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International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals

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INTERNATIONAL CRIMINAL COURTS AND THE MAKING OF PUBLIC INTERNATIONAL LAW: NEW ROLES FOR INTERNATIONAL ORGANIZATIONS AND INDIVIDUALS

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ABSTRACT

Judicial decisions of the International Criminal Court (ICC) and other international criminal tribunals now serve as instances of practice and statements of *opinio juris* for the formation of customary international criminal law and customary international human rights law related to criminal law and procedure. In these areas of law and others, they are no longer "subsidiary" sources as that word is used in Article 38 of the Statute of the International Court of Justice (ICJ).[1] In the same fields of customary international law, other binding acts of international organizations, such as the United Nations Security Council ("Security Council"), are also used as practice, and the statements of these organizations are used as *opinio juris*.

Where judicial and quasi-judicial decisions of international

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1. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute] (stating: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

organizations are acts of treaty interpretation and application, these acts are instances of subsequent practice. In some cases, judicial decisions play a role similar to the subsequent acts of states that are parties to the treaties in the Vienna Convention of the Law of Treaties. Under the Rome Statute, when the ICC is interpreting a matter within its judicial competence, its decision is authoritative.

Individuals, particularly those accused of crime, can make direct claims of right under international law to these courts and tribunals. These claims may concern jurisdiction, the substantive law of crimes and defenses, international human rights in criminal procedure and criminal law, or other issues that arise in the course of prosecutions.

The ICC and other international criminal tribunals are expanding the role of international organizations, including the international judiciary, in the process of making international law. The role of international courts is now growing in other areas of the law, such as international trade law. This growth is likely to continue.

Individuals have gained the right to make claims directly under international law in certain non-criminal international fora. As in criminal law, the right depends on the agreement of states or international organizations to establish these tribunals. While the growth of this right is uncertain, it is hard to imagine that it will be cut back.

I. INTRODUCTION

This Symposium has been focusing in depth on the history, law, practice, and politics of the ICC. This Article steps back and looks at the following questions:

1. How have the creation and operations of the ICC and other international criminal tribunals reflected and contributed to changes in the way public international law is made?
2. Do these changes reflect and contribute to growth in the international legal personality of individuals?
3. How might the trends discussed here develop in the future of international law generally?

There is no better place to begin this discussion than the comments that Professor Roger S. Clark made in the discussion at the end of the second panel at the Symposium. Professor Clark pointed out the following: at Nuremberg, and in every international criminal court and tribunal since, the accused have raised substantive law defenses to the crimes charged.[2] In each of

2. Roger S. Clark, Bd. of Governors Professor, Rutgers School of Law,

the courts and tribunals, some or all of the defenses raised have come from sources outside the text of the organic documents of the relevant court or tribunal. Yet each of these courts and tribunals have responded to these claims concerning defenses on their merits. They acted as though the accused had an enforceable right to raise the defenses, and as though the courts or tribunals had a legal duty to address the defenses. In the course of addressing these claims, the courts and tribunals developed the substantive international criminal law of defenses to crime. Professor Clark indicated a view that this process would apply to defenses to the crime of aggression, which the ICC Review Conference defined on June 11, 2010, in Kampala, Uganda (after this Symposium was held).[3]

Professor Clark's description is undoubtedly accurate. Indeed, it does not only describe the process by which defenses to international crime are developed, but also the process by which the definitions of these crimes are developed[4] and how criminal procedure and human rights protections are implemented. It also stresses the right of individuals to make international law claims in these tribunals and to receive a response to these claims based in law.

This Article will elaborate issues raised for the making of international law generally by these developments in international criminal law as developed by international criminal courts or tribunals, which are either international organizations themselves[5] or organs of international organizations.[6] It will look

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Panel Discussion at The John Marshall Law Review Symposium: International Justice in the 21st Century: The Law & Politics of the International Criminal Court (Apr. 23, 2010). This paragraph is a paraphrase of Professor Clark's comments and does not pretend to capture them exactly.

3. ICC Review Conference, Res. 6, Annexes I & II, ICC Doc. No. RC/Res.6 (June 11, 2010), adding ICC Statute, art. 8 *bis* (2) and ICC Elements of Crimes, Crime of Aggression. *See also id.* Annex III, Understandings 6 & 7. The Review Conference attached a complex set of conditions to the coming into effect of this provision as to any given state. *Id.* Annex I, adding ICC Statute, arts. 15 *bis* & 15 *ter*, and Annex III, Understandings 1-3.

4. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 220 (July 15, 1999) [hereinafter *Tadic Judgment*] (holding that participating in a "joint criminal enterprise" is a mode of becoming responsible for an internationally criminal act); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 220-229 (Jan. 27, 2000) (defining rape as a crime against humanity and as including any forcible sexual penetration, not simply forcible vaginal intercourse, as in some national systems where other penetrations are defined as other forms of sexual assault). From this point on, much of the documentation in this Article will be illustrative rather than comprehensive.

5. For example, International Criminal Court (ICC), Special Court for Sierra Leone (SCSL).

6. For example, International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), both

through the lens of the so-called Doctrine of Sources of international law. It will argue that our understanding of the most famous statement of that doctrine, Article 38 of the Statute of the International Court of Justice,[7] is in need of revision. Also in need of revision is the most famous statement of international custom as a source of law: Manley O. Hudson's definition for the International Law Commission.[8] In particular, the formation and operation of international criminal courts and tribunals demonstrates this need for revision.

The revision should recognize that international organizations, as well as states, contribute to the formation of customary international law through their practice and their statements that evince *opinio juris*. In particular, the decisions of international criminal courts and tribunals have taken their place as such acts and statements of *opinio juris*.

The developments discussed here are real and need to be taken into account, regardless of the view one has of the making of international law. Thus, the material here needs to be considered even by those who reject the usefulness of characterizing "sources" and "evidence" of international law;[9] though these persons may not agree with the theoretical formulation stated here.

International criminal law, as administered by international criminal courts and tribunals, is a particularly useful area for considering changes to how international law is made. First, it is public law: an international public authority prosecutes. The goals of the law are to hold wrongdoers publicly accountable for great wrongs to the public and to deter this behavior across international boundaries. Second, it is international law: the substantive law of the core international crimes is not simply the law of individual states. It is the law of the international community, expressed both in multilateral treaties and customary

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established as subsidiary UN organs by the Security Council.

7. ICJ Statute, *supra* note 1, art. 38(a).

8. Manley O. Hudson, [Working Paper on] *Article 24 of the Statute of the International Law Commission*, U.N. Doc. A/CN.4/16, ¶ 11 (Mar. 3, 1950).

> [T]he emergence of a principle or rule of customary international law would seem to require presence of the following elements:
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> (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
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> (b) continuation or repetition of the practice over a considerable period of time;
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> (c) conception that the practice is required by, or consistent with, prevailing international law; and
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> (d) general acquiescence in the practice by other States.

Id.

9. *See, e.g.*, ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 264-68 (Cornell Univ. Press 1971) (rejecting the notion of the usefulness of characterizing sources of international law). Many others find the Doctrine of Sources problematic for many reasons.

international law. Finally, it is "hard law": convicting persons of crime in these tribunals sends them to prison. A ruling for the defense has similar, real consequences as to actual rights and duties of persons.[10]

II. HOW HAVE THE CREATION AND OPERATIONS OF THE ICC AND OTHER INTERNATIONAL CRIMINAL TRIBUNALS REFLECTED AND CONTRIBUTED TO CHANGES IN THE WAY PUBLIC INTERNATIONAL LAW IS MADE?

A. Customary International Law

Operative acts and *opinio juris* of international organizations must now be included among those acts and opinions that are taken into account in the creation of customary international law.[11] In particular, those international organizations or organs of international organizations that are international criminal courts and tribunals contribute to the formation of customary international law, at least and to the extent that their acts perform the operative functions of issuing judgments and orders in criminal cases.[12] To the extent that their acts consist of the

10. This Article will limit itself to consideration of these operative "hard law" acts. It will not enter into the debate concerning the legal effect of declarations of law such as UN General Assembly Resolutions, often seen as "softer" law.

