

PEOPLES' TRIBUNALS, INTERNATIONAL LAW AND THE USE OF FORCE[#]

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*This Tribunal is not a motley collection of vigilantes but a tribunal
of conscience guided and inspired by the highest principles of
international law and justice.*

Kuala Lumpur War Crimes Tribunal (2011)¹

I INTRODUCTION

Since 1945, the *Charter of the United Nations* ('UN Charter') has imposed a prohibition on the use of force by states – subject to certain exceptions – a prohibition which has been held to exist also at customary international law.² Where the use of force nevertheless occurs, the options open to other states to respond may include the institution of legal proceedings before an international court, resort to the political bodies of the United Nations ('UN') or other international organisations for scrutiny and support, the adoption of diplomatic or other sanctions on a bilateral or multilateral basis, or even the use of force in response. In some cases a state claiming to be the victim of an unlawful use of

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1 *Kuala Lumpur War Crimes Commission v George W Bush and Anthony L Blair*, Kuala Lumpur War Crimes Tribunal, Case No 1-CP-2011, *Notes of Proceedings*, 19 November 2011, 49 [17].

2 *UN Charter* arts 2(4), 51; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14. For a discussion of what constitutes the 'use of force', see Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 50–92. See generally Shirley V Scott, Anthony John Billingsley and Christopher Michaelsen, *International Law and the Use of Force: A Documentary and Reference Guide* (Praeger Security International, 2010).

force may be limited in its ability to enlist the support of other states to exert pressure on the alleged violator; and in many cases an international judicial forum will not be available.

The UN Security Council ('UNSC') is assigned a preeminent place in the *UN Charter's* system of collective security and bears the primary responsibility for ensuring international peace and security, though its record is mixed.³ There are also investigatory or quasi-judicial bodies in the formal UN system, such as Commissions of Inquiry, Panels of Experts and Fact-Finding Missions, appointed by the political bodies of the UN or the UN Secretary-General, which may play a role in responding to allegedly unlawful uses of force.⁴ Other regional bodies and ad hoc mechanisms may also play a role in limiting the damage that the use of force may produce and in resolving the underlying conflict.

Very few cases involving claims of the unlawful use of force by states have come before international tribunals, and even fewer are decided on the merits. This reflects the optional nature of international adjudication and the requirement that the parties concerned must all have accepted the jurisdiction of the relevant tribunal in relation to the particular case, whether by means of a general acceptance of jurisdiction, a specific treaty jurisdictional clause, or a specific agreement to refer an individual case for adjudication. Generally, states are slow to submit to binding international adjudication where vital interests are concerned: they appear to prefer a political solution, if feasible. A less powerful state which is aggrieved by the actions of another state may consider that resort to adjudication is a beneficial option (if a competent tribunal is available); a more powerful state or the alleged aggressor in a given case may find the option politically and legally unattractive. For all parties adjudication is a protracted process, though the availability of interim measures may alleviate this to some extent. Even powerful states may on occasion find the invocation of a binding judicial process to be an option that is both legally and politically advantageous.

In such cases it is not just the interests of the state which are in issue – the lives and well-being of the people living in the territory may also be adversely affected. While the classical international legal system normally views the state as the legitimate and effective representative of the rights and interests of the population, experience shows that is not always the case, and in cases involving a denial of the right of self-determination to a people, the nature of that right means that two sets of interests are often opposed.

Over the last 60 years, scrutiny of the legitimacy and international legality of the use of force has expanded well beyond the arena of official state-sponsored

3 *UN Charter* art 24.

4 See, eg, the UN Human Rights Commission-appointed Commission of Inquiry on Libya: Human Rights Council, *Report of the International Commission of Inquiry on Libya*, 19th sess, Agenda Item 4, UN Doc A/HRC/19/68 (2 March 2012); *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf>; Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, 12th sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009). See also José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) ch 8.

institutions into the realm of international civil society institutions. Against the background of the limited consideration by international tribunals and national courts of allegations of the unlawful use of force, there have been a significant number of international peoples' tribunals that have engaged with these issues. Organised on an ad hoc basis or under the auspices of an existing non-governmental institution which is a repeat player in the holding of such tribunals, these tribunals have engaged with and made pronouncements on the applicability of existing international law to the situations of conflict that have been brought before them.⁵ While variously composed entirely of jurists or a mixture of jurists and other prominent intellectuals or highly respected international figures, they have engaged in a formal, public deliberative process, in which evidence is placed before the tribunal and is the subject of a reasoned conclusion on the compatibility of the actions of those 'indicted' for or 'charged' with violations of international law.⁶ While their pronouncements do not have any 'official' legal force, such tribunals seek to ground their legitimacy and to bring about an impact on public opinion through the stature, integrity and expertise of their members, their commitment to a process of evaluation of evidence, and a reasoned outcome following fair-minded deliberations.⁷

These tribunals are examples of the broader phenomenon of international peoples' tribunals which have a substantial history, especially over the last 60 years. While they share some features with formal state-sponsored tribunals (such as the application of orthodox international law standards, the deliberative public process of consideration of evidence, and the adoption of reasoned conclusions) and serve some similar functions, they lack state authorisation or endorsement – one of the important, though arguably not indispensable, sources of legitimacy for a body that pronounces on 'legality'. They also perform other functions – ones that state-sponsored tribunals may be unable, or at least less able, to perform.

In this article we analyse the role of international peoples' tribunals in relation to the unlawful use of force.⁸ First, international peoples' tribunals may be regarded as a replacement for an official tribunal, that is, if they fill a 'gap' in the international legal system. Second, international peoples' tribunals may act as

5 See generally Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (Palgrave MacMillan, 2002); Arthur W Blaser, 'How to Advance Human Rights Without Really Trying: An Analysis of Nongovernmental Tribunals' (1992) 14 *Human Rights Quarterly* 339; Louis Joinet, 'Les Tribunaux d'Opinion: Bilan et Perspective' ['Public Opinion Tribunals: Assessment and Perspective'] in Giuliano Amato et al (eds), *Marxismo, Democrazia e Diritto dei Popoli: Scritti in Onore di Lelio Basso* [*Marxism, Democracy and Peoples' Law: Essays in Honour of Lelio Basso*] (Franco Angeli Editore, 1979) 821.

6 For further references, see Gabrielle Simm and Andrew Byrnes, 'International Peoples' Tribunals in Asia' (2013) 3 *Asian Journal of International Law* (forthcoming).

7 See Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Tibet*, 20 November 1992 (revised version 14 December 1992), para 2.1 (English version on file with authors; Italian version available at <www.internazionaleleliobasso.it/wp-content/uploads/1992/11/Tibet_TPP_It.pdf>).

8 This analysis borrows from Louis Bickford's discussion of the relationship of unofficial to official truth projects: Louis Bickford, 'Unofficial Truth Projects' (2007) 29 *Human Rights Quarterly* 994, 1004.

a precursor to an official court or tribunal by creating publicity and political pressure as part of a broad campaign to force state-based mechanisms to deal with the issue. Third, even where an official mechanism exists, peoples' tribunals may nevertheless be convened because they offer something qualitatively different or beyond what an official tribunal is capable of providing. In this case, we see them as complements to state-based mechanisms. These bodies and hearings should not simply be dismissed as 'a motley collection of vigilantes';⁹ their role and significance need to be appreciated by understanding how they are similar to state-sponsored tribunals and mechanisms, but also how they differ from them.

Part II of the article briefly reviews the international legal landscape of efforts to bring claims relating to the unlawful use of force before international courts and tribunals. Some of these challenges have gone on to be decided on the merits, while many others have been rejected on jurisdictional grounds. There are also many cases that are never brought because there is no plausible basis of jurisdiction or political will to launch them. Part III of the article describes the lead-up to and the invasion of Iraq in 2003 and the place of questions of international legality in the reaction of civil society to those events. It highlights efforts made to have formal judicial pronouncements made on the legality of the war and the limits of the international system to respond to those demands. Part IV then examines the role of international peoples' tribunals in disputes over the international legality of the use of force. We discuss several examples of peoples' tribunals, beginning in 1967 with the Russell Tribunal on the war in Vietnam and concluding with the 2011–12 Kuala Lumpur War Crimes Trial which dealt with the 2003 Iraq War. Part VI analyses the significance of peoples' tribunals and their impact in this area of law and practice. The article concludes that there are useful roles that peoples' tribunals can play both when there is an applicable and functioning international adjudicative procedure, but perhaps more importantly, where there is no such an avenue available for raising issues of this sort. These represent just one aspect of the contributions that peoples' tribunals can make.

II INTERNATIONAL ADJUDICATION OF THE LEGALITY OF THE USE OF FORCE

The prohibition on the use of force by one country against another is one of the fundamental rules of the post-*UN Charter* era.¹⁰ A failure by a state to abide by the restrictions on the use of force in international relations strikes at the heart of the international community's commitment to the peaceful resolution of disputes. At the same time, a state will rarely resort to force unless it considers that an important political or economic interest is under threat and needs to be

9 *Kuala Lumpur War Crimes Commission v George W Bush and Anthony L Blair*, Kuala Lumpur War Crimes Tribunal, Case No 1-CP-2011, *Notes of Proceedings*, 19 November 2011, 49 [17].

10 See *UN Charter* art 2(4).

addressed by such an exercise of the quintessentially sovereign power to use force.¹¹ Of all state actions, this is the one that the state is perhaps least likely to be prepared to have externally scrutinised and judged.

Cases requiring adjudication of the issue of the legality or otherwise of the use of force before international judicial or arbitral tribunals¹² have involved two quite different types of legal claims. On the one hand, there have been cases brought by one state claiming that another state has violated the prohibitions on the use of force contained in the *UN Charter*, customary international law, and in some cases, other treaties. Such cases involve the delictual responsibility of a state for the commission of an internationally wrongful act.¹³ The other category of cases involves criminal charges against individuals for the crime of aggression, where the unlawful use of force by a state is part of the elements of the individual crime.

A Inter-state Cases

The competence of the International Court of Justice ('ICJ') to decide disputes between states over the legality of the use of force is governed by the same rules that apply to other disputes. The cases must involve a legal dispute and the parties involved must have accepted the jurisdiction of the ICJ in relation to the subject matter of the dispute. While the ICJ has the power to consider the alleged violation of both treaty rules and customary international law rules, the extent of its substantive jurisdiction in an individual case is dependent on the extent to which the contending states' acceptance of its competence overlaps with each other.

11 '[L]aw simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty': Dean Acheson, 'Comments' (1963) 57 *Proceedings of the American Society of International Law at Its Annual Meeting* 13, 14.

12 One prominent recent instance of an arbitral award involving consideration of *jus ad bellum* issues is the Eritrea–Ethiopia Claims Commission, which found in one of its partial awards that Eritrea had violated its obligation under art 2(4) of the *UN Charter* not to use force against the territorial integrity or political independence of another state: *Jus ad Bellum – Ethiopia's Claims 1–8 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 19 December 2005) IV.B.1; *Guidance Regarding Jus ad Bellum Liability (Ethiopia v Eritrea) (Decision No 7)* (Eritrea Ethiopia Claims Commission, 27 July 2007). See also the consideration of claims relating to the use of force in the context of a maritime delimitation claim: *Maritime Boundary (Guyana v Suriname) (Award)* (UNCLOS Arbitral Tribunal, 17 September 2007) [425]–[447].

