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CRIMINAL DEFENCE AND THE INTERNATIONAL LEGAL PERSONALITY OF THE INDIVIDUAL

Kenneth S. Gallant[*]

Since the beginning of the Nuremberg trial, the status of the individual in international law has changed. This change is intimately connected with the rights of defence in criminal proceedings, especially in the context of international criminal proceedings. Today, as a matter of right, the individual may make certain claims in international law, and especially in international criminal law and international human rights law related to criminal procedure and substantive criminal law, without relying on a State to make them on his or her behalf. This brief article explores this development of the international legal personality of individuals. It surveys the sources and evidence of international law that can be used by individual defendants in international criminal cases. Finally, it considers an important limit of this development, concerning whether acts of individuals and other private actors "in the field" affect the development of customary international criminal law.

I. The Defendants at Nuremberg

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*—i.e., only after the defendants had committed their allegedly criminal acts. The motion also alleged that the Tribunal was not neutral, in that all of the Judges had been appointed from the victorious nations in World War II.[1] As the trial began, the Tribunal rejected the motion:

> [I]nsofar 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. Insofar as it may contain other arguments which may be open to the defendants, they may be heard at a later stage.[2]

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[1] *Trial of the Major War Criminals Before the International Military Tribunal*, Motion Adopted by All Defense Counsel (19 November 1945) (International Military Tribunal for Germany), recorded in 1 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set) 168 (1947).

[2] *Trial of the Major War Criminals Before the International Military Tribunal*, Oral Decision on the Motion Adopted by All Defense Counsel (21 November 1945) (International Military Tribunal for

The *Charter of the International Military Tribunal* (*Nuremberg Charter)* had been established through an international agreement among the United States, France, the United Kingdom, and the Union of Soviet Socialist Republics.[3] Article 3 stated, in part:

> Neither the Tribunal, its members nor their alternates can be challenged by the Prosecution, or by the Defendants or their Counsel.

That is, the Tribunal had no need to justify its existence to the defendants, or to justify its exercise of power over them. That had already been decided by the international agreement creating the Tribunal.

Thus far, the Nuremberg story accorded with the classical view of international law. International law was seen solely as the law among nation-states. Individuals were not considered "international legal persons" in the sense of having direct rights and duties under international law. To the extent that international law protected individuals, what it did was allow the state of an individual's nationality to claim that its own rights were violated by another state's offense against the first state's national. In the jargon, a person was an "object" of international law.

Even at Nuremberg though, change stirred. The proceeding was designed to punish alleged violations of duties imposed directly on individuals by international law. The Nuremberg Judgment did not shrink from acknowledging this:

> It was submitted [by the Defense] that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both of these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised.[4]

Certain acts were "condemned as criminal by international law."[5] The Tribunal explained:

Germany) 2 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set) 95.

3 *London Agreement of 8 August 1945*, with annexed *Charter of the International Military Tribunal*, printed in 1 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set) 8 at 10.

4 *Trial of the Major War Criminals Before the International Military Tribunal*, Judgement: The Law of the Charter, 1 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set) 171, 222-223 (International Military Tribunal for Germany, 1 October 1946) [Judgement: The Law of the Charter], citing *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2 (1942) [*Quirin*].

5 Judgement: The Law of the Charter, *ibid.* at 223.

> individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.[6]

The Tribunal here states nothing explicit about rights of individuals accruing directly under international law, discussing only individual duties and individual responsibility for their violation.

Yet, in its Judgment, the Tribunal decided that it would address the legal issues regarding its creation, in particular the authority of its creators to set forth the law applying to the defendants and to apply and enforce that law through a court proceeding. It spoke of the legitimate authority of occupying states to prescribe law:

> the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilized world.[7]

The right to establish and use the Tribunal was also set forth:

> In doing so [establishing the Tribunal], they [the Signatory Powers] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[8]

The Tribunal then entered into its famous and controversial argument that the Law of the Charter was conclusive on the Court, whether or not it was *ex post facto*; but that in fact the Crime against Peace was not created retroactively by the *Charter*.[9]

The Nuremberg Tribunal never explicitly repudiated its pretrial ruling that the defendants had no right to challenge the jurisdiction of the Tribunal. Nor did it ever explicitly say that the defendants had the right to challenge the jurisdiction of the Occupying Powers to prescribe, adjudicate, and enforce the law against them. It nonetheless answered the defendants' question regarding the authority of the Tribunal as well as the authority of those States that constituted it to make the law of the Charter and/or to apply it to them.