11. "Operative" as a word to describe those acts that have legal consequences or that create binding rules beyond the mere internal workings of an organization is from INGRID DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATIONS (P.A. Norstedt & Sönners Förlag 1965). The proposition that international organizations are actors making international law has been around for some time, and various formulations of their authority have been set forth. *See, e.g.*, Krzysztof Skubiszewski, *Enactment of Laws by International Organizations*, 41 BRIT.Y.B. INT'L L. 198, 245 (1965-66) ("the law making acts of international organizations are a distinct source of the law of nations"); Krzysztof Skubiszewski, *Law-Making by International Organizations*, 19 THESAURUS ACROASIUM 357, 365 (1992) ("a fourth (and new) category of rules of international law[,] . . . distinct from customary rules, treaty rules and general principles of law . . ."); THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 57-122 (Syracuse Univ. Press 1969) (the seminal intensive study of lawmaking in a single international organization); C. Economides, *Les Acts Institutionnels Internationaux et les Sources du Droit International*, 34 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 131 (1988); G.I. Tunkin, THEORY OF INTERNATIONAL LAW 203 (William E. Butler trans., Harvard Univ. Press 1974) (originally published in Russian, 1970); BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 147-48 (Aspen Publishers 3d ed. 1999) [hereinafter CARTER & TRIMBLE]. A recent magisterial work on the subject is JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 485-502 (Oxford Univ. Press 2005).

12. *Cf.* ALVAREZ, *supra* note 11, at 500-02. The other sources in note 11 generally did not deal with the acts of international criminal courts and tribunals in the making of international law, largely because they were

issuance of opinions connected to the judgments and orders, they are expressing *opinio juris*.

Some of the acts of the United Nations (UN) involved in establishing international criminal tribunals have contributed as practice to the creation of customary international law and/or general principles of law, and they have evinced *opinio juris* as well.[13] The treatment of legality (particularly the non-retroactivity of crimes and punishments) in the International Criminal Tribunal for the Former Yugoslavia (ICTY) is striking.[14] In his report suggesting the creation of the ICTY, the Secretary-General of the UN stated:

> In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.[15]

By itself, this states the *opinio juris* of the Secretariat as an organ of the UN.

Then, in the resolution establishing the ICTY, the Security Council accepted the entire text of the ICTY Statute proposed by the Secretary-General, including the definitions of crimes within the jurisdiction of the Tribunal.[16] That resolution explicitly "[a]pproves" the Report of the Secretary General.[17] The resolution implements the principle of legality by specification of crimes in the jurisdiction of the Tribunal. It evinces the *opinio* of the Security Council, in adopting that of the Secretariat. The Security Council structured the ICTY's jurisdiction in the way the Secretary-General had suggested in order to apply the principle of

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written before the rise of the modern international criminal tribunals, while the Nuremberg and Tokyo Tribunals were not considered international organizations in the modern sense. The claims throughout this Article that the "hard law" acts of international organizations are practice and *opinio juris* for purposes of the formation of customary international law are, as will be seen, analytically somewhat different and slightly more modest than the broadest claims in the pieces by Skubiszewski, *supra* note 11. This Article does not address an older debate: the place of formally non-binding resolutions of international organizations, such as UN General Assembly, in the formation of customary international law.

13. KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 347-51 (Cambridge Univ. Press 2009).

14. *Id.* at 305-08.

15. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34, U.N. Doc. No. S/25704 (May 3, 1993) [hereinafter Sec.-Gen. Report].

16. S. C. Res. 827, U.N. Doc. No. S/RES/827 (May 25, 1993).

17. *Id.* ¶ 1.

legality. That is, though it did not include the principle of legality in the explicit text of the ICTY Statute, the statement about *nullum crimen sine lege* in the approved Report is the *opinio* of the Security Council as well as the Secretariat. According to the Secretary-General's Report as a whole (approved by the Security Council), international human rights law of crime and criminal procedure should generally apply in an international criminal tribunal.

Judgments and other decisions of international criminal courts and tribunals are practice of those entities as international organizations with a judicial function. They are operative acts that result ultimately in imprisonment (and imposition of other penalties such as fines or restitution) on those convicted of international crime, or in absolution for those found innocent. Under the rule of *ne bis in idem*, either convictions or acquittals prohibit states from prosecuting again for the same acts.[18] Decisions other than final judgments may also be acts finally adjudicating rights and responsibilities under international law. One example is where these courts decide that they have jurisdiction to proceed in cases, and particularly where they decide on the legality of their creation.[19] Beyond operative effects in a given matter, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have recognized and followed their own and each other's prior decisions on a variety of matters.[20]

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18. Rome Statute of the International Criminal Court art. 20, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 10, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda art. 9, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

19. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter *Tadic Juris. Appeal*]. Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, ¶ 53ff (May 20, 2010) [hereinafter *Cambodia Decision on Joint Criminal Enterprise*].

20. *See, e.g.*, Prosecutor v. Kayishema, Case No. 95-1-A, Judgment (Reasons), ¶ 161, n.241 (June 1, 2001) (noting that *mens rea* doctrine of general criminal intent "must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts . . . were committed 'with intent to destroy, in whole or in part a national, ethnical, racial or religious group.'"), relying on *Tadic Judgment*, *supra* note 4, ¶ 269 (distinguishing between motive for crime and *mens rea*); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶¶ 107-09 (Mar. 24, 2000) (stating general rule of following its own prior practice absent "cogent reasons in the interests of justice.") [hereinafter *Aleksovski*]. *See also* L. Zegfeld, *The Bouterse Case*, 32 NETH. Y.B. INT'L L. 97, 99-100 (2001); GALLANT, *supra* note 13, at 349.

One wonderful thing about court judgments as practice is that, in the system of international criminal law, they come with opinions stating reasons that the judgment is compelled by the facts and law. Thus, they generally come with *opinio juris* built in. One need not struggle to determine whether a judgment or other decision was given because of a belief in the compulsion of a certain rule of law or not: the parties are entitled to a statement of the reasons for the decision.[21]

In its first major decision, the *Tadic Interlocutory Appeal on Jurisdiction* (*"Tadic Appeal"*), the ICTY Appeals Chamber gave lip service to the idea that it would "ascertain State practice" in determining the laws and customs of war.[22] But in that case it demonstrated that it was really determining "international practice," whether of states or other relevant entities.[23] And now , the Extraordinary Chambers in the Courts of Cambodia have said that judicial decisions are "subsidiary,"[24] but then went on, in fact, to give international criminal court and tribunal decisions at least as much weight as instances of national practice.[25]

The ICTY Appeals Chamber treated resolutions of the Security Council (other than the acts establishing the Tribunals) as practice of an international organization going to the establishment of custom.[26] It acted similarly with regard to actions of the European Union (and its predecessor, the European Community), though it appeared to treat those actions as both actions of an international organization and its member states.[27] In the same case, the ICTY Appeals Chamber also treated two Security Council resolutions on matters unrelated to the Former Yugoslavia as providing *opinio juris* as to individual criminal responsibility.[28]

The ICTY Appeals Chamber later used the Report of the Secretary-General in a different context. When the ICTY discussed the right of appeal, it used statements in the Secretary-General's

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21. *See* Rome Statute, *supra* note 18, arts. 74(5) (requiring "full and reasoned statement" of Trial Chamber decision), 83(4) (Appeals Chamber "judgement shall state the reasons on which it is based.").

22. *Tadic Juris. Appeal*, *supra* note 19, ¶ 99.

23. *Id.* ¶ 109 ("The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice.").

24. *Cambodia Decision on Joint Criminal Enterprise*, *supra* note 19, ¶ 53, citing ICJ Statute, *supra* note 1, art. 38(1)(d).

25. *Id.* ¶ 54ff.

26. *Tadic Juris. Appeal*, *supra* note 19, ¶¶ 114, 116.

27. *Id.* ¶¶ 113, 115-16.

28. *See id.* ¶ 133 (calling the Security Council on Somalia Resolutions 794 and 814 "[o]f great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations . . . .").