13 The category of state crime, present in early versions of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, did not survive to the final version: International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd sess, Supp No 10, UN Doc A/56/10 (November 2001) IV.E.1. See Eric Wyler and León Arturo Castellanos-Jankiewicz, 'State Responsibility and International Crimes' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge, 2010) 385, 386–94.

Relatively few of the instances in which force is used by one state against another come before international tribunals.¹⁴ Broadly speaking, there are three categories of cases involving the use of force which have come before the ICJ.¹⁵ The first group of cases comprises those in which the ICJ found that it had jurisdiction and made a decision on the merits. These cases are considered in greater detail below. The second group encompasses those cases in which the ICJ found it had jurisdiction but the case was settled without consideration of the merits.¹⁶ The third group includes cases where the ICJ found it lacked jurisdiction to consider the dispute.¹⁷ The attempts by Yugoslavia (later Serbia and Montenegro) to challenge in the ICJ North Atlantic Treaty Organization ('NATO') countries' attacks in 1999 are a case in point.¹⁸ The use of force by NATO and its member states was not authorised by the UNSC and was

14 See, eg, the overview of the uses of force by states from 1945 to the early 1990s, few of which came before an international judicial body: A Mark Weisburd, *Use of Force: The Practice of States since World War II* (Pennsylvania State University Press, 1997).

15 On a rough count, of 116 contentious cases that have been decided by the ICJ, 18 related to use of force: 10 involving the cases brought by Yugoslavia/Serbia and Montenegro against NATO members (all dismissed due to lack of jurisdiction); three brought by Nicaragua (successful against the US; cases against Honduras and Costa Rica discontinued by consent); three *Armed Activities* cases brought by the DRC (jurisdiction found against Uganda, no jurisdiction against Rwanda or Burundi); the *Aerial Incident case (Pakistan v India)*; and the *Oil Platforms case (Iran v United States)*. There are other cases in which one party claimed there was a 'use of force' but the other party did not agree or the Court either did not decide the issue or ruled against the claim there was a use of force: see Corten, above n 2, 50–92. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 are the most relevant of 26 advisory opinions. The ICJ declined jurisdiction in response to a 1993 request by the World Health Organisation for an advisory opinion on the nuclear weapons issue (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66), though it considered the substantive issues in the advisory opinion issued in response to a request by the UN General Assembly.

16 *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras) (Judgment)* [1988] ICJ Rep 69 (settled after Court's judgment rejecting objections to jurisdiction and admissibility of the application, and the conclusion of a political settlement). A parallel case against Costa Rica was withdrawn following the political settlement among five Central American nations: *Case Concerning Border and Transborder Armed Actions (Nicaragua v Costa Rica) (Order of 19 August 1987)* [1987] ICJ Rep 182.

17 See, eg, the *Aerial Incident of 10 August 1999 (Pakistan v India) (Judgment)* [2000] ICJ Rep 12 (Pakistan sought unsuccessfully to rely on article 17 of the *General Act for Pacific Settlement of International Disputes 1928*, on the declarations of acceptance of the compulsory jurisdiction of the Court made by the two states, and on article 36(1) of the *Statute of the International Court of Justice*).

18 *Legality of Use of Force (Yugoslavia v United States of America) (Provisional Measures)* [1999] ICJ Rep 916. See also *Legality of Use of Force (Serbia and Montenegro v Belgium) (Judgment)* [2004] ICJ Rep 279; *Legality of Use of Force (Serbia and Montenegro v Canada) (Preliminary Objections)* [2004] ICJ Rep 429; *Legality of Use of Force (Serbia and Montenegro v France) (Preliminary Objections)* [2004] ICJ Rep 575; *Legality of Use of Force (Serbia and Montenegro v Germany) (Preliminary Objections)* [2004] ICJ Rep 720; *Legality of Use of Force (Serbia and Montenegro v Italy) [2004] ICJ Rep 865*; *Legality of Use of Force (Serbia and Montenegro v Netherlands) (Preliminary Objections)* [2004] ICJ Rep 1011; *Legality of Use of Force (Serbia and Montenegro v Portugal) (Preliminary Objections)* [2004] ICJ Rep 1160; *Legality of Use of Force (Yugoslavia v Spain) (Request for the Indication of Provisional Measures)* [1999] ICJ Rep 761; *Legality of Use of Force (Serbia and Montenegro v United Kingdom) (Preliminary Objections)* [2004] ICJ Rep 1307.

considered by many commentators to be unlawful.¹⁹ The cases were ultimately rejected on jurisdictional grounds due to the contested status of Serbia and Montenegro and disagreement over whether it was a party to the *ICJ Statute* at the time the cases were brought.²⁰ Specific limitations or reservations contained in the declarations of acceptance of the jurisdiction of the ICJ deposited by individual respondent states also prevented it from accepting jurisdiction.²¹

In the first category of cases, there appear to be only two circumstances in which the ICJ has found that it has jurisdiction on the basis of a general declaration of acceptance of jurisdiction by the states or under a specific treaty – in particular, treaties of amity or friendship, commerce and navigation – and gone on to a decision on the merits of a use of force issue: the *Nicaragua case* and *DRC v Uganda*. The only other case which went beyond the jurisdiction phase and resulted in a judgment on the merits, *Oil Platforms (Iran v United States)*,²² found that the claim of the unlawful use of force was not one which fell within the substantive provisions of the treaty under which the Court had jurisdiction.²³

Among this group, the case of *Nicaragua v United States* is the most prominent. Nicaragua claimed that the United States ('US') had engaged in the illegal use of force against Nicaragua (including the mining of several Nicaraguan harbours and, indirectly, in supporting the Contras based in El Salvador in their struggle against the Sandinista government in Nicaragua) and unlawfully intervened in its internal affairs.²⁴ A majority of the ICJ found that it had jurisdiction on the basis of Nicaragua's general acceptance of jurisdiction under the optional clause (in fact, its acceptance of the jurisdiction of the ICJ's predecessor, the Permanent Court of International Justice) and a bilateral 1956 Treaty of Friendship, Commerce and Navigation between the US and Nicaragua which contained a compromissory clause. Notwithstanding the US reservation that it did not accept the ICJ's jurisdiction in relation to a dispute concerning a

19 Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2nd ed, 2004) 267–81.

20 Nor was the question of the possible commission of aggression a matter that could be taken up by the International Criminal Tribunal on the former Yugoslavia: International Criminal Tribunal for the Former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2000) 39 *International Legal Materials* 1257, 1259 [4], 1266 [34].

21 See, eg, *Legality of Use of Force (Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761.

22 *Oil Platforms (Islamic Republic of Iran v United States) (Preliminary Objection)* [1996] ICJ Rep 803.

23 The claim related to US military action which destroyed two oil production platforms belonging to Iran in the Persian Gulf. Iran claimed that the US action involved an unlawful use of force. The Court held that it had jurisdiction under the *Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran*, signed 15 August 1955, 8 UST 900, (entered into force 16 June 1957), but that the specific complaints made by Iraq (unlawful and disproportionate use of force against the oil production facilities) did not, in the circumstances of the case, involve a violation of articles I and X(1) of the Treaty, which provided respectively that '[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran', and that '[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.'

24 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Provisional Measures)* [1984] ICJ Rep 169; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

multilateral treaty unless all States parties to the treaty affected by the decision were also parties to the case before the ICJ, a majority of the Court held that it nonetheless had jurisdiction to consider the customary international law rules relating to the use of force.²⁵ Following the decision on jurisdiction and admissibility, the US took no further part in the proceedings.²⁶ The ICJ eventually found against the US on claims including the illegal use of force contrary to customary international law.²⁷

The unpredictability of whether a case might be entertained by the ICJ is shown by the cases instituted by the Democratic Republic of the Congo ('DRC') against three of its neighbours for the alleged unlawful use of force in the late 1990s. In June 1999 the DRC instituted proceedings before the ICJ against Burundi, Uganda and Rwanda for 'acts of armed aggression perpetrated ... in flagrant breach of the ... Charters of the United Nations and the Organisation of African Unity'.²⁸ The respondents in each case argued that the ICJ had no jurisdiction to hear the cases. The ICJ held that it had jurisdiction in relation to the case against Uganda because both the DRC and Uganda had made declarations accepting its jurisdiction under article 36(2) of the *Statute of the ICJ*.²⁹ It held that Uganda's military engagement in the DRC without the consent of the DRC constituted a grave violation of the prohibition on the use of force under the *UN Charter*, as well as finding that it had violated other international obligations.³⁰ Rwanda and Burundi resisted the cases against them on jurisdictional grounds and these applications were withdrawn, with the DRC's second application against Rwanda rejected on the basis of a lack of jurisdiction.³¹

B International Criminal Cases Involving Crimes against Peace or the Crime of Aggression

The second type of case in which courts have pronounced on the legality of the use of force in international relations has involved criminal cases brought against individuals under customary international law or specific treaty regimes. In these cases individuals have been charged with the crime of aggression (or crimes against peace). A conviction may only follow on a finding that there has

25 For criticism of the result, see James R Crawford, 'Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Case', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, at August 2006) [15]–[17]. See also John F Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) 255–62.

26 See Murphy, above n 25, 260.

27 Ibid 262–8.

28 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction)* [2006] ICJ Rep 6, 12 ('*Armed Activities*'). The DRC instituted proceedings in the same terms against Uganda and Burundi on the same day.

29 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168.

30 Ibid.

31 *Armed Activities*, above n 28 (rejecting each of the 11 different possible bases of jurisdiction advanced by the DRC).

been a violation of the prohibition of the use of force which is criminal and which leads to the imposition of individual criminal responsibility. The International Military Tribunal ('Nuremberg Tribunal')³² and the International Military Tribunal for the Far East ('Tokyo Tribunal'),³³ both held after World War II, are the preeminent examples of such prosecutions.³⁴ The existence of the prohibition on the use of force – and even more so the imposition of individual criminal liability on leaders and others involved in the decision to wage war that was illegal – was highly contentious at the time, and it is hard to maintain that the existence of individual criminal responsibility for such actions was clearly established at the time of commission of the acts that were the subject of prosecution.³⁵ Since then, however, individual criminal responsibility for participating in the commission of the crime of aggression has become accepted as a part of international law as reflected in the inclusion in the *Statute of the International Criminal Court* of the crime of aggression and its definition in the amendments made to the *Statute* adopted in 2010.³⁶

III THE 2003 IRAQ WAR

A Concerns about Legality and the Possibility of International Adjudication

The lead-up to and the launching of an armed attack against Iraq by the US and its allies in 2003 was accompanied by a civil society mobilisation around the world on a scale not seen since the time of the Vietnam War and perhaps

32 International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946* (IMT, 1947), vol 1, 170.

33 See the International Military Tribunal for the Far East, established by the *Charter of the International Military Tribunal for the Far East*, signed 19 January 1946, TIAS 1589, 11. For the proceedings, see R John Pritchard (ed), *The Tokyo Major War Crimes Trial: The Transcripts of the Court Proceedings of the International Military Tribunal for the Far East* (E Mellen Press, 1998). Article 5 of the *Charter of the International Military Tribunal for the Far East* conferred jurisdiction on the Tribunal in relation to crimes against peace, conventional war crimes, and crimes against humanity. 'Crimes against peace' were defined as 'the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. See generally Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) and Howard S Levie, *Terrorism in War: The Law of War Crimes* (Oceana Publications, 1992) 379–93.