The notion that individuals might have some duties under international law, enforceable through criminal sanction, was not wholly new at Nuremberg. Violation of the laws and customs of war was reasonably well established as a crime under

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6 *Ibid.*
7 *Ibid.* at 218.
8 *Ibid.*
9 *Ibid.* at 219 and ff.

international law.[10] So was the idea that piracy was such a crime (whose definition was adopted into national law by, for example, the United States).[11] After Nuremberg, this idea of an international criminal law came to be firmly established in both the legal and the popular minds. A clear statement of the individual's rights directly under international law would have to wait.

II. The Individual in the Modern International Criminal Tribunals

Over half a century later, the United Nations (UN) Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY). The first person to be accused before the Tribunal argued that the Court itself had not been lawfully constituted. The ICTY Trial Chamber denied the individual's right to challenge the existence of the Court.[12] The Appeals Chamber decisively rejected this view. It ruled on the merits of the defendant's claim that the ICTY had not been lawfully created, holding that the Security Council had acted within its authority.[13]

The *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* (*ICTY Statute*) contains no provision resembling the *Nuremberg Charter* Article 3, which was seen in late 1945 as preventing individuals from challenging the jurisdiction of the Court. Yet, the *ICTY Statute* did not specifically allow for challenges to jurisdiction either. The Trial Chamber's holding effectively would have limited the rights of defendants to those specifically set forth in the *ICTY Statute*.[14] Legal personhood of defendants would be limited to that which is granted by the international organization prescribing the *ICTY*

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10 See e.g., Gallant, *The Principle of Legality, supra* note ∗ at 56-59, 69-72; United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: Published for the Commission by H.M. Stationery Office for the United Nations War Crimes Commission, 1948); *Quirin, supra* note 4; "Current Notes:" 16:4 Am. J. Int'l Law 628 (1922) (excerpting and translating some of the post-World War I Leipzig war crimes cases).

11 *United States v. Smith*, 18 U.S. 153, 5 Wheat. 153, 5 L.Ed. 57 (1820). For a view that piracy was never truly an international law crime, or at most an international law crime only for a limited time, see Alfred P. Rubin, *The Law of Piracy*, 2nd ed., (Newport: U.S. Naval War College Press, 1998).

12 *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal (10 August 1995) at paras. 1-40 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/tadic/tdec/en/100895.htm> [*Tadic*: Motion on Jurisdiction], *revised on appeal,* Decision on Appeal on Jurisdiction, IT-94-1-AR72, (2 October 1995) at para 137 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [*Tadic*: Appeal on Jurisdiction].

13 *Tadic*: Appeal on Jurisdiction, *ibid.* at paras. 4-63.

14 See *Tadic*: Motion on Jurisdiction, *supra* note 12; cf. *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*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993), art. 21 (rights of defendants) [*ICTY Statute*].

Statute. This is consistent with the theoretical construct of the individual as an "object" of international law.

By contrast, the ICTY Appeals Chamber's decision recognizes the right of individuals to raise in their defence challenges to the actions that put them in the dock for crimes. The action of the UN Security Council is not automatically conclusive, but, as a matter of right, the defence may compel the Tribunal to examine that action for legal propriety. The theoretical construction here is that the individual is free to make claims not specifically contemplated by the Security Council. The defence right to determine which claims are to be made places the individual in a theoretically more powerful legal position, as an active "subject" asserting rights, rather than a passive "object" which has received them by grace of the Security Council.

The *ICTY Statute* itself contains two suggestive passages. First, it states: "All persons shall be equal before the International Tribunal."[15] Second, "[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [defence procedural rights listed]."[16] This does not denote that the defendant is an international legal person equal to the international organization which is prosecuting, as well as judging the case. Nonetheless, it connotes this idea. The insistence on equality means at least that accused persons are to be treated equally with others as witnesses and are to be treated equally among themselves. Yet, if that is its only meaning, the language of the statute is awkward. Rather, the language suggests that the individual is a legal person equivalent to the Prosecution before the Tribunal.