Report as part of the *opinio* demonstrating the content of the customary international human rights law right of individuals to a fair trial in criminal cases.[29]

Beyond states and international organizations, there are two other entities whose practice the ICTY Appeals Chamber treated as partly constitutive of customary international law of armed conflict. The first is the very important practice (not just statements of *opinio)* of the International Committee of the Red Cross,[30] which in the tradition has been treated as *sui generis*, a non-governmental organization with special status in international law, particularly international humanitarian law. The second is perhaps more controversial: practice of insurgent groups.[31]

Additionally, from the very beginning, the ICTY has treated international and national judicial decisions as part of the practice used to determine the laws and customs of war, without referring to any "subsidiarity" of these acts. Indeed, it has given reasons why judicial decisions must be some of the acts relied upon, notably the fact that they are so much easier to find and understand than acts of soldiers in combat in the field.[32] In the rather special case of the construction of contempt of court as a crime, it treated both national practice (legislative and judicial) and international practice as constitutive of a general principle of law (though not customary international law), which allowed international criminal tribunals to exercise essentially inherent authority to punish for contempt.[33]

The discussion of cases above could be expanded many times over. By itself, it does not show much more than what is commonly known: international criminal courts and tribunals make these declarations of law and use them to justify their judgments against, and sometimes in favor of, persons accused of international crime.[34]

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29. *Aleksovski*, *supra* note 20, ¶¶ 98, 100, 104.

30. *Id.* ¶ 109.

31. *Id.* ¶¶ 107-08. The ICRC says the legal significance of practice of armed opposition groups is "unclear." 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, eds., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxvi (Cambridge Univ. Press 2005) (study for the International Committee of the Red Cross) [hereinafter CUSTOMARY IHL].

32. *Tadic Juris. Appeal*, *supra* note 19, ¶¶ 99, 106 (Nigerian military tribunal decisions followed by executions); *cf. id.* ¶¶ 125 (Nigerian Supreme Court decision discussed as "State practice"), 128 (citing Nuremberg Tribunal).

33. Prosecutor v. Tadic (Appeal of Vujin), Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, ¶¶ 13-29 (Feb. 27, 2001), discussed in GALLANT, *supra* note 13, at 309-11.

34. *See, e.g.*, ALVAREZ, *supra* note 11, at 500-02 (discussing international organizations and customary international law more generally). A large number of specialized international criminal law and international humanitarian law articles discuss the law as declared in international

Importantly, these cases are used as points of practice for future determinations. The value of a judicial act as norm-creating (lawmaking) is determined by whether it is followed or not. In international law, this includes whether the judicial act is followed by courts in the future or by relevant practice of states and international organizations.

These examples of practice and statements of opinion have become as important (as "primary") for the determination and development of customary international law as a given example of practice or statement of opinion by a state, if not more so in most cases. The ICJ may not be able to admit this in its own practice because its statute treats judicial decisions as "subsidiary" sources of international law,[35] and its own decisions are said to have "no binding force except between the parties and in respect of [the] particular case [before the ICJ]."[36] However, these aspects of the ICJ Statute bind neither states nor international organizations (other than the UN when it acts through the ICJ as its judicial organ) in their consideration of what constitutes customary international law.

A few commentators attempt to maintain the hierarchy of sources proposed in the ICJ Statute and maintain the "subsidiary" nature of judicial decisions even in international criminal law cases.[37] This ignores real practice of the courts outside the ICJ, which have broken the thrall of Article 38(1)(d) of the ICJ Statute.

The ICC in fact treats the cases of the prior international criminal tribunals and the European Court of Human Rights, as well as its own decisions, as practice in its determination of customary international law, whether substantive criminal law or human rights law. For example, in confirming charges against Thomas Lubanga Dyilo, the Pre-Trial Chamber determined that recruitment of child soldiers was a crime at the time that Dyilo was alleged to have done so. As part of this determination, it used as practice the decision of the Special Court for Sierra Leone (SCSL) that this prohibition was a "customary law norm" prior to November 1996.[38] Similarly, in dealing with claims under customary international human rights law that an illegal arrest of

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criminal courts and tribunals.

35. ICJ Statute, *supra* note 1, art. 38.

36. *Id.* art. 59.

37. *See, e.g.*, L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 274-75 (Martinus Nijhoff Publishers 2005) (tribunal decisions are subsidiary sources of international law).

38. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 311, n.400 (Pre-Tr. Ch, Jan. 29, 2007), using Prosecutor v. Norman, Case No. SCSL-2004-14-A R72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶¶ 17-24 (May 31, 2004) [hereinafter *Norman*].

an accused in the Congo should vitiate the jurisdiction of the ICC, the Pre-Trial Chamber used decisions of the ICTR, the ICTY, and the European Court of Human Rights as practice in determining that there was no customary international law requirement that prohibited the exercise of jurisdiction in that case.[39]

There is one extremely important indication of state acceptance of this practice: more than 113 states have adopted the Rome Statute, including Article 21(2), which states that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions."[40] This text is not limited to interpreting the Rome Statute itself, but also applies to all relevant rules of law, which may include "applicable treaties and the principles and rules of international law . . ." and "general principles of law derived by the Court from national laws of legal systems of the world . . . ."[41] Interestingly, this rule of using prior decisions does not appear in the early versions of the Rome Statute, such as the 1994 International Law Commission draft,[42] and thus the rule does not appear before the ICTY and ICTR began to operate. It first appears in the official *travaux preparatoires* of the Rome Statute in 1996, as one of many state proposals.[43] This was after it became clear that the ICTY, at any rate, would use both its own decisions[44] and that of the prior Nuremberg Tribunal[45] as practice. The Rome Statute was adopted in 1998, and states subsequently ratified it in light of this practice. As far as can be determined, those states failing to ratify the Rome Statute do not generally complain about this provision of the Statute.

A judgment of an international criminal court or tribunal is at least a point of practice on the substance of relevant customary international law for subsequent cases, even when the same court is not involved. The pattern stated in Article 59 of the ICJ Statute that its decision "has no binding force except between the parties

39. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, nn.30-33 and accompanying text (Oct. 3, 2006) [hereinafter *Lubanga Dyilo*].

40. Rome Statute, *supra* note 18, art. 21(2).

41. *Id.* art. 21(1)(b),(c).

42. *See Report of the International Law Commission on the work of its forty-sixth session [ILC Draft Statute for an International Criminal Court]*, U.N. Doc. A/49/10 (May 2-June 22, 1994) (silent as to a rule regarding the use of prior decisions as authority). The official preparatory documents (*travaux preparatoires* in international law jargon) for the Rome Statute used here are collected in 2 M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE (Transnational Publishers 2005).

43. U.N. GAOR, 51st Sess., Vol. II, U.N. Doc. A/51/22, ¶ 107 (1996).

44. *See, e.g.*, Prosecutor v. Nikolic, Case No. IT-94-2-R61, Review of Indictment, ¶ 26 (Oct. 20, 1995).

45. *See, e.g., id.*; *Tadic Juris. Appeal*, *supra* note 19, ¶ 128.

and in respect of the particular case"[46] has been decisively rejected as a rule to be used by international criminal courts and tribunals—at least if "no binding force" is taken broadly to mean no consideration at all as practice.

These changes do not mean that international criminal courts and tribunals are exactly like common law courts in a national system. The Appeals Chamber of the ICC is not a Supreme Criminal Court for the world, and its judgments are not binding precedent for all nations, international organizations, courts, and individuals everywhere.

When dealing with judgments of other courts, an international or internationalized criminal tribunal may consider the decision of another international tribunal simply to be one instance of practice, and one statement of *opinio* among many, and may conclude that other practice requires that a case not be followed. Thus, the ICTY considered the definition of "control" over insurgent forces by a foreign government set out by the ICJ in the *Nicaragua* case, but the ICTY ultimately followed a different rule for purposes of defining "control" in war crimes cases.[47] And the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia decided that practice as of the time of the Cambodian crimes against humanity, from 1975 through 1979, did not support one type (out of three) of "joint criminal enterprise" liability set out by the ICTY Appeals Chamber in the *Tadic Judgment* opinion.[48] The Cambodian Chamber correctly distinguished between the ICTY's *Tadic Judgment* case as an instance of practice for purpose of the formation of customary international law of "joint criminal enterprise" and the ICC's *Lubanga Dyilo* case, which formulated a different theory of criminal responsibility of individuals because of its reading of the text of the Rome Statute—that is, the ICC's binding organic document.[49] Both these cases, however, were decided long after the accused in Cambodia had committed their acts and could not count as practice that had relevance to whether so called "extended" joint criminal enterprise liability existed at the time of their acts.[50]

In one important way, however, the practice of international

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46. ICJ Statute, *supra* note 1, art. 59 (following Statute of the Permanent Court of International Justice, art. 59 (Dec. 16, 1920)).