34 There was also a number of prosecutions for the crime of aggression under Control Council Law 10 in the US-occupied zone, leading to final convictions in three instances: Levie, above n 33, 386 n 31; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, Paperback Edition 2012) 179–202. See also *Trial of Artur Greiser*, in *Law Reports of the Trials of War Criminals* (HMSO, 1949), vol 13, 70.

35 See the persuasive judgment of Justice Röling, dissenting in the Tokyo Tribunal: B V A Röling and C F Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East* (APA University Press Amsterdam, 1977) vol 2, and in Boister and Cryer, above n 33, 247–70.

36 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8bis ('ICC Statute').

unprecedented in its scope and intensity.³⁷ Central to the public debate about the commencement of armed hostilities was the legality of the action under international law, with the public in many countries demanding that the governments involved clearly demonstrate that their actions were consistent with the international law rules on the use of force.³⁸ The overwhelming view of commentators was that the use of force in this case was illegal: it had not been authorised by the UNSC and was not justifiable on any other basis accepted under international law.³⁹ The contrary view was maintained, of course, by states which participated in the intervention, and their legal advisers put forward arguments in support of their positions, based on what were very much contested readings of the relevant UNSC resolutions.⁴⁰ In the case of the United Kingdom's ('UK') legal justification – offered by its Attorney General – it subsequently emerged that different views had been expressed internally by the same Attorney General.⁴¹

The concern about the lawfulness of the initiation of the war was not just the preoccupation of international lawyers but of the broader community – the legality of the war was seen by many as critical to its legitimacy. This is not to

37 'Millions Join Global Anti-war Protests', *BBC News* (online), 17 February 2003 <<http://news.bbc.co.uk/2/hi/europe/2765215.stm>>.

38 Matthew Craven, Susan Marks, Gerry Simpson and Ralph Wilde, 'We Are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363.

39 'Iraq War Illegal, Says Annan', *BBC News* (online), 16 September 2004 <http://news.bbc.co.uk/2/hi/middle_east/3661134.stm>; see Commentators in 'Agora: Future Implications of the Iraq Conflict' (2003) 97 *American Journal of International Law* 553–642. An inquiry headed by a former Dutch Supreme Court judge found in 2010 that the 2003 war in Iraq was illegal: Afua Hirsch, 'Iraq Invasion Violated International Law, Dutch Inquiry Finds', *The Guardian* (online), 13 January 2010 <<http://www.guardian.co.uk/world/2010/jan/12/iraq-invasion-violated-international-law-dutch-inquiry-finds>>. See English summary in Dutch Committee of Inquiry on Iraq, States-General of the Netherlands, *Rapport Commissie van Onderzoek Besluitvorming Irak* [Report of the Commission of Inquiry on Iraq] (2010) 519–33.

40 See Gray, above n 19, 270–81; Dominic McGoldrick, *From '9-11' to the Iraq War 2003: International Law in an Age of Complexity* (Hart Publishing, 2004) 47–86; Andrew Byrnes, "'The Law Was Warful": The Iraq War and the Role of International Lawyers in the Domestic Reception of International Law' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 229.

41 Byrnes, above n 40, 230–3; Philippe Sands, *Lawless World: America and the Making and Breaking Global Rules* (Allen Lane, 2005) 193–201; Kim Sengupta, 'How Goldsmith Changed Advice on Legality of War', *The Independent* (online), 1 July 2010, <<http://www.independent.co.uk/news/uk/home-news/how-goldsmith-changed-advice-on-legality-of-war-2015252.html>>. The UK Attorney General at the time, Lord Goldsmith, had initially advised that he considered that Security Council Resolution 1441 did not authorise the use of force and that a second resolution would be required. This was also the consistent view of the legal advisers in the Foreign Office. However, following discussions with the Foreign Minister, Jack Straw, the UK Ambassador to the United Nations, Sir Jeremy Greenstock, and members of the US Administration, Lord Goldsmith revised his earlier view in late February 2003, concluding that he was 'prepared to accept that a reasonable case can be made that Resolution 1441 revives the authorisation to use force in Resolution 678'. Much of the relevant documentation was made available for the purposes of the Butler and Chilcot inquiries in the UK, and extensive oral evidence on this issue to the Chilcot inquiry (The Iraq Inquiry). See in particular the statements and evidence of Lord Goldsmith and of Sir Michael Wood: *Evidence*, The Iraq Inquiry <<http://www.iraqinquiry.org.uk/transcripts.aspx>>.

say that concerns about the prudence of an armed intervention and the possible benefits to, but also the likely adverse impact on, the people of Iraq, were not also part of the assessment of the wisdom of engaging in an armed attack, but merely that legality was an important component for many in assessing the correctness of the decision. Despite the contestation over the legality of the war and the preponderance of informed opinion holding it to be unlawful under international law, the limitations of the international legal system meant that the opportunity to challenge the wrongdoing before some authoritative international tribunal was almost non-existent.

The obvious forum for a complaint to be made by one state against another, the ICJ, was not available. While Australia and the UK had accepted the jurisdiction of the ICJ,⁴² neither Iraq nor the US had accepted the compulsory jurisdiction of the ICJ in general terms at the relevant time. The US had withdrawn its acceptance of compulsory jurisdiction with effect from 1986,⁴³ while Iraq had never accepted the Court's compulsory jurisdiction. As a result, the ICJ would have had no power to hear a case brought by Iraq alleging the unlawfulness of the use of force.

B The ICC

Another potential official forum for raising the issue of the legality of the Iraq war was the International Criminal Court ('ICC'). That Court was established to consider allegations of the commission of certain serious international crimes by individuals and is thus not capable of entertaining a complaint by one state against another. Recourse to this forum would not have been within the normal inter-state framework of litigation over the use of force, but would have involved the participation of other actors, in particular civil society groups, bringing matters to the attention of the ICC Prosecutor, who would be obliged to make an independent legal and factual assessment of whether it was appropriate to open an investigation into the allegations.⁴⁴ As the UK and Australia (but not the US) were parties to the *ICC Statute* at the relevant time, the ICC might conceivably have had jurisdiction.⁴⁵

42 *Multilateral Treaties Deposited with the Secretary-General*, UN Doc ST/LEG/SER/E/27 (1 April 2009) ch I.4.

43 *Ibid* n 9. However, the US has accepted the jurisdiction of the Court in relation to disputes under several treaties, though it has entered reservations to many others which contain a clause conferring jurisdiction on the ICJ: see Sean D Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' in Cesare P R Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009) 46, 97–111. See also Murphy, above n 25.

44 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 53.

45 The ICC's jurisdiction over genocide, war crimes and crimes against humanity certainly extends to trying cases involving charges relating to conduct committed in situations of armed conflict, including the responsibility of high-level military and civilian commanders on the basis of command responsibility for the actions of their subordinates: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 6, 7, 8, 28 ('*ICC Statute*').

Nonetheless, this would not have permitted the ICC to examine the legality of the initial use of force: its jurisdiction at that time was limited to the *jus in bello* (rules regulating the conduct of armed hostilities) rather than the *jus ad bellum* (rules regulating the use of force as between states). Jurisdiction to consider allegations against an individual that he or she has committed the crime of aggression was made possible only by the adoption of the definition of the crime of aggression at the Kampala Review Conference of the *ICC Statute* in 2010,⁴⁶ though this amendment has not yet entered into force.

Efforts were made to engage the jurisdiction of the ICC with the goal of having it pronounce on at least some aspects of the legality of the Iraq invasion and subsequent military operations. However, the limits on the jurisdiction of the ICC were made clear in the response from the ICC Prosecutor to those who submitted material calling for an investigation: the legality of the war was not an issue that could be entertained by the ICC, even through the medium of an individual prosecution. As then Prosecutor Luis Moreno-Ocampo put it, some three years after the initiation of the use of force against Iraq:

In other words, the International Criminal Court has a mandate to examine the *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal. As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression.⁴⁷

The ICC Prosecutor further concluded that, while there was a reasonable basis to believe that certain war crimes (namely wilful killing and inhuman treatment) had been committed, these did not satisfy the threshold of gravity contained in article 8 of the *Statute*,⁴⁸ and accordingly he did not propose to commence a formal investigation into allegations of the commission of those crimes which did fall within the jurisdiction of the ICC.⁴⁹

C The Iraq War and Domestic Courts

Nor did domestic courts provide a particularly hospitable forum for resolution of disputes over the legality under international law of the proposed use of force. For example, efforts to seek declarations before the British courts as to the illegality of the threatened use of force by the UK under UNSC Resolution

46 Review Conference of the Rome Statute, *Amendments to the Crime of Aggression to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Resolution RC/Res.6, 13th mtg, *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 Official Records, Part II – Resolutions and Declarations Adopted by the Review Conference*, annex I, RC/11, 17 (11 June 2010).

47 International Criminal Court Office of the Prosecutor, *Iraq Response* (9 February 2006), Coalition for the International Criminal Court <http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> 4 ('*ICC Iraq Letter*').

48 Article 8(1) provides that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'

49 *ICC Iraq Letter*, above n 47, 9.

1441 were rebuffed,⁵⁰ as were various attempts to rely on the alleged unlawfulness of activities related to the intervention in Iraq as defences to criminal charges.⁵¹ Similar attempts before the Irish courts were also rejected.⁵² On the other hand, the German Federal Administrative Court was prepared to express its view that there were serious concerns about the legality of the intervention under international law.⁵³

D Iraq and the Human Rights Jurisdiction

The major exception to the consideration by international tribunals of the events of the Iraq war is to be found in a series of human rights cases brought against the UK government in the English courts that ended up before the European Court of Human Rights in Strasbourg. These cases involved claims of violations of rights guaranteed in the *European Convention on Human Rights* and its domestically incorporated cognate, the *Human Rights Act 1998* (UK).⁵⁴ The outcome of those cases turned largely on the question of whether persons in Iraq in areas where British military forces were operating were 'within the jurisdiction' of the UK for the purposes of the *European Convention on Human Rights*.⁵⁵ The European Court of Human Rights held that, to the extent that persons were under the 'effective control' of British forces, they were within the jurisdiction of the UK for those purposes. In some cases, this led to findings that that the rights of the plaintiffs/applicants under the *Convention* had been violated.⁵⁶ In effect, the cases represent a consideration of international humanitarian law (*jus in bello*) issues through the lens of human rights standards. However, the question of the legality of the use of force (*jus ad bellum*) was not one that was, or could have been, raised before the UK courts under the *Human Rights Act 1998* (UK) or before the Strasbourg Court under the *European Convention on Human Rights*.⁵⁷ Despite widespread international concern about the use of force and the doubts about its legality, neither the international system

50 *Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom* [2002] EWHC 2759 (QB).

51 *R v Jones* [2007] 1 AC 136, on appeal from *Jones v Gloucestershire Crown Prosecution Service* [2005] QB 259 and *Ayliffe v Department of Public Prosecutions* [2005] 3 All ER 330.

52 *Horgan v An Taoiseach* [2003] 2 IR 468.

53 Bundesverwaltungsgericht [German Federal Administrative Court], 2 WD 12.04, 21 June 2005 reported in (2005) BVerwG 2 WD 12.04. See Nikolaus Schultz, 'Was the War on Iraq Illegal? – The German Federal Administrative Court's Judgement of 21st June 2005' (2006) 7 *German Law Journal* 25.