The Secretary-General of the United Nations, in his Report recommending the creation of the ICTY and the adoption of the *ICTY Statute*, did not affirm that an accused is a legal person equivalent to the prosecution. He stated clearly, however, that an accused has rights which must be respected by the Security Council in creating the ICTY:

> 106. It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[17]

The Report does not say that the *International Covenant on Civil and Political Rights* (*ICCPR*) would apply of its own force to the ICTY; and it could not do so because the ICCPR applies only to states parties to it, not to non-party international organizations like the United Nations. Rather, the Report indicates that an international criminal court "must fully respect internationally recognized

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15 *Ibid.*, art. 21(1).

16 *Ibid.*, art. 21(4).

17 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN SC, 3200th mtg., UN Doc. S/25704 (1993), discussing article 21 of the *ICTY Statute* [Sec.-Gen: *ICTY Rep*].

standards regarding the rights of the accused at all stages of its proceedings." The *ICCPR* is merely a document which happens to articulate these standards.

The idea that the accused could challenge the creation of international criminal tribunals has continued to gain acceptance. The International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone have also considered challenges to their creation as beyond the authority of the United Nations and rejected them on their merits.[18]

Defence objections have prominently raised another issue which is not listed among defence rights in the Statutes of these courts. The ICTY, ICTR, and SCSL all treat non-retroactivity of crimes and punishments (*nullum crimen, nulla poena sine lege*) as an issue that the individual can raise as a matter of right in these international fora.[19] The ICTY treats this as a right the accused can raise in defence as a matter of customary international law, as well as a matter of subject matter jurisdiction under the law of its organic documents:

> The scope of the Tribunal's jurisdiction *ratione materiae* [subject matter jurisdiction] may therefore be said to be determined both by the Statute . . . and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends upon its existence *qua* custom at the time this crime was allegedly committed.[20]

The next paragraph indicated that this issue was not a matter of personal jurisdiction, but "the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged."[21] This includes whether, at the time of the acts charged, those acts could subject one to criminal liability for the acts of others.[22] In other words, legality is also a principle of substantive criminal law on which individuals can rely. The SCSL has allowed a defendant to challenge, as a matter of jurisdiction, the existence of the crime of

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18 *Tadic*: Appeal on Jurisdiction, *supra* note 12; *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on Defence Motion on Jurisdiction (18 June 1997) at paras. 17-29, 33-36 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org/ENGLISH/cases/Kanyabashi/decisions/180697.pdf> [*Kanyabashi*]; *Prosecutor v. Norman*, SCSL 04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (31 May 2004) (Special Court for Sierra Leone, Appeals Chamber), online: SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=XSdlFGVsuTI%3D&tabid=193> [*Norman*].

19 See *Tadic*: Appeal on Jurisprudence, *supra* note 12; *Prosecutor v. Hadzihasanovic*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003) at paras. 10-36 (International Criminal Tribunal for Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/hadzihasanovic/acdec/en/030716.htm>; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement (2 September 1998) at paras. 611-17 (International Criminal Tribunal for Rwanda, Trial Chambers), online: <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>; *Kanyabashi*, *ibid.*; *Norman, ibid.*

20 *Prosecutor v. Milutinovic et al*., IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise (21 May 2003) at para. 9 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) (bracketed material added).

21 *Ibid.* at 10.

22 *Ibid.*

recruitment of child soldiers under customary international law at the time of the acts alleged. This *nullum crimen* claim has been rejected on its merits, on the ground that the crime existed in customary international law at the time.[23]

Individuals may challenge the actions of all three of these courts, including the exercise of jurisdiction over them, and may litigate the meaning of criminal definitions and whether they have committed the acts charged. They may do this without approval of the State of their nationality and sometimes in opposition to the views of that State. This is most evident from the presentation of defences before the ICTR, where the State of Rwanda is generally seen as favouring the position of the prosecution over that of the Rwandese nationals accused in that court. These are direct acts of individuals under international law and the law of the appropriate international organization. As the tribunals have stated, sometimes the appropriate law under which defendants make their objections is customary international law.

A very interesting pattern has developed concerning individuals who have been turned over to the *ad hoc* international tribunals, which contradicts the view that under international law individuals are principally objects of state protection. Once in the custody of these courts, the individual is the sole "person" who can raise a challenge to the legality of the proceedings against him or her. In the *ad hoc* tribunals there does not appear to be a legal mechanism for a State, even the State of the person's nationality, to make such a complaint as a matter of right. Perhaps such a complaint could be made politically, through the U.N. Security Council, but even this is unclear. No such mechanism has been contemplated. States have in effect "objected" to acts of the ICTR and ICTY by withdrawing (or threatening to withdraw) lawfully required cooperation from the Tribunals;[24] but this appears to have been, in itself, illegal.

