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

Promotor: Prof. dr. C.J.R. Dugard  
Referent: Dr. E van Sliedregt  

Leden:  
Justice R.J. Goldstone (Former Justice, Constitutional Court, Zuid- Afrika)  
Prof. W.A. Schabas (National University of Ireland, Galway)  
Prof. dr. A.H.J Swart (Universiteit van Amsterdam)  
Dr. M. Boot  
Prof. dr. A.H. Klip (Universiteit Maastricht)  
Prof. dr. G.K Sluiter (Universiteit van Amsterdam)
In memory of my Father
ACKNOWLEDGEMENTS

The idea of writing about judicial lawmaking at the Tribunals originated during an internship in the Appeals Chamber of the ICTY in 2001. Conversations with legal officers such as Herman von Hebel, Gabriel Oosthuizen, Guenael Mettraux and Kate Greenwood helped to steer my thinking on the many interesting features of the work of Tribunal judges. Over the course of the next four years many contributed to this thesis both intellectually and in a more personal sense.

I was financially supported by scholarships, initially by the Huygens scholarship and later by the Mandela Scholarship and a grant from the Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NW0). I wish to thank Nuffic for the Huygens Scholarship and the Hendrik Muller Foundation for the Mandela scholarship. I am thankful to Carel Stolker for making my stay at the Meijers Institute a pleasant one.

Laurel Angus deserves thanks for careful proofreading.

Other friends during the Leiden years include Thomas Skouteris, Christine Tremblay and Marius Wehren. Aoife Nolan provided companionship in New York. Jaike Wolfkamp and Henk Johan Streufkerk opened their home and hearts to me and provided invaluable practical support during my time in Leiden and The Hague. Antje Pedain’s friendship and encouragement sustained me throughout.

This thesis is dedicated to the memory of my father, Freek Swart. He encouraged study at Leiden and suggested the internship at the ICTY. His intense interest in the Second World War and the Nuremberg trials also became my interest. His legacy of independent thinking and hard work continues to inspire me.

My mother, Nina Swart, supported me through the difficult times. She was my most important ally in the battle against discouragement. She taught me the importance of developing one’s mind, of reading, and of being focused: ‘What I must do is all that concerns me.’

Mia Swart
Johannesburg
October 2006
TABLE OF CONTENTS

INTRODUCTION .................................................................................................................. 9
Structure of the Study ........................................................................................................ 21
   A Short Note on Method and Terminology .................................................................. 24

CHAPTER ONE .................................................................................................................. 25
SETTING THE STAGE: THE ESTABLISHMENT AND
ORGANISATION OF THE TRIBUNALS ........................................................................ 25
   1. Introduction .............................................................................................................. 25
   2. Historical Precedents ............................................................................................ 26
      (i) The Interbellum ................................................................................................. 26
      (ii) Nuremberg and Tokyo ..................................................................................... 27
   3. Establishment of the ICTY .................................................................................... 28
   4. Principal Organs of the ICTY .............................................................................. 30
   5. Jurisdiction of the ICTY ....................................................................................... 31
      (i) Concurrent jurisdiction .................................................................................. 31
      (ii) Subject-matter jurisdiction .......................................................................... 31
      (iii) Personal jurisdiction ................................................................................... 32
      (iv) Territorial jurisdiction .................................................................................. 32
      (v) Temporal jurisdiction ................................................................................... 33
   6. The Establishment of the ICTR ............................................................................ 33
   7. Principal Organs of the ICTR .............................................................................. 35
   8. Jurisdiction of the ICTR ....................................................................................... 35
      (i) Concurrent jurisdiction .................................................................................. 35
      (ii) Subject-matter jurisdiction .......................................................................... 36
      (iii) Personal jurisdiction ................................................................................... 37
      (iv) Territorial jurisdiction .................................................................................. 37
      (v) Temporal jurisdiction ................................................................................... 37
   9. The Cost of Justice: Funding and its Implications for Independence ............... 38
      (i) The Funding of the ICTY and ICTR .......................................................... 38
      (ii) The Funding of the ICC .............................................................................. 42
   10. A Question of Pedigree: The Legality of the Establishment of the
       Tribunals ............................................................................................................. 43
      Challenges to the Establishment of the ICTY ...................................................... 43
         (i) Arguments Against and in Favour of the Treaty Approach ................. 43
         (ii) The Tadic Challenge .................................................................................. 45
         (iii) Criticising Tadic ....................................................................................... 46
      11. Challenges to the Legality of the Establishment of the ICTR ...................... 49
   12. Conclusion .............................................................................................................. 53