54 *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [79], [129]; *Al-Skeini v United Kingdom* [2011] ECHR 1093; *Al-Saadoon and Mufdhi v United Kingdom* [2010] ECHR 285; *Al-Jedda v United Kingdom* [2011] ECHR 1092 ('*Al-Jedda*'). See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

55 See the Symposium on *Al-Jedda* and *Al-Skeini* cases, (2011) 50 *Military Law and the Law of War Review* 315–446.

56 *Al-Jedda* [2011] ECHR 1092; Francesco Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*' (2011) 50 *Military Law and Law of War Review* 321.

57 See, eg, *R (Gentle) v The Prime Minister* [2008] 1 AC 1356 (not possible to raise question of legality of use of force in context of article 2 obligation to investigate deaths) [58] (Baroness Hale of Richmond).

nor national legal systems were able to provide a judicial or quasi-judicial forum in which the issue of legality could be considered.

E Civil Society Responds

Thus, the opportunities that the international legal system offers to states or other groups to seek judicial adjudication of claims that another state has unlawfully resorted to the use of force against them are relatively limited. This reflects the lack of a compulsory jurisdiction in the ICJ and the limited number of states which have generally accepted that Court's jurisdiction, but perhaps also a recognition where there is jurisdiction that recourse to such a tactic may not be the best way to achieve the results a state wants. Nor have international criminal tribunals provided a more accessible venue, as their jurisdiction is primarily limited to crimes against humanity, war crimes and genocide, with the recent expansion of ICC jurisdiction to include aggression. Attempts to engage the existing ICC jurisdiction in relation to Iraq ran into the problem of the non-acceptance of the *Statute* by some of the states concerned and the reluctance by the Prosecutor to accept that the crimes alleged satisfied the criterion of seriousness. National courts did not offer a more hospitable environment to explore the possible illegality of the military action against Iraq, an unsurprising outcome in view of the reluctance of most domestic courts to second-guess the executive government on such issues and the fact that in some relevant jurisdictions international law does not automatically form part of domestic law.

Into this gap came not just the protests and demonstrations on the streets of cities around the world and other forms of dissent and lobbying, but also international peoples' tribunals, or public opinion tribunals. They sought to address the issue of the legality of the Iraq invasion from the perspective of established international law, binding on states involved in the 'coalition of the willing'. These included the World Tribunal on Iraq (2002–5)⁵⁸ and, more recently, the Kuala Lumpur War Crimes Commission (2011–12). These tribunals were examples of peoples' tribunals – initiated by civil society rather than states or governments – which saw themselves as responding to the absence of effective official legal channels to hold the states concerned accountable by subjecting acts of questionable legality to external (quasi-)judicial scrutiny according to established international legal standards. They also served other functions, the World Tribunal on Iraq being at least as important as the result of, and providing a framework for, international citizen resistance, advocacy and solidarity.

IV PEOPLES' TRIBUNALS AND THE *JUS AD BELLUM*

The legality of the use of force by one state against another state has been an issue taken up by several international peoples' tribunals. In some cases, the

58 See generally Müge Gürsöy Sökmen (ed), *World Tribunal on Iraq: Making the Case against War* (Olive Branch Press, 2008).

tribunals concerned have examined a situation in which there was no legal or practical prospect of the issue of the lawfulness of a use of force being taken up by an international court or tribunal. In other cases, tribunals have examined situations which were either the subject of such proceedings⁵⁹ (in which case they may be seen as complementing official proceedings), or which would subsequently come before an international court or tribunal (in which case peoples' tribunals hearings could be seen as a precursor to state-based proceedings⁶⁰). In many of these cases, the peoples' tribunals concerned, like the ICJ and other tribunals, have engaged not only with the *jus ad bellum* issues, but also with the *jus in bello* or humanitarian law issues, with more attention devoted overall to the *jus in bello* issues.⁶¹ However, in this article we focus on the *jus ad bellum* issues and seek to explore the significance of the engagement with those issues by international peoples' tribunals. These tribunals have examined the question of the use of force in interstate relations in a number of cases. In this section we examine the First Russell Tribunal on the Vietnam War; the Permanent Peoples' Tribunal proceedings relating to the cases of East Timor, the former Yugoslavia, Afghanistan and Nicaragua; the World Tribunal on Iraq; and the Kuala Lumpur War Crimes Tribunal, also on Iraq.

A The First Russell Tribunal

The first major international peoples' tribunal of the post-World War II era was the Russell Tribunal established by Bertrand Russell and colleagues in order to inquire into the conduct of the war in Vietnam by the US and its allies.⁶² The applicability of international law on the use of force was much debated in

59 See, eg, the Permanent Peoples' Tribunal ('PPT') hearings on Nicaragua which culminated in hearings in Brussels from 5–7 October 1984. Proceedings before the ICJ had been instituted by Nicaragua on 9 April 1984. The ICJ ruled that it had jurisdiction to consider the case on 26 November 1984, after which the US took no further part in the proceedings. The Court delivered its judgment on the merits on 27 June 1986.

60 See, eg, the PPT hearing on East Timor and the PPT hearings on the former Yugoslavia.

61 Peoples' tribunals which have considered both categories of issue include the Russell Tribunal on the War in Vietnam, Stockholm and Copenhagen 1967; the legality of nuclear weapons, Madrid 1983, London 1985, Los Angeles 1987; the USSR invasion of Afghanistan, Paris 1982, Stockholm 1981, Copenhagen 1986; the Israeli-Palestinian conflict, Geneva and Tokyo 1983, Nicosia and London 1982; the World Court of Women against war, for peace, South Africa 2001; the Dublin Tribunal on Sri Lanka 2010; and the Russell Tribunal on Palestine, at various locations from 2010–2013. Those focusing largely on the use of force include tribunals on the US invasion of Panama, held in New York in 1991; US intervention in Nicaragua, Brussels 1984. See further Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30 *New Political Science* 161; Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Sessioni e Sentenze* [Sessions and Verdicts] <<http://www.internazionaleleleliobasso.it/?cat=15>>.

62 See John Duffett (ed), *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (Simon & Schuster, 1970); Peter Limquenco and Peter Weiss (eds), *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal founded by Bertrand Russell* (Allen Lane, 1971); Arthur Jay Klinghoffer and Judith Apter Klinghoffer, above n 5, chs 11–14. The proceedings of the First Russell Tribunal can also be found at 'War Crimes Tribunal' on *A Vietnamese-American Experience* <<http://tuantran.noblogs.org/war-crimes-tribunal/>>.

relation to the Vietnam War.⁶³ The US argued that South Vietnam was subject to armed attack by North Vietnam and that it was therefore able to exercise the right of individual and collective defence against that armed attack.⁶⁴ On the other hand, it was contended, among other arguments, that there was no independent state of South Vietnam and that the US participation was an intervention in a civil war which was contrary to accepted international law.⁶⁵

Neither the ICJ nor any other international court had jurisdiction over the states principally involved, and there was no state-sponsored international criminal tribunal before which individuals might have been charged with war crimes. The Russell Tribunal saw itself as filling that gap, continuing the work of the International Military Tribunal at Nuremberg until such time as a permanent international body of that sort was established.⁶⁶ As Jean-Paul Sartre, one of the organisers and members of the Tribunal, wrote:

Why did we appoint ourselves? For the precise reason that no one else did it. Governments or peoples could have done it. But governments want to retain the ability to commit war crimes without running the risk of being judged; they are therefore not about to set up an international body responsible for judging them. As for the people, save in time of revolution they do not appoint tribunals; therefore they could not appoint us.⁶⁷

Held in Sweden and Denmark in 1967, the First Russell Tribunal addressed a number of questions regarding the *jus ad bellum* and *jus in bello*: much of the focus of the inquiry and the evidence produced to it addressed questions relating to the conduct of the hostilities, involving alleged violations of international humanitarian law. In relation to the use of force, it examined the question of whether the US government (and the governments of Australia, New Zealand and South Korea) had committed acts of aggression contrary to international law.

The Tribunal appears to have proceeded on the basis that Vietnam was to be considered a single nation rather than two separate nations.⁶⁸ It concluded that the US had committed acts of aggression against Vietnam, Cambodia and Laos in violation of international law; that Australia, New Zealand and South Korea had been accomplices of the US in the aggression against Vietnam in violation of international law; and that Thailand, the Philippines and Japan were guilty of complicity in the aggression committed by the US Government against Vietnam. In addition to making these specific legal findings, the Tribunal sought to place

63 See the collection of primary and secondary materials in Richard A Falk (ed), *The Vietnam War and International Law* (American Society of International Law, 1968–76) vols 1–4. The papers collected in Volume One of that collection in particular address the *jus ad bellum* issues.

64 Leonard C Meeker, State Department Legal Adviser, 'The Legality of United States Participation in the Defense of Vietnam' (1966) *Department of State Bulletin* 474–89.

65 Lawyers Committee on American Policy towards Vietnam – Consultative Council, *Vietnam and International Law: An Analysis of the Legality of the US Military Involvement* (O'Hare Books, 1967).

66 See Jean-Paul Sartre, 'Inaugural Statement', First Russell Tribunal, in Limquenco and Weiss, above n 62, 63–5.

67 Jean-Paul Sartre, 'Answer and Commentary to de Gaulle's Letter Banning the Tribunal from France', in Duffett, above n 62, 29, 33.

68 Jean-Paul Sartre, 'Summary and Verdict of the Stockholm Session', in Limquenco and Weiss, above n 62, 177, 180.

these violations of positive law within a broader narrative of US imperialist expansion.⁶⁹ Although it was much criticised, the Tribunal provided an important model for future tribunals and also collected a significant amount of documentation, which brought to public notice events that might otherwise not have been revealed to the West.⁷⁰ Richard Falk argues

The Russell Tribunal may not have been 'legal' as understood from conventional governmental perspectives, but it was 'legitimate' in responding to double standards, by calling attention to massive crimes and dangerous criminals who otherwise enjoy a free pass, and by providing a reliable and comprehensive narrative account of criminal patterns of wrongdoing that destroy or disrupt the lives of entire societies and millions of people. As it happens, these societal initiatives require a great effort, and only occur where the criminality seems severe and extreme, and where a geopolitical mobilisation precludes inquiry by established institutions of criminal law.⁷¹

B The Permanent Peoples' Tribunal and the Use of Force

The Permanent Peoples' Tribunal ('PPT')⁷² is one of the few peoples' tribunals which have an institutional base or which have organised a significant number of hearings on a range of topics.⁷³ The Panels of the PPT are multidisciplinary, including lawyers such as Belgian international law professors François Rigaux and Joe Verhoeven, who have served as ad hoc judges on the ICJ, and Salvatore Senese, an Italian magistrate and senator (East Timor, Afghanistan); and writers (Eduardo Galeano: Nicaragua); mathematicians

69 See Lelio Basso, 'Summing-Up of the Second Session', in Limqueco and Weiss, above n 62, 324, 336–43.

70 Anthony A D'Amato, 'Book Review of *Against the Crime of Silence; On Genocide*' (1969) 57 *California Law Review* 1033–8; Staughton Lynd, 'The War Crimes Tribunal: A Dissent' (1967–8) 12 *Liberation* 76. Richard Falk called the tribunal 'a juridical farce': Richard A Falk, 'International Law and the United States Role in the Vietnam War: A Response to Professor Moore' (1966–7) 76 *Yale Law Journal* 1095, 1101. In later assessments, including that which follows in the text, Falk seems more positive about the Russell Tribunal's contribution: Richard A Falk, *The Costs of War: International Law, the UN, and the World Order after Iraq* (Routledge, 2008) 171, 173.