47. *Tadic Judgment*, *supra* note 4, ¶ 99ff (considering and ultimately rejecting the rule of control stated in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)).

48. *Cambodia Decision on Joint Criminal Enterprise*, *supra* note 19, ¶ 36ff.

49. *Id.* ¶ 51, n.136 (referring to the different "control over the crime approach" of the ICC under its Statute, as discussed in *Lubanga Dyilo*, *supra* note 39), ¶¶ 326ff, 54ff (discussing joint criminal enterprise as a customary international law approach in *Tadic Judgment*, *supra* note 4).

50. It would not serve the purpose of this Article to go into the details of "extended" joint criminal enterprise liability.

criminal tribunals approaches a common law idea of precedent. The Appeals Chamber rulings of the *ad hoc* Tribunals on points of law bind their Trial Chambers in the way familiar to the common law world.[51] In the *Aleksovski* case announcing the rule that "absent cogent reasons" the ICTY should follow its own Appeals Chamber case law, the ICTY Appeals Chamber effectively held that its own later case law was to be followed by Trial Chambers in preference to an earlier ruling of the ICJ on a similar issue in a non-criminal case.[52] It did not rely on Article 59 of the ICJ Statute, which denies effect to an ICJ judgment except between the parties in respect of a particular case. As Professor William A. Schabas, another of the Symposium speakers, said in a different context: The *ad hoc* Tribunals "treat the rulings of their own Appeals Chambers as authoritative, and not merely 'subsidiary'. . . . [I]t is now well accepted that the Trial Chambers are bound by the *ratio decidendi* of rulings of the Appeals Chamber."[53] And, for example, a person acting within the territory of the Former Yugoslavia during the existence of the ICTY might expect that the rulings of the Appeals Chamber might be applied to his or her future acts.

It remains to be seen whether the ICC will implement this rule and require both its Pre-Trial and Trial Chambers to follow decisions of law made by its Appeals Chamber in prior cases. Given the developments discussed here, and the "implicit"[54] nature of Appeals Chambers in courts that are structured with some hierarchy, it is reasonable to think that the ICC will act in this way, and that it ought to do so.

In any event, international criminal courts and tribunals are not the sole makers of this law. The notion of state practice as largely constitutive of customary international criminal law remains. The ICC and other international criminal tribunals frequently refer to state acts as part of the construction of customary international law.[55] The ICTY and SCSL, which were created mostly to avoid impunity for acts already committed, insist on the existence of a crime at the time the allegedly criminal act was committed, as does the ICC.[56] This implies that they also reject the idea that the Security Council, as an organ of an international organization, can create binding international

51. *Aleksovski*, *supra* note 20, ¶¶ 112-13 (Trial Chambers bound by Appeals Chamber ruling).

52. *Id.* ¶ 95, citing as practice on treaty interpretation, Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) (1990).

53. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 107 (Cambridge Univ. Press 2006).

54. *Id.*

55. *See, e.g.*, *Tadic Judgment*, *supra* note 4.

56. *See, e.g.*, *id.*; *Lubanga Dyilo*, *supra* note 39, ¶ 311, n.400, using *Norman*, *supra* note 38, ¶¶ 17-24.

criminal law if that law is to be applied retroactively. They apply international human rights law in their decisions, whether or not such law is explicitly stated in their statutes.[57]

B. Treaty Interpretation

Similarly, these acts and opinions of international criminal courts and tribunals contribute as subsequent practice for the interpretation of relevant treaty law. This is true even in some cases where the international organization is not a party to the treaty being interpreted. This expands the traditional rule, as stated in the Vienna Convention on the Law of Treaties, that subsequent practice in the application of a treaty shall be taken into account if it "establishes the agreement of the *parties* regarding its interpretation . . . ."[58]

In some cases, judicial decisions may be more that just "subsequent practice" for the purpose of treaty interpretation—especially when decisions are made on a treaty that is the organic document of the court. The ICC itself interprets and applies the Rome Statute as to all of its judicial functions. Article 119 of its statute states: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[59] This, combined with the provision allowing use of "principles and rules of law as interpreted in its previous decisions,"[60] makes the decisions of the ICC, especially its Appeals Chamber, effectively authoritative as to these matters.

These cases will generally arise on the basis of claims made by or against individuals as persons being investigated or prosecuted. In some cases, they may be brought by persons who are victims of crimes. Finally, they may be brought by states challenging determinations of jurisdiction and admissibility[61] or requirements to cooperate with the Court.[62] Thus, it is likely to be

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57. *Compare* Rome Statute, *supra* note 18, art. 21(3) (stating law of Rome Statute must be applied and interpreted to be "consistent with internationally recognized human rights . . ."), *and Cambodia Decision on Joint Criminal Enterprise*, *supra* note 19, ¶ 43 (applying principle of legality as an internationally recognized human right), *with Aleksovski*, *supra* note 20, ¶ 126, *and* Prosecutor v. Kordic, Case No. 95-14/2-PT, Decision on the Joint Defence Motion to Dismiss for Lack of Jurisdiction Portions of the Amended Indictment alleging "Failure to Punish" Liability, ¶ 20 (Mar. 2, 1999) (both applying non-retroactivity of customary international law crimes, even though such a rule was not in the ICTY Statute, and both discussed in SCHABAS, *supra* note 53, at 84).

58. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, (emphasis added).

59. Rome Statute, *supra* note 18, art. 119(1).

60. *Id.* art. 21(2).

61. *Id.* arts. 17-19.

62. *Id.* Part IX. The relationship between a state not party to the Rome Statute and the ICC itself following a Security Council referral of a situation

a distinct minority of interpretations of the Statute in the Court where the issue of interpretation will be raised by states, the normal entities for raising issues of treaty interpretation in the international system. In other cases, it is likely that states may be able to participate only as *amici curiae.*

States effectively have little appeal to the Assembly of States Parties (ASP) on matters of interpretation. The ASP cannot interfere in the judgments and decisions made in a case. The ASP can propose amendments to the Statute, which must be subsequently ratified.[63] The Assembly of States Parties does have authority to amend the Rules of Procedure and Evidence and the Elements of Crime, or to reject changes the Judges propose to the Regulations of the Court.[64] These are lawmaking tasks to be carried out within the framework of the Statute, and to some degree involve interpreting the Statute.[65]

The Rome Statute as a treaty gives to another international organ, the ICJ, the "principal" judicial organ of the UN, the authority to settle disputes among the parties to the treaty about its interpretation that cannot be otherwise settled. Note that under the ICJ Statute, only disputes among states can be brought as contentious cases. Thus, to deal with any "non-judicial" dispute between the ICC and a state, the ICJ would have to be asked properly to exercise its advisory opinion jurisdiction. Such conflict resolutions (or failures to resolve), whether reached among the parties or decided by the ICJ, would appear to have the force of similar practice among parties to a treaty. In these matters, therefore, interpretation of the Rome Statute as a treaty much more resembles the traditional model of claim and counterclaim among states and international organizations. The one difference is that the subsequent practice might involve practice of the international organization in dealing with states, as well as states who are parties to a treaty dealing among themselves.[66]

The Tribunals must regularly apply law of treaties other than their own statutes, especially the great treaties of international humanitarian law, the Geneva Conventions of 1949, their Additional Protocols, and the earlier Hague Conventions.[67]

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in that state is peculiar. *See* Kenneth S. Gallant, *The International Criminal Court in the System of States and International Organizations*, 16 LEIDEN J. INT'L L. 553 (2003) (emphasizing the peculiarity of such a situation).

63. Rome Statute, *supra* note 18, arts. 112, 119.

64. *Id.* arts. 9, 51, 52.

65. For example, the Elements of Crimes state interpretations of what facts are required to prove each statutory crime.

66. *Cf.* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, March 20, 1986 (not yet in effect) (dealing with acts involving states and international organizations).

