decision pushed the law beyond what had been accepted up to that point and subsequent legislative developments were guided by it:

‘[...] the innovation of the Appeals Chamber soon received a convincing echo when the Rome Conference on the International Criminal Court agreed to codify a range of ‘war crimes’ committed in non-international armed conflicts. It is now beyond question that there is international criminal responsibility for war crimes committed during non-international armed conflict and this is undoubtedly thanks to the bold initiative of the four judges of the majority in the Appeals Chamber in the *Tadić* jurisdictional decision.’⁸³

Meron believes that the influential position adopted by the United States regarding war crimes in internal conflicts at the Rome Conference in 1998 was undoubtedly attributable to this important ICTY jurisprudence.⁸⁴ The Rome Statute is unequivocal in conferring jurisdiction on the ICC over war crimes committed in non-international armed conflicts.

⁷⁸ *Ibid.*, at para. 128.

⁷⁹ *Ibid.*, at paras. 130-133.

⁸⁰ *Ibid.*, at para. 135. See however *Prosecutor v. Tadić*, *supra* n. 19, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 5-13.

⁸¹ D.F. Orentlicher, ‘Internationalizing Civil War’, in Cooper, ed., *supra* n. 3, p. 154 at p. 154.

⁸² Schabas, *supra* n. 39, at pp. 228-229, 235. See also A. Zahar and G. Sluiter, *International Criminal Law* (Oxford, OUP 2008) pp. 110-112.

⁸³ Schabas, *supra* n. 39, at p. 236 [footnotes omitted]. See also M. Bothe, ‘War Crimes’, in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford, OUP 2002) p. 379 at p. 420.

⁸⁴ T. Meron, ‘Panel Commentary: War Crimes Tribunals: The Record and Prospects: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law’, 13 *AUILR* (1998) p. 1509 at p. 1538.

3. THE 'HALFWAY HOUSE' OF JUDICIAL LEGISLATION

The foregoing section has demonstrated the profound impact that judicial decisions have often had on the development of IHL and prompts the question as to where judicial decisions stand as a source of international law. Article 38 of the ICJ Statute describes judicial decisions as 'a subsidiary means for the determination of rules of law',⁸⁵ indicating that they are not, in and of themselves, a source of international law.⁸⁶ The constitutive instruments of international courts and tribunals do not give those bodies any express power to create law. In the debates at the Security Council leading to the establishment of the *ad hoc* tribunals, the representative of Venezuela, presiding, stated that the Tribunal, 'as a subsidiary organ of the Council, would not be empowered with – nor would the Council be assuming – the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law.'⁸⁷ Courts themselves have hesitated to claim that they possess law-making ability. The ICJ in the *Nuclear Weapons* Advisory Opinion stated that '[i]t is clear that the Court cannot legislate',⁸⁸ while the US Military Tribunal in the *Hostages* case noted that the judges could not write new law, but rather were to 'apply it as we find it'.⁸⁹

The reality, however, is that judicial decisions are often given far greater weight than that of a subsidiary means of determining the rules of international law. In fact, determining what the rules of international are often amounts to stating new law. Shaw has written how 'judgments of the International Court of Justice may actually create law in the same way the municipal judges formulate new law in the process of interpreting existing law.'⁹⁰ Judicial decisions are often treated as if they themselves are a source of law. The system of human rights protection under the European Convention of Human Rights and Fundamental Freedoms, provides an example of where the Convention itself and the jurisprudence of the European Court of Human Rights must be considered together in order to establish the extent of the obligations of States parties to the Convention.⁹¹ Judgments of the *ad hoc* international criminal tribunals are often cited as if a source of law themselves – commentators have noted the increasingly self-referential nature of international criminal law, where the tribunals are 'primarily – and often exclusively – citing their own case law in support'.⁹² While formally there is no doctrine of binding precedent in

⁸⁵ Art. 38(1)(d) ICJ Statute, *supra* n. 2.

⁸⁶ See also I.P. Blishchenko, 'Judicial Decisions as a Source of International Humanitarian Law', in A. Cassese, ed., *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica S.r.l., Naples 1979) p. 41 at p. 41.

⁸⁷ S/PV.3217, 25 May 1993, reprinted in V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (New York, Transnational Publishers 1995) p. 182.

⁸⁸ *Legality of the Threat or Use of Nuclear Weapons*, *supra* n. 5, at para. 18.

⁸⁹ *United States of America v. Wilhelm List et al.*, Judgment, *supra* n. 8, at p. 1249.

⁹⁰ M. Shaw, *International Law*, 5th edn. (Cambridge, CUP 2003) p. 67.

⁹¹ See for example, A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart 2004).

⁹² Zahar and Sluiter, *supra* n. 82, at p. viii.

international law, although certain chambers of the *ad hoc* tribunals can be said to be bound by other decisions in certain circumstances,⁹³ international courts often act like their own decisions are binding.⁹⁴ The absence of *stare decisis* does not prevent international or national courts from relying on judgments which they view as either persuasive or authoritative. With regard to national courts, decisions of the ICC may carry some formal weight under the system of complementarity.