71 Richard Falk, 'Toward a Jurisprudence of Conscience' on Richard Falk, *Citizen Pilgrimage* (26 November 2011) <<http://richardfalk.wordpress.com/2011/11/26/toward-a-jurisprudence-of-conscience/>>.

72 Inspired by the Russell Tribunals and established by Italian Senator Lelio Basso and others involved in the early Russell Tribunals, the PPT, based in Rome, was established in 1979 as a standing institution intended to provide a forum for claims to be considered that were excluded by the formal international system. See Gianni Tognoni, 'La Storia del Tribunale Permanente dei Popoli' ['The History of the Permanent Peoples' Tribunal'] in Linda Bimbi and Gianni Tognoni (eds), *Speranze e Inquietudini di Ieri e di Oggi: I Trent'Anni della Dichiarazione Universale del Diritto dei Popoli* [Hopes and Concerns of Yesterday and Today: Thirty Years of the Universal Declaration of Peoples' Law] (EdUP, 2008); Janine Odink, 'The Permanent Peoples' Tribunal' (1993) 11 *Netherlands Quarterly of Human Rights* 229; Richard A Falk, 'Keeping Nuremberg Alive' in G Amato et al (eds), above n 5, 811.

73 The PPT has organised more than three dozen peoples' tribunals since its establishment in 1979. Other repeat players have been the Russell Tribunals organised by the Bertrand Russell Peace Foundation, which followed the first Russell Tribunal on Vietnam; these addressed repression in Latin America, and the *Berufsverbot* in West Germany, and more recently, the Russell Tribunal on Palestine: Bertrand Russell Peace Foundation, *Home* <www.russfound.org/default.html>. The Latin American Water Tribunal has also been a repeat player with a number of hearings held since its inception: Tribunal Latinoamericano del Agua [Latin American Water Tribunal], *Inicio* [Home] <tragua.com>.

(Laurent Schwartz: Afghanistan); scientists (George Wald: Nicaragua), as well as other eminent persons, including Nobel Prize laureates. Such multidisciplinary backgrounds are fairly typical for most international peoples' tribunals, though there have been a number which have deliberately been composed only of lawyers (the Tokyo Women's Tribunal and the Kuala Lumpur War Crimes Tribunal being two prominent examples).

The PPT has taken up the issue of violations of the international law on the use of force on a number of occasions, many of which have also involved consideration of *jus in bello* issues. The situations it has examined have included hearings on the use of force in East Timor, Afghanistan, Nicaragua, and the former Yugoslavia. In the first two of these cases there was no prospect of any international judicial hearing;⁷⁴ in the latter two there were current or contemplated proceedings underway before the ICJ and an international criminal tribunal, respectively. The hearings thus illustrate a range of functions that peoples' tribunals may perform, so far as existing state-based institutions are concerned.

1 *The PPT and East Timor*⁷⁵

In proceedings held in Lisbon in 1981, the PPT examined Indonesia's invasion of East Timor in 1975 and its subsequent occupation of that territory. The Revolutionary Front for an Independent East Timor ('FRETILIN')⁷⁶ brought the case to the PPT, which concluded that the introduction and maintenance of Indonesian forces into East Timor was an act of aggression prohibited by article 2(4) of the *UN Charter* and that Indonesia was 'guilty of a crime against international peace for which it [was] internationally accountable.'⁷⁷ The PPT also concluded that the US and other governments and organisations which had provided aid and assistance to the Indonesian government were 'guilty of complicity in its act of aggression'. The PPT found that Indonesia and other countries had violated the right to self-determination of the people of East Timor, a conclusion that rests on more secure juridical ground than the PPT's finding of aggression against an independent state, given the uncertain status of East Timor at the time. This case is thus illustrative of the classic role of a peoples' tribunal,

74 At the time; in fact Portugal attempted to argue before the ICJ that Australia's reliance on the Timor Gap Treaty resulted from its recognition of Indonesia's unlawful use of force to invade and occupy East Timor in violation of its right to self-determination. The Court held it lacked jurisdiction due to the absence of an indispensable third party, Indonesia: *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

75 See Simm and Byrnes, above n 6.

76 In Portuguese: Frente Revolucionária de Timor-Leste Independente. On the political background, including the role of the other parties, and FRETILIN's engagement in international diplomacy and use of international law, see Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste* (2006), ch 7.1, [366]–[369] ('*Chega!*').

77 Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Timor Orientale, Lisbona 19–21 giugno 1981* [Session on East Timor, Lisbon, 19–21 June 1981], Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1981/06/Timor_TPP_it.pdf>. Unofficial English translation by Patrick Walsh (on file with authors).

namely a formal pronouncement of findings of fact and law following a deliberative process based on evidence produced to the body hearing the case. In this instance the proceedings and verdict served as an affirmation of the experience of the East Timorese people and provided material to be employed in the ongoing diplomatic and advocacy efforts in relation to the military occupation of East Timor.⁷⁸

2 PPT and Hearings on Afghanistan⁷⁹

The entry into and military occupation of Afghanistan by the Union of Soviet Socialist Republics ('USSR') in December 1979, which continued for a decade, was widely challenged as violating international law.⁸⁰ Given that the USSR had not accepted the compulsory jurisdiction of the ICJ, there was little practical prospect that the question of the legality of the invasion and subsequent actions would come before the ICJ or before some other international adjudicative mechanism. However, the PPT did take up the issue, in two hearings held in Stockholm in 1981⁸¹ and in Paris in 1982.⁸² The issues addressed were whether the Soviet intervention in Afghanistan constituted aggression, as defined in international law, against the sovereignty, territorial integrity or political independence of the State of Afghanistan, and a violation of the fundamental

78 The Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR) described the PPT as part of the East Timorese Resistance's building of international collaboration during a difficult period: 'Convened to lift Timor-Leste's profile during this lean period, particularly in Portugal, the session brought together Fretilin leaders, lawyers, academics, politicians, journalists, church representatives and Indonesians from 15 countries': *Chega!*, above n 77, ch 7.1, [463].

79 See also in relation to a later use of force against Afghanistan in 2001: The Executive Committee of the International Criminal Tribunal for Afghanistan, *Judgement* (3 October 2004) International Criminal Tribunal for Afghanistan <<http://icta.m-shonan.jp/japanese/english-top.htm>>.

80 Jimmy Carter, 'Address to the Nation on the Soviet Invasion of Afghanistan' (Speech delivered at the White House, Washington DC, 4 January 1980) <<http://www.presidency.ucsb.edu/ws/?pid=32911>>; *Situation in Afghanistan and Its Implications for International Peace and Security*, GA Res ES-6/2, UN GAOR, ESS, Supp No 1, UN Doc A/RES/ES-6/2 (15 January 1980), reaffirmed each year until the Soviet withdrawal in 1988. The Soviet invasion of Afghanistan was also condemned by the Islamic Conference in 1980, and a 1983 meeting of Non-Aligned Heads of States in New Delhi called for a political solution: Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2012) 177–80. See also Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 121.

81 Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Afghanistan, Prima Sessione, Stoccolma 1–3 maggio 1981* [Afghanistan, First Session, Stockholm 1–3 May 1981], Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1981/05/Afghanistan_I_TPP_it.pdf> ('*Afghanistan Judgment I*'). English version on file with authors.

82 Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Afghanistan, Seconda Sessione, 16–20 dicembre 1981* [Afghanistan, Second Session, 16–20 December 1981], Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1982/12/Afghanistan_II_TPP_it.pdf> ('*Afghanistan Judgment II*'). English version on file with authors.

national rights of the Afghan people⁸³ and whether Soviet forces in Afghanistan had violated the rules of international humanitarian law.⁸⁴

The Tribunal undertook a fairly conventional analysis of the international law rules relating to the use of force, concluding that ‘the incursion and the maintenance of Soviet troops on Afghan territory is ... an aggression prohibited by article 2(4) of the *Charter of the United Nations*, defined as such in the General Assembly resolution 3314 (XXIX)’, that the Soviet government had ‘committed a crime against international peace according to the definition of a war of aggression in General Assembly resolutions 3314 (XXIX) and 2625 (XXV)’ and that these acts gave rise to international responsibility. The PPT also held that the USSR had committed a violation of article 5 of the *Universal Declaration of the Rights of Peoples* (*‘Declaration of Algiers’*) in respect of the right of the Afghan people to self-determination.⁸⁵

A feature of both the judgments is the specific mention of ‘peoples’ law’, a source of law outside the positive law made by states.⁸⁶ The legitimacy of peoples’ law is asserted to derive not from the endorsement by the community of nation states but as emanating from peoples themselves, the ultimate democratically legitimate source of power. The document which embodies these claims of peoples to formulate international ‘law’ is the *Declaration of Algiers*,⁸⁷ adopted on 4 July 1976 by a group which included many of those involved in the first two Russell Tribunals and subsequently in the founding of the PPT in 1979.⁸⁸ That body includes in its *Statute* as one of the norms to be applied by the Tribunal the *Declaration of Algiers*.⁸⁹

83 *Afghanistan Judgment I* (English version), 10.

84 *Ibid* 26.

85 *Ibid* 30.

86 *Ibid*; *Afghanistan Judgment II*.

87 *Universal Declaration of the Rights of the Peoples*, Algiers (adopted 4 July 1976) <http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm>. See François Rigaux, ‘The Algiers Declaration of the Rights of Peoples’ in Antonio Cassese (ed), *UN Law, Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff International Publishers, 1979) 211; Richard Falk, ‘The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights’, in Antonio Cassese (ed), *UN Law, Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff International Publishers, 1979) 225; François Rigaux (ed), *La Carta di Algeri: La Dichiarazione Universale dei Diritti dei Popoli* [The Charter of Algiers: The Universal Declaration of the Rights of Peoples] (Edizioni Cultura della Pace, 1988).

88 Tribunale Permanente dei Popoli [Permanent Peoples’ Tribunal], *Filippine e Popolo Bangsa-Moro, Anversa 30 ottobre – 3 novembre 1980* [Session on the Filipino People and the Bangsa Moro People, Antwerp 30 October – 3 November 1980], Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1980/10/Filippine-I_TPP_it.pdf>. English version on file with authors.

89 Article 2 of the *Statute of the Permanent Peoples’ Tribunal* provides (authors’ translation from Italian):

The Tribunal notes in relation to the *jus ad bellum* part of the case that the Soviet intervention violated article 5 of the *Declaration of Algiers*.⁹⁰ Given that article 5 seems in substance very similar to the orthodox norms, one might ask what value is added by the reference to this document. The Tribunal provides two responses. The first is a general one, based on its mandate:

The specific mission of the Tribunal is to promote the universal and effective respect of the fundamental rights of peoples by deciding when these rights are violated, *by examining the causes of such violations*, and by exposing those responsible for these violations to public opinion.⁹¹

This quotation above highlights an important element in the work of this peoples' tribunal (seen also in others), namely that they see their role as not just the identification of violations and violators, but also seeking to understand and describe the broader context and causes of violations, as a necessary step in applying and further developing international law and other means to address the structures that lead to violations of human rights.⁹² This is a task different to that normally undertaken by international courts and tribunals, which are more constrained in the breadth of the context that they may be able to engage with in expounding and applying the law. This is true even in the case of courts such as the ICJ which operate in a context in which contentious political dimensions often frame the 'legal' disputes which they are empowered to decide.