67. SCHABAS, *supra* note 53, at 91-96.

However, the context of the applications varies a great deal. At Nuremberg, the Hague Conventions of 1907 and the Geneva Convention of 1929 were applied as constitutive of the customary international law of war crimes during the time of World War II.[68] This type of application has continued through the modern *ad hoc* tribunals, as where the ICTY Statute draws its provisions on the "laws and customs of war" from the Hague Conventions of 1907 (as discussed in the Secretary-General's report), without referring in its text to Hague itself.[69] In the *Tadic Appeal* case, the ICTY followed the Nuremberg technique in the application of Common Article 3 of the 1949 Geneva Conventions on the ground that Common Article 3 stated customary international law of war crimes in non-international conflicts.[70] What the ICTY did was develop a definition of customary international criminal law from the treaty text (and the international community's acceptance of it as custom). But in deciding whether specific acts violate Common Article 3, the ICTY was necessarily interpreting the Geneva Conventions, even if it was not applying them of their own force.[71]

The ICTY also interprets and applies the Geneva Conventions directly. "Grave breaches" of those conventions are to be criminalized by states under the conventions. They are crimes under the ICTY Statute, by reference to the Geneva Conventions themselves.[72]

In the ICTR Statute, both Common Article 3 and Additional Protocol II of 1977 (ratified and implemented by Rwanda before the 1994 mass violence) were stated directly as the sources of criminal law, without a claim that they stated customary international law.[73] In discussing the use of these documents as sources of criminal law, the ICTR Trial Chamber depended both upon Rwanda's status as a party to these treaties and had largely implemented their provisions into domestic criminal law and upon the status of the treaties as stating customary international law.[74] Naturally, once these provisions were made part of the ICTR

68. Judgment of the International Military Tribunal, 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 171, 253-54 (Oct. 1, 1946) (Nuremberg: International Military Tribunal, 1947).

69. ICTY Statute, *supra* note 18, art. 3; commented upon in Sec.-Gen. Report, *supra* note 15, ¶¶ 41-44 (discussing the Hague Convention IV of 1907).

70. Geneva Conventions I-IV art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Tadic Juris. Appeal*, *supra* note 19, ¶¶ 87-89.

71. ICTY Statute, *supra* note 18, art. 2; *Tadic Juris. Appeal*, *supra* note 19, ¶ 67ff.

72. ICTY Statute, *supra* note 18, art. 2.

73. *Id.* art. 4.

74. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 617 (Sept. 2, 1998) [hereinafter *Akayesu*] (relying on the ratification of Additional Protocol II by Rwanda on Nov. 19, 1984, and the adoption of its provisions into domestic criminal law, as well as the status of those provisions as customary international law).

Statute, the ICTR became responsible for appropriate interpretations of these Statutes.

The *Tadic Appeal* opinion has been a vital piece of practice and statement of *opinio juris* showing that serious violations of Common Article 3 are customary international law crimes. Both the *Tadic Appeal* opinion and the ICTR Statute were important in the development of the idea that the "grave breaches" regime was not the only rule of criminalization available under the Geneva Conventions. Thus, the jurisprudence contributes to the interpretation of these treaties as well as to customary international law.

Subsequent practice has approved the usage of these treaties as part of the definition of crime. The most important example is the acceptance by the States Parties to the Rome Statute of "serious violations" of Common Article 3 of the Geneva Conventions as war crimes[75] because there had been questions raised whether these were truly crimes under customary international law.[76]

Another example of subsequent international practice accepting this pattern is the Statute of the SCSL, negotiated between the UN and the state of Sierra Leone. That treaty, negotiated after the application of Common Article 3 in the ICTY and ICTR, explicitly placed violations of Common Article 3 as crimes within the jurisdiction of the SCSL.[77]

The structure of the Rome Statute continues this practice of interpreting and applying other treaties as defining crimes as well. The Rome Statute directly incorporates "grave breaches" of the 1949 Geneva Conventions as war crimes in international armed conflict,[78] as well as violations of Common Article 3 in non-international armed conflict.[79] Some crimes are defined in the same terms as prohibited acts set out in other treaties, such as the Genocide Convention.[80]

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75. Rome Statute, *supra* note 18, art. 8(2)(c).

76. Note, however, the Rome Statute generally applies only prospectively to persons with a relevant relationship to a State Party. With regard to such persons, these provisions could be applied (without violating the principle of legality) even if there had not been a complete consensus that they were customary as of the adoption of the Statute in 1998. The status of a provision as customary international law can create an issue of legality only when a Security Council referral is made involving a state not party to the Rome Statute or when a retroactive acceptance of jurisdiction by such a state is made. Rome Statute, *supra* note 18, arts. 12(3), 13(b).

77. Statute for the Special Court of Sierra Leone art. 3, S.C. Res. 1315, U.N. Doc. S/2000/915 (Aug. 14, 2000) [hereinafter SCSL Statute].

78. Rome Statute, *supra* note 18, art. 8(2)(a).

79. *Id.* art. 8(2)(c).

80. *Id.* art. 6.

C. The International Legal Personality of the ICC and International Criminal Tribunals

These materials show the growth of the international legal personality of international organizations—at least some international organizations—over the last half-century. The concept of "international legal personality" is not as definite, nor as functionally oriented, as the concept of, say, "statehood." Statehood—the primary example of international legal personality—imports a relatively clear set of rights and duties that apply to an entity in the international legal system. The attribution of international legal personality to an entity means that it has some rights or responsibilities—or some authority to act (or perhaps to be acted upon)—in the international legal system. It does not, however, specify what those rights and duties are. Rather, it is an attribution created specifically to allow for the identification of different categories of entity with different rights and duties within the system.

The modern doctrine of "international legal personality" began with the ICJ Advisory Opinion in the *Reparations* case.[81] This case held that the UN, as an international organization, was able to make international claims on its own behalf and on behalf of the family of a person who had been killed while working for it, against a state that was not then a UN member. Both of these types of claims had traditionally been made in the modern[82] international legal system only by states. That is, in the tradition, only states could make claims in the international legal system on other states, and only the state of an individual's nationality (or perhaps another state with a close relation to the matter) could represent an individual's interest diplomatically against another state. In this case, however, international legal personality attached only to the UN as an international organization and not to the individual victim, Count Bernadotte, or his family. Importantly, this advisory opinion was actually obeyed both by the UN and by the non-UN state involved. Israel (the state) and the UN negotiated a resolution in which Israel recognized its failure to protect Count Bernadotte and paid reparations to the UN for losses to both the UN and the dead man's family.

The cases and other actions discussed here assert different authority and responsibility—a different aspect of international legal personality—on behalf of the international criminal courts and tribunals. They assert the authority to declare and apply international criminal law, and by necessity, international humanitarian law, which is the root of this criminal law. They also

81. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ 174 (Apr. 11).

82. That is, Westphalian.

assert the authority to declare international human rights law concerning as it applies to criminal law and procedure. These applications may in fact be part of the making of new law as we have seen above.

III. DO THESE CHANGES REFLECT AND CONTRIBUTE TO GROWTH IN THE INTERNATIONAL LEGAL PERSONALITY OF INDIVIDUALS?

Now it is time to take up the issues of inhering in the statement of Professor Clark that accused persons have always had the right to raise defenses in international criminal courts and tribunals.[83] These issues closely connect to the way international criminal courts and tribunals operate as international organizations or organs of international organizations. The international organization practice discussed in part II above falls into two basic types of acts. The first is the more traditional pattern of acts that have political, policy making, or policy implementation goals. These acts include the Security Council's establishment of the ICTY and ICTR.

The second type of act is the judgment or decision of an international criminal tribunal made in the course of litigation. This is what is relevant to the international legal personality of individuals.

To oversimplify matters a bit, individuals and other non-state actors were traditionally considered "objects" of international law; states were effectively the sole "subjects." Individuals did not have rights directly under any form of international law. Rather, states had rights that they could enforce on behalf of their nationals by making claims against other states. Treaties did not directly give individuals rights, but again the state could make claims under them that would benefit individuals who were their nationals.

This was the attitude at the beginning of the main Nuremberg Trial. At the beginning of the proceeding against them, the accused Major War Criminals at Nuremberg filed a motion claiming that the Crimes against Peace set forth in the Charter of the International Military Tribunal were defined *ex post facto*—that is, defined only after the defendants had committed their allegedly criminal acts.[84] As the trial began, the Tribunal rejected the motion stating, "insofar as it may be a plea to the jurisdiction of the tribunal, it conflicts with Article 3 of the Charter and will not be entertained."[85] The Tribunal never

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83. *See* Clark, *supra* note 2 (stating that that the accused in every international criminal tribunal have raised substantive law defenses).

84. Motion Adopted by All Defense Counsel, 19 November 1945, 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 168-170 (Nuremberg: International Military Tribunal, 1947).