In the International Criminal Court (ICC), both individuals and concerned States have the right to object to jurisdiction over cases and admissibility of cases.[25] Presumably, this would include challenges to legality in a prosecution, as we have seen that the *ad hoc* tribunals have treated this as a jurisdictional matter. In these challenges, the interests and legal positions of individuals and their states of nationality may or may not be aligned. For example, Uganda sought ICC investigation and prosecution of crimes arising out of the armed conflict with its own nationals in the Lord's Resistance Army (LRA). LRA members being investigated and prosecuted oppose the ICC's action.

There are many other legal rights held by accused persons in the modern international criminal courts and tribunals, set out in the statutes of these entities. One of the most interesting and wide-ranging of these is the provision of the *ICC Statute*

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23 *Norman*, *supra* note 18.

24 Consider the long-time failure of Serbia to cooperate with the arrest of Ratko Mladic and (until recently) Radovan Karadzic.

25 *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, entered into force July 1, 2002, arts. 17-19 [*ICC Statute*].

which requires that the law of the ICC be applied consistently with internationally recognized human rights.[26]

By themselves, these rights in the *ICC Statute* would be consistent with a theory that an international organization, like a State, can grant whatever rights it wishes to a person within its power. That is, the individual is an "object" of international law, and must specifically be granted protection within any given system of law.

Yet current international law goes further. The duty of the international criminal courts to consider issues not explicitly within their statutes, discussed above, makes clear the increasing independence of the individual in international law. That is, the individual is becoming to some extent a "subject" in the international law system. Given that the rights of individuals in international criminal courts and tribunals go beyond those granted in their organic documents, and apply rights from customary international law,, the individual's legal personality appears to be developing as a matter of customary international law as well.[27]

This account of the individual as a subject of international law has not been universally accepted, even by strong advocates of international human rights law. William A. Schabas, a strong proponent of international human rights, has difficulties with the notion that an international criminal tribunal can challenge the authority of the international organization that set it up to do so, or can deny the applicability of the definitions of crimes set out in the organic documents of the court (as, e.g., by a claim that applying a definition would violate the principle of legality).[28]

The logic of international human rights, however, suggests that the courts and tribunals which allow individuals to make these claims are correct. The real issue is the right of individuals to test whether they are being imprisoned by an entity, whether the United Nations or a State, that is acting beyond its legitimate authority. The challenge to the lawfulness of the establishment of a court is one device to test the legality of a person's detention. It thus serves a purpose analogous to the writ of habeas corpus in common law systems and to similar procedural devices in other systems, ensuring that detentions in criminal matters are lawful.

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26 *Ibid.* at art. 21(3).

27 It appears that the practice of international organizations is joining the practice of States in the development of customary international law. This matter itself deserves discussion which cannot be undertaken here. Some discussion appears in Gallant, *The Principle of Legality, supra* note ∗, at 10, 347-50, 402-03. For a more extensive treatment of the matter, see José E. Alvarez, *International Organizations as Law-makers* (New York: Oxford University Press, 2005), and in Kenneth S. Gallant, "International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals," John Marshall Law Review (2010, forthcoming).

28 See William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at pp. 63, 66-67.

The right to have the legality of one's detention determined is recognized in treaty law.[29] It is also recognized by the Secretary-General of the United Nations in his *ICTY Report*[30] and by the Security Council in its adoption of the report.[31]

There is no real alternative to judicial self-examination if individuals are entitled to challenge the legality of their detention by international criminal law bodies. There is no moral or legal value in allowing an illegitimately established tribunal to convict and imprison persons. There is no moral or legal value in allowing courts to convict persons of acts which were not crimes when they were committed. It is also difficult to see the moral or legal value of restricting the legal personality of those individuals whom the international legal system seeks to imprison to the extent that they cannot ensure the legality of the process against them.

This growth of the international legal personality of individuals in international criminal matters began with defendants. In the ICC, however, it has been expanded to include rights for individual victims of international crime as well. Victims are not technically parties in the ICC, but they do have certain procedural opportunities to make claims in the Court.[32] The ICC Statute includes provisions on restitution and reparations to victims.[33] Thus, in the situation in Darfur, some victims who are Sudanese nationals have been seeking ICC action while the state of the Sudan remains strongly hostile, as do the Sudanese nationals being investigated for and charged with crimes.