In its first pronouncement in the Afghanistan proceedings the PPT commented in relation to the specific situation:

Although characterising the Soviet occupation as a violation, the international juridical order does not recognise the Afghan people as the primary injured party. Under international law, the Afghan people do not enjoy any right to speak up or to complain and the violation is considered an affair which concerns only States.

It is incumbent upon the Tribunal to denounce to world public opinion the violation of the inalienable right of the Afghan people to self-determination through and beyond the violation of the right of the Afghan State, at present

The mission of the Tribunal is to promote universal and effective respect for the fundamental rights of peoples, determining if such rights are violated, examining the causes of such violations and denouncing the authors of such violations in the court of world public opinion. The Tribunal applies the international principles of *jus cogens* as an expression of universal juridical conscience, in particular the principles of Nuremberg, its Declaration of Algiers on the fundamental rights of peoples and applies the founding legal instruments of the United Nations, in particular the Universal Declaration and international human rights treaties, the Declaration on Friendly Relations, General Assembly Resolutions on Decolonisation and on the New International Economic Order, as well as the Convention on the Suppression and Prevention of the Crime of Genocide.

90 Article 5 of the *Declaration of Algiers* provides: 'Every people has an imprescriptible and unalienable right to self-determination. It shall determine its political status freely and without any foreign interference.'

91 *Afghanistan Judgment II* (English version), 21 (emphasis added).

92 See also *Statute of the Permanent Peoples' Tribunal*, Preamble (authors' translation from Italian): 'Considering that it is equally necessary to deepen the analysis of the economic causes, social policies of crimes against peoples with regard to imperialism, neo-colonialism and the consequent violations of the rights of minorities and individuals'.

represented by a Government which has become an instrument of aggression against its own people. In this way the Tribunal seeks to bring international law back to its true source: peoples and their desire for a more just world.⁹³

The Tribunal here is making both a procedural point and a substantive one. The procedural point is that there is no official international adjudicative forum to which the Afghan people *qua* people could have taken a claim of the denial of the right to self-determination that resulted from the actions of the USSR and the Afghan government. The second point is the assertion of the claim, based firmly in the perspective of the *Declaration of Algiers*, that ‘peoples and their desire for a more just world’ ground a right not only to claim international law rights but also to define a peoples’ international law which enjoys legitimacy even though it has not been adopted by states or international organisations.

3 *The PPT Relating to Nicaragua*

Another important engagement with the international law on the use of force by peoples’ tribunals was the hearing organised, once again under the auspices of the PPT, in relation to the US involvement in Nicaragua in the 1980s.⁹⁴ In September 1984, 15 groups based in Nicaragua⁹⁵ requested the PPT to institute proceedings inquiring into the actions of the US which were alleged to be ‘violations of the rights of peoples’ and in breach of ‘international law and the principles of peaceful coexistence of peoples.’⁹⁶

When the PPT took up the case,⁹⁷ Nicaragua had already instituted proceedings against the US before the ICJ, a case raising many of the same legal issues brought before the PPT.⁹⁸ The usual stance of the PPT (which reflects a view that peoples’ tribunals fill gaps in the existing international system) is that the competence of the PPT is generally engaged only when there is no adequate remedial option in the state-sponsored system of international law. The President of the PPT addressed the issue of the pending ICJ proceedings as follows:

The request before the Court and the pleading with which we are seised follow parallel routes and ... therefore do not risk coming into conflict. On the one hand, the origin of the action is not identical, as the peoples’ tribunal is invoked by a people or its representatives. On the other hand, the aim of the pleading addressed to us is more extensive than that lodged in The Hague.

93 *Afghanistan Judgment I* (English version), 25.

94 Tribunale Permanente dei Popoli [Permanent Peoples’ Tribunal], *Nicaragua, Bruxelles 5–8 ottobre 1984* [Nicaragua, 5–8 October 1984] Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1984/10/Nicaragua_TPP_it.pdf>.

95 Letter from Lucío Jiménez, Secretary-General of the Central Sandinista de Trabajadores, and others to the PPT, dated 1 September 1984 (in Spanish, copy on file with authors).

96 *Ibid* 5.

97 The Tribunal appointed Professor Francis Boyle to present the case of the US. See Francis A Boyle, Statement on behalf of the United States of America in the case of *Nicaragua v United States of America* before the Permanent Peoples’ Tribunal, Brussels, 6 October 1984 (on file with authors).

98 See the discussion above.

In addition, the planes on which the two actions are occurring are so distinct that there is no risk of confusion or conflict. Our tribunal is seised by organisations representing the Nicaraguan people, not by the government which has exercised its jurisdiction before the Court. The facts that concern us are much broader than those which form the object of the request of 9 April 1984 ... [and] it is on a fundamental attribute of the Nicaraguan people, its right to self-determination, that we are invited to pronounce.⁹⁹

The Tribunal noted that 'accusations of imminent invasion by US-backed forces' 'backed by evidence' had been put before it, and the need to condemn these plans constituted another reason for proceeding.¹⁰⁰ The Tribunal found that the US had engaged in an unlawful use of force against Nicaragua by undertaking acts of aggression against Nicaragua. The findings of the Tribunal were very similar to the eventual findings of the ICJ in its 1986 judgment on the merits in *Nicaragua v United States*. Thus, in this case the Tribunal acted as both a precursor and a complement to proceedings in the ICJ, focusing on the rights of the Nicaraguan people to self-determination, rather than solely on the violations of state sovereignty caused by the illegal use of force.

4 The PPT and the Former Yugoslavia

The PPT also took up the issue of the *jus ad bellum* (and the *jus in bello*) in the break-up of the former Yugoslavia, though its major focus was on the alleged commission of genocide, crimes against humanity and war crimes by parties to the conflict. The tribunal held two sessions in 1993, in Bern¹⁰¹ and Barcelona.¹⁰² During this period, steps were being taken within the UN to respond to the events in the former Yugoslavia. The UNSC had called for the establishment of an international criminal tribunal in February 1993,¹⁰³ and in May 1993 the Council adopted resolution 827 which established the International Criminal Tribunal for the Former Yugoslavia ('ICTY').¹⁰⁴ The ICTY was mandated to prosecute individuals for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991. It had no jurisdiction to prosecute individuals for the crime of aggression, nor did it have any jurisdiction over any states in relation to their involvement in the alleged violations of international

99 Tribunal Permanent des Peuples [Permanent Peoples' Tribunal], *L'Agression américaine au Nicaragua, Discours d'Ouverture du Président* [*American Aggression against Nicaragua, Opening Address of the President*] 1, 6 (on file with authors) (authors' translation).

100 PPT Proceedings, *Decision of the Tribunal*, English version, 27–8.

101 PPT, *First Session on Former Yugoslavia, Bern, 17–20 February 1993, Findings and Recommendations* (English/French version on file with authors).

102 PPT, *Second Session on Former Yugoslavia, Barcelona, 7–11 December 1993, Verdict* (English version on file with authors).

103 SC Res 808, UN SCOR, 48th sess, 3175th mtg, UN Doc S/RES/808 (22 February 1993).

104 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, established by SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN DOC S/RES/827 (25 May 1993).

law (including violations of the prohibition of the use of force). The ICTY issued its first indictments in 1994 and commenced its first prosecution in 1995.¹⁰⁵

The PPT's first session in Bern was a preliminary engagement with the issues, though it briefly stated that Federal Republic of Yugoslavia (Serbia and Montenegro) ('FRY') had breached article 2(4) of the *UN Charter* by using force against Bosnia-Herzegovina, Slovenia, Croatia and Kosovo.¹⁰⁶ In its second session, it found that the FRY was responsible for acts of aggression against Bosnia-Herzegovina and Croatia, and that Croatia was similarly responsible for aggression against Bosnia-Herzegovina (continuing to use the language of the state being *criminally* responsible).¹⁰⁷ It made a range of findings against all the states involved so far as the commission of crimes against humanity and war crimes were concerned.¹⁰⁸ The PPT also addressed the legal responsibility of other member states of the UN for failure to comply with UNSC sanctions, as well as adopting a more general critique of the political shortcomings of states and the UNSC in relation to the unfolding of the events in former Yugoslavia.¹⁰⁹

Since the PPT was undertaking an inquiry into matters being addressed by the UNSC and also assigned to the ICTY, the PPT appeared to feel that an explanation for its parallel activity was required. The PPT argued that 'the development of a procedure in parallel to that of the UN Tribunal, far from weakening the UN initiative, reinforces and enhances it at least for four main reasons'.¹¹⁰ First, it argued that the PPT was 'in the position of highlighting criminal responsibilities of other subjects besides those indicted by the [ICTY], and of raising other charges against them, particularly that of genocide.' It also noted that the PPT's jurisdiction went 'beyond the determination of criminal responsibilities of individuals' and extended also 'to the international responsibility for illicit deeds attributable to states, to other belligerent parties, and to international agencies.' The range of its inquiry was broader, allowing it to address political responsibilities and the causes of the violations, something which lay beyond the scope of inquiry of criminal courts.¹¹¹ The PPT also noted that it drew on additional sources of law not included in the *Statute of the ICTY*, as well as to peoples' law in the form of the *Declaration of Algiers*, and a wider range of evidence, including material that might not be admissible before a criminal court in individual proceedings.

The Tribunal set out a final, 'possibly the most important', justification for its activity, arguing that the events in former Yugoslavia had underlined the importance of international law and reinforced 'the main function of opinion tribunals, namely that of contributing to the establishment of the normative value

105 *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999).

106 PPT, *First Session on Former Yugoslavia, Bern, 17–20 February 1995, Findings and Recommendations*, 17 (English/French version on file with authors).

107 PPT, *Second Session on Former Yugoslavia, Barcelona, 7–11 December 1995, Verdict*, 24–5, 34–6.

108 *Ibid* 34–7.

109 *Ibid* 36–8.

110 *Ibid* 8–9.

111 *Ibid* 9.

of the international law at large, in the common perception and in the public opinion.' This took the form of urging the ICTY to take up the PPT's suggestions as to further possible defendants; affirming the need for a permanent and compulsory international court with jurisdiction in relation to crimes against peace and other serious violations of human rights; and making proposals for action by those responsible for the events to ensure peace and the protection of human rights in former Yugoslavia.¹¹² The PPT's judgment refers to the fact that a legal adviser of the ICTY had provided an oral report to the PPT hearing and had also 'proposed a collaboration' between the two bodies 'so that the [ICTY] could make use of the conclusions of the [PPT], and comply more effectively with its mandate.'¹¹³ It is not clear what concrete steps were taken in response to this, beyond presumably sending a copy of the PPT's verdict to the ICTY. Hence, in this case the PPT's role may be viewed as complementing that of the ICTY and the UNSC.