85. Oral Decision, 21 November 1945, 2 INTERNATIONAL MILITARY

precisely repudiated this view. Yet in its famous judgment at the end of the trial, the Tribunal decided to write, at some length, on the validity of its formation, on the authority of its creators to set forth the law applying to the defendants, on its jurisdiction, and on the alleged *ex post facto* nature of the crime of aggression.[86] Moreover, much of the judgment deals with defenses raised by the accused to the substance of the accusations, without any sense that these need not, or should not be addressed. Finally, the whole point of the Nuremberg exercise was to ensure that individuals had duties, and criminal responsibility, directly under international law for crimes defined by international law.

The history of the ICTY, ICTR, and SCSL, described in Part II above, continues this development. From the *Tadic Appeal* decision onward, it is clear that individuals accused of crimes have the right to challenge the jurisdiction of international criminal tribunals and alleged violation of the principle of legality.[87] They have the right to challenge the substantive law definition of crimes and modes of criminal responsibility[88] and application of the law to the facts. They have the right to raise substantive defenses to crimes, on both the facts and the law. They have the authority to claim procedural rights, such as the right to appeal.[89] The judges of these courts have the duty to respond to these claims of accused persons or persons under investigation, and to accept claims properly grounded in the law and the facts and also properly brought under court procedures.

There is no doubt, in other words, that there is a right under customary international law to present a defense on the law and facts in international criminal tribunals. International criminal tribunals as international organizations (or organs thereof) are bound to respect customary international human rights law when asserted by the accused or suspects. This is in the Rome Statute as treaty law and the organic law of the Court as an international

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TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 95 (Nuremberg: International Military Tribunal, 1947).

86. *Id.* ¶ 218ff.

87. Proscutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 10-36 (July 16, 2003) [hereinafter *Hadzihasanovic*]; *Akayesu*, *supra* note 74, ¶¶ 611-17; *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion on Jurisdiction (June 18, 1997); *Norman*, *supra* note 38.

88. *See, e.g.*, *Hadzihasanovic*, *supra* note 87, ¶¶ 10-36 (on right to challenge definition of command responsibility); *Cambodia Decision on Joint Criminal Enterprise*, *supra* note 19 (same as to so-called "joint criminal enterprise" responsibility").

89. *See, e.g.*, Prosecutor v. Tadic (Appeal of Vujin), Case No. IT-94-1-A-R77, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 3 (Feb. 27, 2001) [hereinafter *Tadic/Vujin*] (person convicted of contempt could claim right to appeal).

organization.[90]

Everything said above about proceedings in the international criminal courts and tribunals would be absolutely familiar to national lawyers. No criminal lawyer would be surprised at any of this. Indeed such a lawyer would be shocked if the ability to make such challenges were denied in criminal cases in any national court.

Yet in the international criminal courts and tribunals, there is a key difference. The claims made, both by the prosecution and the defense, on the definitions of crimes, defenses to crimes, criminal procedure guarantees, and so on, are made directly under international law, to an international body.[91] The international criminal courts and tribunals have the duty to respond to these conflicting claims of prosecution and defense and apply the facts as the judges find them to international law. The judgments given are binding and may result in enforcement of rights in favor of individuals, or (upon conviction) penalization for violations of duties.

Indeed, states cannot even object as a matter of right to most of the claims raised by the accused to an international criminal court or tribunal. They are claims raised by individuals against prosecutors who directly represent the international community, or other entity which has created the court. States can only object directly to individuals' claims where the state itself has an interest in the claims (as where the accused or a victim requests documents that a State claims are protected by national security interests); states may have the status of *amicus curiae* to give "observations" as to other issues, but this status is discretionary with the court.[92] This is, in a limited area of the law, a remarkable reversal of the role of states and individuals in international law.

The role of the individual here begins to look a bit like the role of the UN in the *Reparations* case;[93] that is, the individual is an international legal person to the extent of being directly responsible for violations of international criminal law. The individual also has the right to make claims in defense of these charges, both substantively and procedurally.

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90. Rome Statute, *supra* note 18, art. 21(3).

91. There are a few cases even in these tribunals where national law may apply, as in the use of some national criminal law in the SCSL Statute.

92. A state may, of course, object where an order binds it to do an act, such as provide information to the relevant international court or tribunal. *Cf.* Rome Statute, *supra* note 18, art. 72 (protection of states' national security information). They may also give an "observation" as *amici curiae*. *Cf.* International Criminal Court, Rules of Procedure and Evidence art. 103(1), U.N. Doc. PCNICC/2000/1/Add.1 (2000) (state may seek *amicus* status to make observation).

93. *See supra* Part II.C (analyzing the *Reparations* case and the international legal personality of the ICC and ICTs).

However, in a criminal case, both prosecution and defense have the right to have their claims adjudicated by the court. In the *Reparations* case, the ICJ only gave its Advisory Opinion that the UN had the authority to make international claims and to be subject to international claims. It did not claim jurisdiction to decide the merits of the dispute between the UN and Israel concerning responsibility and liability for the death of Count Bernadotte. By contrast, the international criminal courts and tribunals have the duty to make the substantive decisions and give judgment in criminal cases.

The individual suspect or accused, in other words, has a right to demand that a decision be made on his or her claims. In this way, the individual has a greater personality in the criminal system than in the system of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). There, the individual may have the right to make claims to the Human Rights Committee against a state that has adopted the Protocol. The opinions rendered by the Committee, however, do not bind states to follow them.

The source of the claims of right varies in international criminal courts. Many are based specifically in the organic documents of the relevant tribunal, as where the Statutes of the *ad hoc* Tribunals and the ICC contain procedural rights of suspects and the accused.[94] Others are based in customary international human rights law, as where the right to appeal was adjudged a customary international law right.[95]

Two provisions of the Rome Statute suggest a new (or at least revised) source of international human rights law that individuals can claim—generally accepted human rights treaties to which the ICC as an international organization is not a party. The first example is the general human rights provision of Article 21(3):

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national,

94. Rome Statute, *supra* note 18, arts. 57, 67; ICTY Statute, *supra* note 18, arts. 18, 21; ICTR Statute, *supra* note 18, arts. 17, 20. For analogous provisions, compare International Covenant on Civil and Political Rights, art. 14, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966).

95. *See Aleksovski*, *supra* note 20, ¶¶ 98, 100, 104 (finding right to appeal part of fair trial "requirement of customary international law"); *see* also *Tadic/Vujin*, *supra* note 89, at p. 3 (right to appeal criminal conviction and sentence is an "imperative norm of international law to which the tribunal must adhere," relying on International Covenant on Civil and Political Rights, art. 14(5) and Secretary-General's Report of May 3, 1993, S/25704 (ICTY Statute and Rules must be interpreted to respect "internationally recognized standards regarding the rights of the accused")).

> ethnic or social origin, wealth, birth or other status.[96]

This provision at least binds the ICC to apply customary international human rights law to individuals and other private entities in investigation, prosecution, substantive law of crime, and defenses and sentencing.[97] The language of the provision is not specifically limited to custom, however. The Court could conceivably choose to interpret "internationally recognized human rights" to include general principles of law, and possibly widely recognized treaties (such as provisions of the ICCPR), in matters where such rights would be applicable, even if they have not yet become customary international law rights.[98] This would have the interesting effect of applying ICCPR treaty rights to an international organization which could not become a party to the treaty because it is not a state.

The second example explicitly uses the technique of applying treaty law to the ICC, even though it is not a party to the relevant treaties. In "exercising its discretion" where sentenced persons may be sent for imprisonment, the Court

> shall take into account the following;
>
> . . .
>
> (b) the application of widely accepted international treaty standards governing the treatment of prisoners;
>
> (c) the views of the sentenced person; . . . .[99]

The phrase "widely accepted international treaty standards" indicates that sentenced persons are entitled to protections beyond those provided by customary international law. It is not clear whether any such "widely accepted international treaty standards" are minimal standards of treatment that bind the Court in all cases. This is listed as one of several factors that guide the Court's discretion. However, the fact that the sentenced person has the right to give views shows that such persons may bring this issue before the Court.

It seems a bit ironic, though. Many of the accused in international criminal courts have committed the worst of acts. Yet they are among the first to be able to bring international claims as a matter of right on their own behalves on the

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96. Rome Statute, *supra* note 18, art. 21(3).

97. *See generally* Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, 3 INT'L CRIMINAL L. 693-722 (M. Cherif Bassiouni ed., Transnational Publishers 2d ed. 1999) (providing analysis of the stated proposition).