The persuasive or precedential value of a judgment depends on both the authority of the court which has issued it and the reasoning put forward in the judgment itself.⁹⁵ In terms of developing international law, the key then is how states, the traditional architects of international law, and other relevant bodies react to the judicial decision. The concept of judicial legislation is something of a halfway house then, with judgments lacking the binding force of a treaty on the one hand, yet pushing the progressive development of the law on the other. At Nuremberg, the International Military Tribunal looked at the sources and development of international laws regulating the use of armed force:

‘The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.’⁹⁶

Judicial development of IHL by the international criminal tribunals has served to progress this body of law and to bridge noticeable gaps in the laws of armed conflict, but as a halfway house, this approach needs to be treated with a degree of caution.

One of the principle concerns is that excessive judicial creativity by international *criminal* courts and could run up against the principle of legality and the prohibition against *nullem crimen sine lege*.⁹⁷ As stated in Article 11 of the Universal Declaration of Human Rights, ‘[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence,

⁹³ See for example, Art. 20(3) Statute of the Special Court for Sierra Leone, having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000), UN Doc S/RES/1315. Judge Thompson of the Special Court has held that this provision does not mean a ‘slavish and uncritical emulation either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals’, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-2003-05-PT, Trial Chamber, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 11. See however Schabas, *supra* n. 39, at p. 107.

⁹⁴ See generally M. Shahabuddeen, *Precedent in the World Court* (Cambridge, CUP 1996).

⁹⁵ M. Greenspan, *The Modern Law of Warfare* (Berkeley and Los Angeles, UCP 1959) pp. 7-8; J.K. Kleffner and A. Nollkaemper, ‘The Relationship Between Internationalized Courts and National Courts’, in C.P.R. Romano, A. Nollkaemper and J.K. Kleffner, eds., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, OUP 2004) p. 359 at p. 377.

⁹⁶ International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, reprinted in 41 *AJIL* (1947) p. 172 at p. 219.

⁹⁷ Cassese, *supra* n. 20.

under national or international law, at the time when it was committed.⁹⁸ The Trial Chamber in *Tadic* argued, somewhat weakly, that ‘common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.’⁹⁹ The Appeals Chamber felt that the limitations imposed by *nullem crimen sine lege* do 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 of 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 that assessment.’¹⁰⁰

It is difficult to say when judges have crossed the fine line between judicial legislation and reasonable interpretation of the law, and judicial creativity will often prompt defence lawyers to raise the argument that the law was not clearly stated and accessible at the time alleged offences were committed.

Judicial activism at the international criminal tribunals has also seen customary international law treated as a malleable instrument, with frequent questionable claims as to the customary status of particular rules. It has been argued that some ‘activist judicial legislation’ has constituted an attempt to reconfigure the GCs without the consent of the state parties.¹⁰¹ Further difficulties arise when one considers that international judges are ‘relatively unaccountable, subject to opaque selection procedures, and may not have expertise in the relevant subject areas.’¹⁰² It is possible, finally, that any judicial development of IHL by international criminal courts may be skewed by the selectivity of the process, to the advantage of more powerful States.¹⁰³

The work of the *ad hoc* international criminal tribunals has undoubtedly led to the closing of significant gaps in IHL and although the means may not have been orthodox, the results have largely been positive. Judicial bodies may be well-placed to identify existing lacunae or areas of weakness in the laws of armed conflict and the cases before them deal with real examples, rather than more abstract ideas which

⁹⁸ Universal Declaration of Human Rights 1948, G.A. Res. 217A (III), UN Doc A/810, at para. 71.

⁹⁹ *Prosecutor v. Tadic*, *supra* n. 71, at para. 72.

¹⁰⁰ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 38 [footnotes omitted].

¹⁰¹ P.W. Murphy, ‘Judging War Criminals’, 35 *TILJ* (2000) p. 325 at p. 332.

¹⁰² Marsten Danner, *supra* n. 1, at pp. 49-50.

¹⁰³ See generally R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, CUP 2005).

may guide the treaty-making process.¹⁰⁴ In this connection, *Oppenheim's International Law* states that 'in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing international law.'¹⁰⁵ There is a reluctance to publicly accept the reality of judicial legislation, particularly given the propensity to offend the rights of the accused. What Marston Danner has called 'the truth of international politics that cannot be named',¹⁰⁶ seems to have done as much for the progressive development of IHL, in its admittedly *ad hoc* way, as has the treaty-making process in recent years.

¹⁰⁴ Marston Danner, *supra* n. 1, at p. 51, referring to P.M. Wald, 'Punishment of War Crimes by International Tribunals', 69 *SR* (2002) p. 1119.

¹⁰⁵ R. Y. Jennings and A. Watts, eds., *Oppenheim's International Law: Volume I: Peace*, 9th edn. (London/New York, Longmans 1996) p. 41.

¹⁰⁶ Marston Danner, *supra* n. 1, at p. 47.