C World Tribunal on Iraq

The World Tribunal on Iraq ('WTI') was a series of some 20 hearings in cities around the world which culminated in a hearing in June 2005 in Istanbul.¹¹⁴ These hearings represented a citizens' movement that sought to explore the underlying causes and meaning of the war against Iraq in 2003, including specific findings on the legality of the invasion and its impact. In addition to lawyers such as Richard Falk, the Tribunal included a range of leading international figures including writers such as Arundhati Roy, playwright Eve Ensler, peace activists and other luminaries. The four stated aims of the WTI were: to establish the facts and inform the public about the war and the broader issues; to continue mobilisation of the anti-war movement – the tribunal was not to remain an 'academic endeavour, but will be backed by a strong international network'; to contribute to restoring truth and preserving collective memory by challenging the silence of international institutions; and 'to be part of a broader movement to stop the establishment of the new imperial world order as a permanent "state of exception" with constant war as one of its main tools.'¹¹⁵

The broader purposes of the Tribunal can be seen in the statement of principles set out in its Platform Text.¹¹⁶ It claimed legitimacy deriving from a range of factors, including 'the failure of official international institutions to hold

112 Ibid 10.

113 Ibid 15.

114 See generally Sökmen, above n 58; Jayan Nayar, 'Taking Empire Seriously: Empire's Law, Peoples' Law and the World Tribunal on Iraq' in Amy Bartholomew (ed), *Empire's Law: The American Imperial Project and the 'War to Remake the World'* (Pluto Press, 2006) 313–39; Richard A Falk, 'World Tribunal on Iraq: Truth, Law and Justice', in Richard A Falk (ed), *The Costs of War: International Law, The UN, and World Order after Iraq* (Routledge, 2008) 171–82.

115 Coordinating Committee for the World Tribunal on Iraq, *Statement of Principles: The Istanbul Platform Text* (29 October 2003) The Brussels Tribunal
<http://www.brusselstribunal.org/pdf/WTI_PlatformText.pdf> 2–3.

116 Ibid 1–5.

accountable those who committed grave international crimes and constitute a menace to world peace', being part of a worldwide anti-war movement, the Iraqi people's resistance towards occupation, the 'duty of all people of conscience to take action against wars of aggression' and other international crimes, giving voice to the voiceless victims of the war, and 'bring[ing] the principles of international law to the forefront.'¹¹⁷ The Tribunal set itself three tasks: to investigate the crimes committed by the US government in initiating the Iraq war; to investigate war crimes, genocide and crimes against humanity; and to expose 'the broader context of the New Imperial World Order', including the 'vast economic interests that are involved in this war-logic.'¹¹⁸

The opening statement of Richard Falk on behalf of the Panel of Advocates made clear what he saw as the role of the Tribunal:

Of course, this tribunal does not pretend to be a normal court of law with powers of enforcement. At the same time, it is acting on behalf of the peoples of the world to uphold respect for international law. When governments and the UN are silent, and fail to protect victims of aggression, tribunals of concerned citizens possess a law-making authority. Their unique contribution is to tell the truth as powerfully and fully as possible, and by such truthfulness to activate the conscience of humanity to resist.¹¹⁹

He noted that the WTI differed from a normal court of law in that it was

an organ of civil society, not of the state; its essential purpose is to confirm the truth, not to discover it; its jurors are dedicated, informed, and committed citizens of the world, not neutral and indifferent individuals of the community; its advocates are knowledgeable, wise and decent, but not legally trained specialists; its trust for the future is not based on violence and police, but on conscience, political struggle, and public opinion.

He concluded:

Nevertheless, we claim for this tribunal the authority to declare the law and to impose its judgment and to hope – hope that a demonstration of this criminality will not fall on deaf ears, but will awaken and exercise the peoples of the world to intensify their resistance to America's plans for world domination and stand in solidarity with the Iraqi people.¹²⁰

The WTI's wide-ranging mandate and set of concerns meant that the procedures of the tribunal were less 'legal' (in the sense of giving priority to the observance of legal procedural forms and legal standards) than some other peoples' tribunals have been. This includes the PPT tribunals discussed earlier, despite their practice of placing specific instances of violation of international law in a broader context, and especially the Kuala Lumpur War Crimes Tribunal in its hearings on Iraq, which are discussed below. Nevertheless, the evidence that was put before the WTI included much material of the type put before other peoples' tribunals and official tribunals that was directed to proving specific legal

117 Ibid 1–2.

118 Ibid 2.

119 Richard Falk, 'Opening Speech on Behalf of the Panel of Advocates' (Speech delivered at the World Tribunal on Iraq, Istanbul, 24 June 2005).

120 Ibid.

claims, as well as other material that addressed the broader questions raised by the Platform of the Tribunal.

The WTI's Jury of Conscience issued a Declaration which made findings and recommendations, some of which stated legal conclusions, while other conclusions were moral and political in character.¹²¹ This reflected diverse approaches among organisers and participants to what the Tribunal should do and how it should go about doing this and the importance of law and legal analysis in that process.¹²² This tension is seen in the fact that an explanatory note relating to international law was added to the final Declaration of the Jury, its purpose being 'to back up the Jury Statement that rests its assessments primarily on a moral and political appraisal of the Iraq war.'¹²³ Nevertheless, in its final Declaration the Jury made specific findings on issues of law, including holding the US and UK governments guilty of 'planning, preparing and waging the supreme crime of a war of aggression' and violating international humanitarian law and human rights law.¹²⁴ As has been the case with some other peoples' tribunals, the Tribunal dealt with issues both of state responsibility and individual criminal responsibility, though it appears to have elided them in its findings on the question of aggression. The Declaration's finding that the two governments had also committed a 'crime against peace by violating the will of the global anti-war movement'¹²⁵ is a conclusion that has no basis in current international law, though it may have been intended to be a rhetorical conclusion.

The explanatory note provided in an appendix to the Declaration was apparently an attempt to put the findings on a more secure international legal footing.¹²⁶ It carefully notes the distinction between the delictual responsibility of states and the individual criminal responsibility of persons, and argues further that the cumulative effect of the violations relating to the unlawful use of force 'is to create a strong factual and legal foundation for the indictment, prosecution and punishment of the individuals responsible for planning, initiating, and waging a crime of aggression towards Iraq.'¹²⁷ This is one of the few occasions, whether in relation to Iraq or other conflicts, when the issue is raised (here only by implication) as to whether every state violation of the prohibition on the use of

121 Jury of Conscience, 'Declaration of the Jury of Conscience, World Tribunal on Iraq: Istanbul, 23–27 June 2005' in Sökmen, above n 58, 492–509.

122 Ayça Çubukçu, 'On Cosmopolitan Occupations: The Case of the World Tribunal on Iraq' (2011) 13 *Interventions: International Journal of Postcolonial Studies* 422.

123 World Tribunal on Iraq, 'Appendix I: International Law', in Sökmen, above n 58, 502.

124 Jury of Conscience, above n 121, II.A.1, 492, 494.

125 *Ibid* 497.

126 *Ibid*.

127 *Ibid* 506.

force also constitutes the crime of aggression and gives rise to individual criminal responsibility.¹²⁸

D Kuala Lumpur War Crimes Commission and Tribunal

The Kuala Lumpur War Crimes Commission and Tribunal also dealt with the question of the legality of the institution and conduct of the 2003 Iraq War. The Commission and Tribunal were established under the Charter of the Kuala Lumpur Foundation to Criminalise War Incorporated, founded by former Malaysian Prime Minister Tun Dr Mahathir Mohamed in 2007. The aims and jurisdiction of the Tribunal are ‘to adjudicate prosecutions brought by the Kuala Lumpur War Crimes Commission in particular those involving crimes against peace; crimes against humanity; crimes of genocide; and war crimes, thereby holding perpetrators of war crimes to account for their actions especially when relevant international judicial organs fail to do so.’¹²⁹ Its judges and prosecutors are mostly retired Malaysian judges and legal academics, although one judge (Alfred Were) and one prosecutor (law professor Francis Boyle) are US citizens. In November 2011, the Tribunal ‘convicted’ former US president George W Bush and former UK Prime Minister Tony Blair of crimes against peace, crimes against humanity and genocide as a result of their roles in the Iraq War.¹³⁰ In May 2012 the Tribunal found Bush and Blair and their co-defendants, former US senior Bush administration figures, guilty of conspiracy to commit torture and war crimes.¹³¹ The Kuala Lumpur War Crimes Commission held a hearing on Palestine in November 2012 and August 2013.¹³²

The Kuala Lumpur War Crimes Commission has closer links to government than most peoples’ tribunals. It is a private organisation under Malaysian law. By contrast, most peoples’ tribunals have no legal status as an incorporated entity, but are events sponsored by particular non-government organisations (‘NGOs’) or networks of civil society organisations. When Dr Mahathir proposed the Kuala Lumpur War Crimes Tribunal, former UN Special Rapporteur and prominent Malaysian lawyer Dato’ Param Cumaraswamy criticised the idea as ‘a farce’ and a ‘circus’.¹³³ He doubted that the Tribunal could be impartial following

128 Article 8bis (1) of the Statute of the International Criminal Court provides that the “‘crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” (emphasis added).

129 Kuala Lumpur Foundation to Criminalise War, *Aim of the Tribunal* <<http://criminalisewar.org/the-foundation/aim-of-the-tribunal/>>.

130 Richard Falk, ‘Kuala Lumpur Tribunal: Bush and Blair Guilty’, *Al Jazeera* (online), 28 November 2011 <<http://www.aljazeera.com/indepth/opinion/2011/11/20111128105712109215.html>>.

131 These were former US Vice-President Dick Cheney, Defense Secretary Donald Rumsfeld, Attorney-General Alberto Gonzales, Assistant Attorney-General Jay Bybee, and Deputy Assistant Attorney-General John Yoo: ‘Bush and Cheney on Trial’, *The Diplomat* (online), 15 May 2012 <<http://thediplomat.com/2012/05/15/bush-and-cheney-on-trial/>>.

132 Kuala Lumpur Foundation to Criminalise War, *Events* <<http://criminalisewar.org/events/>>.

133 Dato’ Param Cumaraswamy, ‘Dr M’s Proposed War Crimes Tribunal a Farce’, *Malaysiakini* (online), 12 February 2007 <<http://www.malaysiakini.com/letters/63313>>.

Mahathir's 'virulent' statements against its proposed defendants (Bush, Blair, and others), questioned the Tribunal's claim to give a fair trial to absentee defendants, and referred to the lack of legal basis for the establishment of the tribunal.¹³⁴ Cumaraswamy also argued that if Mahathir, while prime minister, had been 'genuinely concerned about justice to victims of war and bringing war criminals to trial, he should have got the Malaysian government to sign the [Rome] Statute then. He never bothered.'¹³⁵ Cumaraswamy considered the Kuala Lumpur Tribunal's lack of official legal status as a 'dangerous precedent' whereby NGOs could set up a similar tribunal 'to try Mahathir for human rights violations, assault of the independent judiciary in 1988, corruption, abuse of power, nepotism and cronyism during his 22 years as prime minister.'¹³⁶

By contrast, Falk argues that the Kuala Lumpur War Crimes Tribunal has 'the imprint of an influential former head of state in the country where the tribunal was convened, giving the whole undertaking a quasi-governmental character.'¹³⁷ The Tribunal is also more explicit in its aim of influencing official organisations, such as states, the ICC, the UN General Assembly and the UNSC, than are most peoples' tribunals.

The Kuala Lumpur War Crimes Tribunal claimed to be exercising 'universal jurisdiction' in prosecuting Western leaders whom the ICC had refused to indict due to its alleged pro-Western bias.¹³⁸ Following the 'convictions', the Tribunal said that it would file reports of genocide and crimes against humanity at the ICC and register the names of those convicted in its own register of war criminals. It also recommended requesting the UN General Assembly to adopt a resolution demanding that the US end its occupation of Iraq, requesting the UNSC to authorise a UN peacekeeping force in Iraq, and communicating the findings to the states parties to the *ICC Statute*.¹³⁹ The ICC would have had jurisdiction in relation to allegations of war crimes and crimes against humanity against British and Australian leaders (including former Prime Minister Blair) and military personnel (as the UK was a party to the *ICC Statute* at the time). But it would have had no such jurisdiction in relation to crimes against peace or the crime of aggression, which were not within the jurisdiction of the ICC at the time of the events in question. Equally, the ICC would not have had jurisdiction in relation to the crime of aggression alleged to have been committed by President Bush or his colleagues, nor would it have had jurisdiction over war crimes or crimes

134 One criticism commonly levelled at peoples' tribunals is that the outcome is predetermined and that peoples' tribunals are therefore 'show trials' or mock trials, a criticism also levelled at international criminal tribunals: Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press, 2007), ch 5. Yet prosecutions in state courts and official international institutions rarely proceed unless 'the evidence of guilt is overwhelming and decisive': Falk, above n 130. Hence, virtual certainty of outcome is not always a factor that distinguishes official from peoples' tribunals.