98. While there is much commentary that suggests that the entire ICCPR has passed into customary international law, it is more accurate to examine each provision of the treaty to determine whether it has done so.

99. Rome Statute, *supra* note 18, art. 103(3).

international plane.

The Rome Statute begins to broaden this right to bring international claims on the international plane to victims of crimes within the jurisdiction of the Court.[100] Victims are not truly parties to the proceedings in the ICC—party status remains limited to the prosecution and the accused. However, they do have certain rights of participation in the proceedings, the outlines of which are being developed by the jurisprudence of the Court.[101] These rights of participation along with restitution as a part of the sentence that may be imposed on a convicted person[102] will likely lead to at least one narrow situation where victims of core international crime will be able to raise claims of right in the ICC and to receive an adjudication of those claims. Thus, they too appear to be on the road to an "international legal personality," albeit a strictly limited one. For example, it does not appear that victims will have an internationallaw right to enforce restitution payments in the courts of states where property of sentenced persons is located; this may need to be done through the mechanisms of the ICC.[103]

In sum, individuals are now "law claimers" as of right in the system of international criminal law and procedure. The original creation of international criminal liability, along with its enforcement by courts or tribunals that are international organs, has led to a limited system in which individuals have enforceable rights as well as duties directly under international law. Whether individual acts will ever become constitutive of international law, as international organization acts have, remains to be seen.[104] That is, individuals are not yet "law makers" even in the international criminal law system.

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100. *Id.* arts. 5-21.

101. *Id.* arts. 68, 75(3), discussed in Situation in the Democratic Republic of the Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of December 7, 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of December 24, 2007, ICC 01/04-556 (Dec. 19, 2008).

102. Rome Statute, *supra* note 18, arts. 77-80.

103. *Id.* art. 109.

104. By contrast, Professor Jordan Paust, in discussion at the Symposium, suggested that acts of individuals are generally relevant to the creation of international law. Jordan Paust, Mike and Teresa Baker Law Center Professor of International Law at the Law Center of the University of Houston, Panel Discussion at The John Marshall Law Review Symposium: International Justice in the 21st Century: The Law & Politics of the International Criminal Court (Apr. 23, 2010); *Cf.* CUSTOMARY IHL, *supra* note 31 (refusing to take a position on whether status of acts of anti-government insurgent groups are acts that contribute to the international humanitarian law of internal armed conflict).

IV. How Might the Trends Discussed Here Develop in International Law Generally?

International criminal law, and the related areas of international human rights law (including but not limited to human rights in criminal law and procedure) and international humanitarian law, may be the most obvious fields of international law where the changes discussed above are occurring. However, international organizations are taking on a binding judicial or quasi-judicial role in many other areas of law, such as the Law of the Sea (Tribunal for the Law of the Sea under the United Nations Convention on the Law of the Sea) and international trade (World Trade Organization Dispute Settlement Mechanism, North American Free Trade Agreement Dispute Settlement Mechanism). The role of private interests is also developing. In the time and space allotted here, we can only discuss a few examples of developing trends.

A. International Organizations

The trend toward acknowledgement of judicial decisions, especially international judicial decisions, as "non-subsidiary" points of practice is expanding beyond the area of international criminal law. Specifically, there is evidence that, within a judicial or quasi-judicial system, prior decisions of appeals bodies bind subsidiary bodies on matters of law. Moreover, there is use of decisions across lines of subject matter jurisdiction. There is also use of decisions between bodies with jurisdiction over different types of "international persons" such as states, individuals, and international organizations.

One remarkable decision comes from the World Trade Organization Appeals Body. Its report in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, decided that first-instance Panels should generally follow rules of law articulated by Appeals Panels in prior matters, citing both *Aleksovski* and a decision from the International Centre for Settlement of Investment Disputes (ICSID).[105] It found this necessary to "ensuring 'security and stability' in the dispute settlement system."[106] This decision was accepted as final by the

105. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 145-62, n.313, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *Stainless Steel*]. Interestingly, the party in that case arguing that a WTO Panel violated the Dispute Resolution Understanding by failing to apply prior Appellate Body rulings was Mexico, a civil law country, supported by the European Communities (largely civil law, except for Great Britain and Ireland), Thailand, and Japan. The United States, a common law country, supported the right of Panels to consider but ultimately disregard prior Appeals Body rulings, even in related matters.

106. *Id.* ¶ 160, n.313, citing *Aleksovski*, *supra* note 20; *See* Saipem S.p.A. v.

WTO Dispute Settlement Body (that is, it was not rejected by consensus).[107]

This decision by the Appellate Body of the WTO Dispute Settlement Body is fascinating for a number of reasons. Several reasons appear directly from its reliance on *Aleksovski* and the ICSID decision.

First, international decisionmakers are relying on international judicial and quasi-judicial decisions as instances of practice despite the fact that international status of the parties in the cases they rely on are clearly distinguishable from those the case they are reviewing. In the *Stainless Steel* case matter, the WTO Dispute Settlement Body dealt, as it generally does, with disputes between states.[108] Yet here, it accepts as relevant practice from bodies with very different mandates. This practice is relevant to the Dispute Settlement Body's interpretation of its judging process under its own constituent agreements, the WTO Agreement and the WTO Dispute Resolution Understanding. Yet one case relied on, *Aleksovski*, is from the ICTY, which judges criminal cases in which a public Prosecutor empowered by the UN brings charges against individuals under customary international law.[109] The other case, the ICSID decision in *Saipem S.p.A.*, is from an arbitral tribunal that, like the international criminal courts, deals with disputes between public and private entities.[110] ICSID Tribunals deal with disputes between states and "natural" or "juridical" persons when submitted to ICSID by consent of the parties.[111] Its substantive law sources are cosmopolitan, based first in agreement of the parties, and then in national law and both

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Bangl., Case No. ARB/05/07, ¶ 67 (ICSID Arb. Tr., Mar. 21, 2007) (footnotes omitted) [hereinafter *Sipem S.p.A.*]:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

107. World Trade Organization Dispute Settlement Understanding art. 17(14), *available at* http://www.wto.org/english/traptop_e/dispu_e/dsu_e.htm#17.

108. In some instances, the WTO Dispute Settlement Body may deal with entities such as Hong Kong or the European Union, which have special status in WTO law, but essentially play a role analogous to states in the WTO system.

109. *See supra* Part III (analyzing whether recent changes reflect and contribute to growth in the international legal personality of individuals).

110. *Saipem S.p.A.*, *supra* note 106.

111. ICSID Convention art. 25, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

public and private international law:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[112]

International organizations exercising judicial and quasi-judicial functions are now part of the international lawmaking process. They may exercise their power solely concerning disputing states, or have direct power over private parties, or indeed (as with the ICC and international criminal tribunalss) they may exercise a prosecutorial function—punishing crimes against the international community as a whole. They may decide about applicable customary international law, applicable treaties and conventions, or applicable general principles of law. The claims of private parties in the tribunals with jurisdiction over them result in judgments which become part of the practice which constitutes international law.

Second, in the *Stainless Steel* case, the Appellate Body recognizes that there are other, so-called "exclusive" authorities for interpretations of the WTO Agreement that bind states. These are the Council of Ministers and the General Council of the WTO, both of which have representatives of every member state.[113] Yet under *Stainless Steel*, an Appellate Body ruling of law interpreting the WTO Agreement that has been accepted by the Dispute Settlement Body appears to be authoritative, until either of those organs acts, preferably by a consensus but at least by a 3/4 vote.[114] Presumably, the political decision of one of the Councils to adopt a different interpretation would "overrule" the DSB interpretation because if the Council interpretations bind states, surely they bind the Dispute Settlement Bony and its bodies in interpreting the rights and duties of states in conflict. Yet even when the Councils act, the rule of non-unanimity demonstrates that it is the international organization that is legislating an interpretation, not the states (at least in all cases) merely coming to an agreement.

Third is the reference to the ICSID case. In the cited case, the ICSID arbitral panel stated that "it must pay due consideration to earlier decisions of international tribunals."[115]

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112. *Id.* art. 42(1); *see also id.* art. 42(2) (prohibiting a decision of *non liquet*).

113. *Stainless Steel*, *supra* note 105, ¶ 158, n.308, relying on World Trade Organization Agreement art. IX(2), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm [hereinafter WTO Agreement], which states in part, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements . . . ."