CHAPTER TWO .............................................................................................................. 54
WHEN THE RULES RUN OUT ..................................................................................... 54
   1. Introduction .............................................................................................................. 54
   2. The (Rudimentary) Nature of International Criminal Law .............................. 55
   3. The Concept of Lawmaking .................................................................................. 57
nullum crimen and the Nazi era .................................................................144

(iii) Modern German Criminal Law ..........................................................145
(iv) Art 103(2): Gesetzlichkeitsprinzip..............................................................146

4. City of Danzig case ......................................................................................148

5. Legality at Nuremberg ...................................................................................150
(a) Crimes against the Peace ............................................................................152
(b) War Crimes ..................................................................................................154
c) Crimes Against Humanity ..............................................................................154

6. National Prosecutions and the Principle of Legality ......................................158
(i) Attorney General of Israel v Eichmann .........................................................158
(ii) R v Finta ........................................................................................................161
(iii) Polyukhovich v The Commonwealth .........................................................163
(iv) East German Border Guard Cases (Mauerschützenprozesse) .....................165
(v) Bouterse ........................................................................................................167
(vi) Conclusion ....................................................................................................169

7. The Principle of Legality in American Law ....................................................170

8. Common Law Crimes: Scottish Law .............................................................172

9. The Principle of Legality in Regional and International Human Rights Instruments .................................................................173
(ii) European Court of Human Rights ................................................................174

10. Relevance of the Principle of Legality in International Criminal Law .............177
11. The Ad Hoc Tribunals and the Principle of Legality .........................................181
(i) Legality at the ICTY .......................................................................................181
(ii) The Principle of Legality and the ICTR .........................................................187
12. ICC ...............................................................................................................188
13. Nulla Poena Sine Lege ..................................................................................189
14. Conclusion .....................................................................................................192

CHAPTER 6 ..................................................................................................196
LAWMAKING THROUGH THE CASE LAW ..................................................196

1. Introduction ....................................................................................................196

2. Lawmaking in Tadić .....................................................................................197
(i) competence de la competence ........................................................................198
(ii) Distinction between international and internal armed conflict ......................203
(iii) Redefinition of ‘protected persons’ by Appeals Chamber ............................206
(iv) Extension of Common Purpose Doctrine ....................................................213

3. Rape as Crime Against Humanity: Akayesu, Furundzija, Kunarac ..................221
4. Torture ..........................................................................................................230
5. Duress: Erdemovic ..........................................................................................235
6. Reprisals .........................................................................................................241
7. Conclusion .....................................................................................................246

CHAPTER 7 ..................................................................................................251
RULEMAKING AT THE TRIBUNALS ............................................................251

1. Introduction ....................................................................................................251

2. Rulemaking at Nuremberg and Tokyo ............................................................255
3. Adversarial v Inquisitorial Approach ............................................................256
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Rulemaking at the ICTY</td>
<td>28</td>
</tr>
<tr>
<td>5. The Rules of the ICTR</td>
<td>260</td>
</tr>
<tr>
<td>6. The quasi legislative power of the judges</td>
<td>261</td>
</tr>
<tr>
<td>7. The amendments</td>
<td>262</td>
</tr>
<tr>
<td>8. Procedural lawmaking in Domestic Jurisdictions</td>
<td>265</td>
</tr>
<tr>
<td>9. The Rules and Inherent Powers</td>
<td>266</td>
</tr>
<tr>
<td>10. Limitations on Scope of the Rules</td>
<td>268</td>
</tr>
<tr>
<td>11. Are the Rules Binding?</td>
<td>269</td>
</tr>
<tr>
<td>12. Ultra Vires Rules</td>
<td>270</td>
</tr>
<tr>
<td>13. The Barayagwiza Appeals Chamber Decision</td>
<td>272</td>
</tr>
<tr>
<td>14. The Barayagwiza Reconsideration Decision</td>
<td>274</td>
</tr>
<tr>
<td>15. Abuse of discretion? The Kupreskic Deposition Decision</td>
<td>277</td>
</tr>
<tr>
<td>16. Amending to Expedite</td>
<td>278</td>
</tr>
<tr>
<td>17. Conclusion</td>
<td>281</td>
</tr>
</tbody>
</table>

**CONCLUSION**                                                          | 283  |

**BIBLIOGRAPHY**                                                        | 297  |

**SAMENVATTING**                                                        | 321  |

**CURRICULUM VITAE**                                                    | 329  |