The above describes the growth of the international legal personality of the individual as a matter of the individual gaining rights, as well as responsibilities, in international law. There is another, more process-oriented, way of considering the matter as well.

One of the standard models of how customary international law works is that decision-makers within states perform actions and make claims of right, often in competition and sometimes in conflict with each other. There is a pattern of claim, appraisal and response (which might include acceptance or rejection of claims by other states).[34] Disagreements are normally worked out through claim and unilateral response or by negotiation. Adjudication between states is relatively rare.

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29 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 9, 6 I.L.M. 368 [*ICCPR*]; *Convention for the Protection of Human Rights and Fundamental Freedoms* 4 November 1950, 213 U.N.T.S. 221, art. 5, Eur. T.S. 5 [*ECHR*]; *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123 art. 7, O.A.S.Treaty Series No. 36 [*ACHR*]; *Revised Arab Charter on Human Rights*, 22 May 2004, art. 14 (2004); cf. *African Charter of Human and Peoples Rights* 1520 U.N.T.S. 217 arts. 6, 7(1)(a) (creates right against unlawful detention but does not specifically require existence of remedy for illegal detention), 21 I.L.M. 58 (1982) [*ACHPR*].

30 Sec.-Gen: *ICTY Rep*, *supra* note 17 at paras. 16, 18-30.

31 SC Res. 827, 25 May 1993, 3217th meeting; S/RES827.

32 See *ICC Statute,* art. 68.

33 See *ICC Statute,* arts. 75, 79.

34 This is a great simplification of some of the ideas in Myres S. McDougal, "The Hydrogen Bomb Tests" (1955) 49 A.J.I.L. 357, and other works by McDougal and his collaborators.

What happens in international criminal tribunals is in some ways similar. That is, there is an ability—indeed a right—for individuals to make claims about the facts, the law and the appropriate consequences of the facts and the law, and to respond to claims made by the prosecution. The prosecution has similar rights. Now this analogy cannot be pushed very far. Unlike in the world of interstate relations, most international criminal claims are decided by tribunals. Nonetheless, even in the world of international criminal law, a practice of negotiation over pleas and appropriate sentences is developing—agreements which must be ratified by courts, but which are made between the parties.[35]

There are limits to the international legal personality of individuals even in international tribunal proceedings. Many of these cause impediments to the defense. Once outside the doors of the international courtroom, the defense team is subject to state authority.

The Prosecution has some measure of ability to act on its own accord, with the authority of an international organization backing it up. This is not generally true of the defense in most of these tribunals and courts, as a matter either of law or of fact. Defense counsel cannot enter a state or conduct an investigation without that state's permission. Nor does defense counsel generally have the international stature to persuade a state to grant permission.

Recently, the Agreement on Privileges and Immunities of the International Criminal Court brought specific protections to defense counsel and those working for the defense pursuant to a general international treaty.[36] However, the privileges accorded to defense counsel and others working for the defense are considerably weaker than those accorded to the Prosecutor and others working with the prosecution.[37]

The internal organization of the Tribunals also generally disadvantages the defense. The Prosecution is generally part of the Tribunal as an international organization, and shares in the international legal personality of the Tribunal or its parent organization. Defense counsel, by contrast, have not been seen as part of the international organization.

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35 See generally Nancy Combs, *Bridging Justice and Truth: Constructing a Restorative Justice Guilty Plea System for International Crimes* (Stanford: Stanford Univ. Press, 2007).

36 *Agreement on Privileges and Immunities of the International Criminal Court*, art. 18, implementing *ICC Statute*, art. 48(4).

37 The weaknesses, and strengths, of the protections are shown by the arrest in Rwanda in May 2010 of Peter Erlinder, a lawyer for a defendant in the ICTR, on charges of "genocide ideology." The initial documents in the Rwandese courts indicated that he was arrested in part because of statements he had made in the ICTR. Decision of June 7, 2010, Decision No. RDP0312/10/TGJI/GSBO, Case No. RPGR0678/10/Kgl/NM (Gasabo High Court). He was released on bail only after the ICTR informed the Rwandese government that his arrest was a violation of the functional immunity of lawyers at that Tribunal. Note Verbale, ICTR Registrar to Foreign Minister of Rwanda, 15 June 2010, ICTR Doc. ICTR/RO/06/10/175. As of the current writing, the case is still pending against Erlinder in Rwanda.

Thus, the individual as an actor, a legal "person," is limited in international criminal law. The individual is in no sense the equivalent of a state or an international organization.