114. WTO Agreement, *supra* note 113, art. IX(1)(2).

115. *Saipem S.p.A.*, *supra* note 106.

This suggests a requirement that relevant decisions of other international tribunals—regardless of which tribunals they are—be considered practice under the relevant source of international law. It certainly does not suggest these sources are subsidiary. This aspect of ICSID practice, however, must be viewed with caution because ICSID is more like a set of arbitration panels than a unified permanent court, and because the panels may not always have consistently applied rulings of prior panels.

Last is the reaction of some relevant states to the WTO Appeals Body decision. The majority of states discussing the matter in the Dispute Resolution Body reacted favorably to the decision that Panels should follow prior Appellate Body determinations on points of law.[116] The United States disagreed:

> This Report purported to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that was reserved by the WTO Agreement exclusively to Members.[117]

Yet the United States had a tightrope to walk. It did not want to give Panels complete freedom to ignore prior Appellate Body decisions. The ambivalence of its position is quite clear in the following paragraph:

> The United States did, of course, share the Appellate Body's interest in having similar cases treated similarly. The United States expected that all Members would do likewise. The United States did not, however, share this Report's view that this meant that panels must follow Appellate Body reports in different disputes. Rather, to cite again the "Japan—Alcoholic Beverages" Appellate Body Report, the United States would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel. To take account of an adopted report, of course, did not mean to follow it without hesitation. To the contrary, to take account of such a report meant to examine it, to consider it, and to engage with its reasoning. The United States recalled that an objective assessment was one that was critical and searching. Such an assessment could lead, in fact, to further or greater clarification.[118]

So, in the end, even the United States accepted the notion that prior Appellate Body decisions should be treated as relevant treaty practice for purposes of interpreting the WTO Agreement.

Not surprisingly, the states commenting on this issue divided on the basis of their view of the merits of the case, and readers may draw their own conclusions from this.

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116. World Trade Organization, Dispute Settlement Body Minutes of Meeting, May 20, 2008, WT/DSB/M/250 (2008).

117. *Id.* ¶ 48.

118. *Id.* ¶ 54.

These developments pose interesting challenges to the "principal judicial organ" of the UN, the ICJ.[119] The new multi-tribunal, more specialized international judiciary and its participation in the lawmaking function threatens to diminish the importance of the ICJ in some areas of international law.

These developments also challenge the dominance of Article 38 of the ICJ Statute as the most accurate model for describing the sources of international law. This article has essentially persisted from the time of its predecessor, the Statute of the League of Nations' Permanent Court of International Justice.[120] The ICJ must apply its own Statute, and states may continue choosing to have disputes resolved by that Court. The use of political or executive acts of international organizations as practice that goes to the formation or demonstration of international custom does not violate the plain text of the ICJ Statute. Article 38 does not limit to states the entities whose practice may be considered.[121]

The ICJ does face two conundrums with regard to the use and limitations of international judicial decisions. First, international custom is now partially constituted by the practice of international tribunals. Thus, consideration of such custom under Article 38 must include consideration of these decisions as non-subsidiary instances of practice. Second, the Court needs to face up openly to the fact that its own decisions have become part of the practice constituting custom. A strong reading of Article 59—giving no effect whatsoever to prior practice of the ICJ in subsequent decisions—has never been the practice of the Court. Such a reading is now wholly untenable.

This Article considers only two aspects of the participation of international organizations, along with states, in the creation of international law: first, in the creation of international custom and, second, in treaty interpretation. It does not address one of the stronger claims concerning the role of international organizations in the making of international law. Professor Krzysztof Skubiszewski has called rules of law made by international organizations "a fourth (and new) category of rules of international law[,] . . . distinct from customary rules, treaty rules and general principles of law . . . ."[122] Whether this is true or not can be left for another day.

One thing is very likely though: as the number of international organizations grows, along with their powers (including especially judicial or quasi-judicial authority), the

119. U.N. Charter art. 92.

120. Permanent Court of International Justice Statute art. 38. The fate of this Court makes the author nervous about congratulatory references to the ICC as the world's first "permanent" international criminal court.

121. ICJ Statute, *supra* note 1, art. 38(1)(b).

122. Skubiszewski, *supra* note 11, at 365.

importance of international organizations in the development of customary international law and the interpretation of treaties will grow as well.

B. Individuals and Private Interests

The right of individuals and other private entities to raise claims internationally is being consolidated. This development is intimately connected with the growth in the lawmaking function of international organizations as exercised by their judicial and quasi-judicial organs.

These rights of individuals are granted in one of two ways. The first is by treaty or international agreement. Such treaties include the Rome Statute of the ICC, the regional human rights treaties establishing regional human rights courts that allow individuals to make human rights claims under regional treaty law against states,[123] the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the agreement between Sierra Leone and the UN to establish the SCSL, or the London Agreement to establish the International Military Tribunal (Nuremberg).

The second is by the operative act of an international organization acting within its mandate, such as the creation of the ICTY and ICTR by the Security Council pursuant to its obligation to restore and maintain international peace and security. Other tribunals that largely deal with how internal law of international organizations affects individuals and private interests include the UN Administrative Tribunal and the new UN Dispute Tribunal.

This new international legal personality of individuals remains strictly limited. It exists only where recognized by the relevant international actors, whether states (through treaties) or international organizations (through treaties or operative acts). The materials presented here cannot be stretched to make a claim that individuals have a general right in all cases to make international law claims directly against states, or that such a right is likely to develop soon. Moreover, in the tribunals discussed in this Article, individuals and other private persons remain strictly law claimers, and not law makers.

Thus, the continued growth of the individual legal personality of the natural and juridical persons seems likely to be "horizontal." It is quite likely that they may become law claimers in an increasing number of international judicial and quasi-judicial bodies, covering a broadening range of subject matters. It is

123. European Convention on Human Rights and Protocols (establishing European Court of Human Rights); American Convention on Human Rights (establishing Inter-American Court of Human Rights); African Charter on Human and Peoples Rights and Protocol (establishing the African Court of Human and Peoples Rights).

unlikely that the role of the individual in international law will be cut back in the foreseeable future.

V. CONCLUSION

One new reality demonstrated here—that is, the inclusion of acts of international organizations as international lawmaking practice and the non-subsidiary nature of international judicial and quasi-judicial decisions—should even now be reflected in doctrine. As mentioned above,[124] it throws into doubt the reliance on Article 38 as the exclusive model for sources of international law and the place of international adjudication in the making of international law. It certainly rejects, outside the direct ICJ context, the subsidiary nature of international judicial decisions. It indicates that national judicial decisions may be considered as state practice, along with state-to-state diplomatic interactions, in appropriate cases.

The role of international judicial and quasi-judicial organs in treaty interpretation varies. Where interpreting their own constituent treaties in cases within their judicial competence, their decisions may be authoritative or nearly so. These may include decisions where an individual has raised a claim based directly on the treaty in the Court—that is, individuals may in some cases be able to force an authoritative interpretation. Yet even where a court makes an adjudication concerning interpretation of a treaty to which it is not a party, such a decision may be considered as subsequent practice for further interpretation.

The new reality also means that Judge Manley O. Hudson's famous formulation of custom, which exclusively considers the practice of states, must be revised. A minimal revision of his doctrine, responding only to the changes discussed in this Article, and preserving his intellectual framework, might read:

> The emergence of a principle or rule of customary international law would seem to require presence of the following elements:
>
> (a) concordant practice by a number of States *or International Organizations, including their judicial or quasi-judicial organs, acting within their authority* with reference to the type of situation falling within the domain of international relations:
>
> (b) continuation or repetition of the practice over a considerable length of time;
>
> (c) conception that the practice is required by, or consistent with prevailing international law; and
>
> (d) general acquiescence in the practice by other States *and relevant International Organizations.*

124. *See supra* Part IV.A (analyzing international organizations as they affect international law generally).

The judicial and quasi-judicial organs referred to above include those in which individuals, other private entities, and organs of international organizations may raise and receive binding adjudication of claims under international or other relevant law, as well as those in which states may be the sole parties in contentious cases.[125]

125. Modified with great respect from Hudson, *supra* note 8, ¶ 11 (additions in italics). This version deals only with criticisms of Hudson's definition raised in this Article, and not with the many other issues that could be argued concerning it.