135 Cumaraswamy, above n 133.

136 Ibid.

137 Falk, above n 130.

138 Ibid.

139 Ibid.

against humanity allegedly committed by or under the leadership of President Bush or other high-level US leaders, since the US was not a party to the *ICC Statute*.

The Kuala Lumpur War Crimes Tribunal was also more focused on international law than politics or morality compared with the World Tribunal on Iraq, for instance. As Richard Falk points out, the WTI offered recommendations ‘on the basis of a politically and morally oriented assessment of evidence by a jury of conscience.’¹⁴⁰ Although legal experts gave evidence, the role of social activists and public intellectuals was paramount to its condemnation of the Iraq war.¹⁴¹ By contrast, all judges of the Kuala Lumpur Tribunal were legal professionals.¹⁴² The Tribunal followed its own Charter and Rules of Evidence and Procedure, and referred to the *UN Charter* and the *Charter of the International Military Tribunal* at Nuremberg.¹⁴³

V ANALYSIS

The discussion above has demonstrated that there are significant limits on the extent to which official international courts and tribunals have the opportunity to make legal assessments of the use of force by states. This is in part the result of the consent-based nature of most interstate litigation at the international level and the restricted personal and subject-matter jurisdiction of international criminal tribunals. Thus, while several important cases have been determined on the merits by international courts and tribunals, these are relatively few in number, with most cases not making it beyond the stage of jurisdictional objections. So far as criminal tribunals are concerned, there has been little use of such tribunals to prosecute the crime of aggression since the prosecutions in Nuremberg and Tokyo after the Second World War. While the eventual entry into force of the amendments to the *ICC Statute* incorporating the crime of aggression into the *Statute* may open up the theoretical possibility of such prosecutions, it will be some time before we see the impact of that provision.

International adjudication of the legality of the use of force is not the only, dominant or always most desirable way to respond to a situation of conflict, and the international political system provides for a range of other responses (though these are often not effective or satisfactory in outcome). Nevertheless, the unavailability of such a formal legal avenue at the suit of the states concerned or the affected populations has been felt as a significant gap in the minds of proponents of peoples’ tribunals. These groups have seen some type of formal inquiry and solemn statement of findings of law following a careful process of

140 Ibid.

141 Ibid.

142 Kuala Lumpur Foundation to Criminalise War, *Judges and Commissioners* <<http://criminalisewar.org/the-foundation/judges-commissioners/>>.

143 Kuala Lumpur Foundation to Criminalise War, *KLFCW Charter* <<http://criminalisewar.org/the-foundation/klfcw-charter/>>.

taking evidence and deliberation as important – in itself as a means of reaffirming the importance of legality and of recognising the experience of those affected by alleged illegalities, and as a contribution to advocacy.

As a result of the limited opportunities for authoritative adjudication of allegedly unlawful uses of force before state-sponsored tribunals, many groups have thus brought cases before international peoples' tribunals. Civil society groups rather than states initiate such cases, providing an opportunity for communities to claim access to a 'formal' pronouncement on the international law of which they are also meant to be the beneficiaries. Some of these cases have been brought where there is no possibility of an action being considered by a state-sponsored tribunal (for example, Afghanistan, Iraq). In these cases we can see the role that peoples' tribunals can play in supplementing the gaps in or shortfalls of the official system, by providing a forum, albeit imperfect, for the formal determination of a claim based on evidence and articulated reasoning. Moreover, peoples' tribunals go further than plugging jurisdictional gaps. They offer qualitatively different types of justice, an important feature of which is the right of peoples, rather than states, to articulate, interpret and apply international law. The PPT put it as follows:

In this respect, the *Algiers Declaration*, drafted and approved by leading jurists from all regions in the world, challenges the idea that governments and their institutions enjoy a monopoly over law-making. The ... tribunal is committed to the notion that individuals, as citizens of the world as well as of their own country, have the right and obligation to shape emerging law in accordance with human needs and human views.¹⁴⁴

In other cases, there may be current proceedings before an official tribunal (for example, in *Nicaragua*), but the fact that the case is brought by civil society groups and not the state, and the uncertainty and delay involved in proceedings before an official institution has been considered enough to justify continuing with such cases before peoples' tribunals. In any event, peoples' tribunals may legitimately in their own terms consider the legal issues on a broader canvas than a court, and may also wish to draw on alternative sources of law (such as peoples' law). They may range more broadly in the search for causes of the violations and the significance of the forces that have led to them. This is so even in the case of some of the more legalistic peoples' tribunals and of course of those such as the WTI which seek a much broader engagement by identifying and analysing international patterns of power and domination.

Peoples' tribunals dealing with issues of the use of force, like peoples' tribunals dealing with other alleged violations of international law, can also play an important role in the preservation of the truth and collective

144 Tribunale Permanente dei Popoli, above n 88.

memory.¹⁴⁵ For instance, the Tokyo Women's Tribunal which examined the Japanese military 'comfort women' system referred to the importance of museums, national days of remembrance and rewriting history books as forms of reparation to the survivors.¹⁴⁶ By giving endorsement in a formal procedure to the stories and evidence presented by those affected, peoples' tribunals may also serve the function of providing material for subsequent procedures established by state-sponsored institutions.¹⁴⁷

These functions take place in the context of a case being brought against a particular state or groups of states. However, peoples' tribunals relating to the use of force can, like peoples' tribunals in other contexts, also perform another function. This is to provide an overall critique of and reflection upon international law and international society, analysing patterns of domination and violations of international law and human rights. Sometimes this will take place as part of the examination of a specific situation, at other times as part of a thematic hearing, as for example with the PPT hearings on International Law and the New Wars.¹⁴⁸ Sometimes these may have a historical dimension, which highlights the origins of present-day assumptions and injustices but which may also contribute to contemporary struggles to redress those insofar as that is possible. The PPT proceedings in 1992 relating to international law and the conquest of the Americas¹⁴⁹ is one such example of this, while the 1993 Hawaiian International Peoples' Tribunal provides another illustration.¹⁵⁰

145 See Louis Joinet, 'Le Rôle des Archives dans la Lutte contre l'Impunité' [The Role of Archives in the Fight against Impunity] (2003) 72 *Matériaux pour l'Histoire de notre Temps* [Materials for the History of Our Time] 50.

146 See judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, *Prosecutors v Hirohito Emperor Showa (Judgment)* (31 January 2002) Japan Computer Access Network <<http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf>> [1069] (better known as the Tokyo Women's Tribunal).

147 An example is the forwarding of material from the Kuala Lumpur War Crimes Commission to the ICC and UN organs.

148 Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *Il Diritto Internazionale e le Nuove Guerre: Roma, 14–16 dicembre 2002* [International Law and the New Wars: Rome 14–16 December 2002], Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/2002/12/Diritto-internaz-e-le-nuove-guerre_IT.pdf>. See further Mary Kaldor, 'In Defence of New Wars' (2013) 2 *Stability: International Journal of Security and Development* 1.

149 Tribunale Permanente dei Popoli [Permanent Peoples' Tribunal], *La Conquista dell'America e il Diritto Internazionale: Padova, Venezia 5–8 ottobre 1992* [The Conquest of the Americas and International Law: Padua and Venice, 5–8 October 1992] Fondazione Internazionale Lelio Basso per il Diritto e la Liberazione dei Popoli [Lelio Basso International Foundation for the Rights and Liberation of Peoples] <http://www.internazionaleleliobasso.it/wp-content/uploads/1991/10/Conquista-America_TPP_It.pdf>.

150 See 'Findings of the Peoples' International Tribunal, Hawai'i, August 1993', in Ward Churchill and Sharon H Venne (eds), *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians* (South End Press, 2004) 677, 689–701.

VI CONCLUSION

Whatever the limitations of international peoples' tribunals in terms of their formal sources of authority and procedural limitations, such bodies continue to play a role in supplementing official procedures or providing a venue for the articulation and validation of claims and experiences where the official state-sanctioned system fails communities. They provide an opportunity for actors who may have no standing in state-sponsored international fora to obtain a formal examination of claims in terms of established international law. The 'desire for law' appears to be a powerful motivation for those who organise and participate in peoples' tribunals, and may be understood as a call for accountability. There is something about such a solemn declaration of the illegality of actions or of a situation that has meaning for those affected by them, even if it does not emanate from an official body. The holding of such an event also provides an occasion for solidarity and networking among activists and their supporters.

To understand the significance of peoples' tribunals, one must move beyond a focus on the question of whether they can ever be viewed as 'legitimate' because they do not derive their authority from the state or a state-sponsored international organisation. There are, after all, other bases on which a body may be viewed as legitimate,¹⁵¹ and bodies may be legitimate in certain contexts and possibly not in others.

Equally, the significance of peoples' tribunals should not be sought only or primarily in terms of their causal impact on the development of law or scholarship, or their impact on the resolution of specific disputes. Indeed, they seem to have contributed relatively little to the substantive development of international law relating to the use of force¹⁵² or to the resolution of specific disputes (though this area may not be typical of their broader contribution). Rather, they should be understood as a form of practice that, while potentially contributing to the formation and work of official tribunals, finds its more important impact in building solidarity and affirming the experiences of those who have suffered human rights violations.

As noted earlier, Louis Bickford refers to three functions that unofficial truth projects (in which category he would count some peoples' tribunals): as

151 Borowiak, above n 61, 181, suggests that legitimacy in this context may be derived from 'authorisation, rationale, credibility, and recognition'. While a peoples' tribunal may not be able to draw on the first, it can certainly draw on the other three to be just another form of 'partisan protest' (181–2) or a form of 'guerrilla theater' (183).

152 The suggestion by two of the prosecutors before the Kuala Lumpur War Crimes Tribunal that the decision of the Tribunal would be a subsidiary source of international law as a 'judicial decision' with the meaning of article 38(1) of the *Statute of the International Court of Justice* seems untenable, and it would be very difficult to argue that such pronouncements would be characterised as belonging to 'the teachings of the most highly qualified publicists of the various nations' within the meaning of that provision. See *Kuala Lumpur War Crimes Commission v George W Bush and Anthony L Blair*, Kuala Lumpur War Crimes Tribunal, Case No 1-CP-2011, *Notes of Proceedings*, 19 November 2011, 40–2.

a replacement for an official body, as a precursor to such a commission, and as a complement to such a body.¹⁵³ International peoples' tribunals certainly play those roles, as the examples examined above illustrate. But they do more – they articulate a claim that peoples and communities are not only entitled to enjoy the benefits of the international law that proclaims itself as being made for and on behalf of them ('we, the peoples of the United Nations', as the Preamble to the *UN Charter* intones), but also the right to innovate and fashion new law themselves.

153 Bickford, above n 8, 1004–5.