III. Sources and Evidence of Rights the Individual May Claim

The international criminal courts and tribunals have not yet set out theory of concerning the sources of law that can provide a basis for rights of the individual, or the evidence of that law which may be admitted. There are a few things, however, that can be said now.

Certain of the international and national courts specify rights, or sources of rights, which apply in their statutes. These range from the very general to the quite specific.

The ICC Statute provides a set of rights provisions which have different sources of law, and different scopes. The broadest is the provision referred to above, that the application of the law of the ICC "must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender [as defined elsewhere in the statute], age, race, religion or belief, political or other opinion, ethnic or social origin, wealth, birth, or other status."[38]

The source of the "internationally recognized human rights" is not specified. Unless and until practice shows otherwise, a fair hypothesis is that these are human rights recognized in customary international law. Thus, for example, a right mentioned in the International Covenant on Civil and Political Rights (ICCPR) (a treaty among states) or the Universal Declaration of Human Rights (UDHR) (a UN General Assembly resolution) is not *ipso facto* to be applied in the ICC. However, all evidence of what constitutes international custom as to that right should be considered, including those documents, along with other state practice and *opinio juris*, and, in my view, the practice and *opinio juris* of relevant international organizations as well.[39] One particularly important example of practice and *opinio juris* of international organizations being relevant to formation of international criminal law and procedure occurs in the ICC Statute, "The Court may apply principles and rules of law as interpreted in its previous decisions."[40]

The "equal protection clause" in the ICC Statute defines the rule to be applied in the ICC—i.e., what grounds of equality will be guaranteed. The interpretive tools available in international law and particularly international criminal law which may be applied to a treaty establishing a court as an international organization are to be applied here. There is insufficient practice to determine definitively how these provisions will be applied in the ICC.

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38 *ICC Statute*, art. 21(3).

39 For further discussion, see sources cited in note 28 above.

40 *ICC Statute*, art. 21(2). See also note 45 below on similar practice in the ICTY and ICTR.

Elsewhere, the ICC statute defines specific rules concerning non-retroactivity of crimes and punishments and protecting specific criminal procedure rights are available.[41] These rules largely parallel rights in the ICCPR, but are not always identical. Finally, in determining where a sentence of imprisonment is to be served, the court "shall take into account . . . [t]he application of widely accepted international treaty standards governing the treatment of prisoners."[42] These treaty standards generally come from treaties among states, not international organizations. They apply here only because the ICC Statute specifically adopts them. One might hope that the Court will interpret this provision as obligatory, but the grammar does not require the Court to immediately veto imprisonment in a state whose penal institutions do not meet these standards.

Other international and internationalized courts and tribunals follow patterns with both similarities and differences. As mentioned above, the ICTY has a provision that recognizes specific procedural rights. A similar provision exists in the ICTR Statute.[43] As discussed above, the ICTY and ICTR have recognized individual rights not set forth in their Statutes.[44] The ICTY and the ICTR have recognized and followed their own and each other's prior decisions.[45]

The internationalized tribunals in Kosovo and East Timor followed a different pattern. The tribunals in Kosovo were required to "observe internationally recognized human rights standards, as reflected in particular in [the Universal Declaration of Human Rights (UDHR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols, and the International Covenant on Civil and Political Rights (ICCPR) and its Protocols]."[46] The UN Transitional Administrator for East Timor placed a similar provision in the law of East Timor. That provision incorporated the provisions of the UDHR and the ICCPR.[47] Here, the relevant treaty and resolutions were incorporated directly into the law of administered Kosovo and East Timor.

The power which had previously controlled East Timor, Indonesia, was not a party to the ICCPR at the time the UN administration began; nor was the former colonial power in East Timor, Portugal, a party to the ICCPR until after it lost actual

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41 See *ICC Statute*, arts. 11, 22-24 (non-retroactivity), 55, 67 (criminal procedure rights of suspects and accused persons).

42 *ICC Statute*, art. 103(3).

43 *ICTY Statute*, art. 21; *ICTR Statute*, art. 20.

44 See part II above.

45 See e.g., *Prosecutor v. Kayishema*, Judgement (Reasons), Case No. 95-1-A, para. 161 & n.241 (ICTR App. Ch., 1 June 2001), relying on *Prosecutor v. Tadic*, Appeals Judgment, para. 269, Case No. IT-94-1-A (ICTY App. Ch. 15 July 1999); *Prosecutor v. Aleksovski*, Appeals Judgment para. 107-09 (stating general rule of following its own prior practice absent "cogent reasons in the interests of justice"). See also L. Zegfeld, "The Bouterse Case" (2001) 32 Netherlands Y.B.I.L. 97, 99-100; Gallant at 349.

46 UN Interim Administration Mission in Kosovo *UNMIK Regulation No*. 2000/59, UN Doc. UNMIK/REG/2000/59, Amending UNMIK Regulation No. 1999/24 [10 June 1999] On the Law Applicable in Kosovo, sec. 1.3 (27 October 2000).

47 *UNTAET Regulation No*. 1999/1, UN Doc. UNTAET/REG/1999/1, On the Authority of the Transitional Administrator in East Timor, sec. 2 (27 November 1999).

control over the territory.[48] In Kosovo, the situation was more confused due to the historical legacy of the collapse of the former Yugoslavia and state succession. Nonetheless, these examples suggest that the UDHR and ICCPR (and perhaps the regional human rights treaties within the appropriate region) are useful guides to customary international human rights law; or at very least this is an instance of practice of an international organization determining that the human rights embodied in these documents need to be granted to persons in an administered territory.

Here we see three different models. In the ICC, we have a general adoption of human rights law, along with specific procedural protections, both through the organic document of the Court. In the ICTY and ICTR, we have an adoption of procedural standards, with the Court accepting as part of its practice other human rights standards which appear to be customary international human rights law. Finally, there is the adoption into the law of tribunals (in these cases, internationalized administration of territory) of the UDHR and treaty rights, whether or not these treaties were adopted by the relevant sovereigns.

This practice points to an eventual consolidation of a rule which would protect accused persons and suspects rights to the extent of rights in international human rights law. What points in this direction is the practice of the ICTY and the ICTR, the general endorsement of human rights in the ICC Statute, the use of the UDHR and ICCPR in the administration of Kosovo and East Timor, and the use of the ECHR in the administration of Kosovo.

If customary international human rights law is to be observed by international and internationalized courts and tribunals, then all evidence which goes to the creation of custom should be relevant to the existence of rights claimed by the defense. As mentioned above, this would include practice and *opinio juris* of states and international organizations, including the judgments of international courts and tribunals; treaties to the extent they contribute to the formation of custom; resolutions of international organizations and other bodies to the extent that they contribute to custom; and even (as a subsidiary source) the writings of scholars to the extent that they describe and encapsulate customary international law.[49]

For the purposes of this article, one caveat is in order: the above may work in practice, but may or may not fully support my theory about the growth of the international legal personality of individuals. This is because the "object" theory of the individual in international law is consistent with the granting of specific rights to individuals by international organizations in the organic documents of international criminal courts and tribunals.[50] Naming of these rights in these organic documents is indeed consistent with the growth of the international legal personality of individuals.

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[48] Table of ICCPR signatures, ratifications and accessions at UN Office of the High Commissioner for Human Rights website, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (Portugal ratified the ICCPR on 15 June 1978; Indonesia acceded on 23 February 2006). Indeed, the ICCPR did not enter into force until 23 March 1976, some months after Portugal lost control of East Timor and Indonesia invaded it near the end of 1975.

[49] Cf. *Statute of the International Court of Justice*, art. 38.

[50] See discussion throughout part II above.

However, only those examples of defense rights which are not explicitly contained in these organic documents that unambiguously point to this growth in customary international law.

IV. Individual Actions in the Field and Cutomary International Criminal Law

We need to be clear what the material above does not show: it does not yet show that the non-juridical (i.e., out of court) acts of private individuals and other private (i.e., non-state, non-international organization) actors go to the creation of customary international criminal law. Even if there were more thorough research done in this area, it would in all likelihood demonstrate that such acts do not currently go to the creation of customary international law.

The International Committee of the Red Cross, in its recent massive study of customary international humanitarian law[51] is agnostic on whether or not 'practice' goes to the creation and evolution of customary international humanitarian law. As the ICRC points out:

> The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements does not constitute state practice as such. While such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear.[52]

For instance, the ICRC study states, as a rule of customary international humanitarian law in both international and non-international conflicts,

> The convictions and religious practices of civilians and persons *hors de combat* must be respected.[53]

Two of the examples of non-state practice that it lists concerning this norm follow. The first supports the norm:

> In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "captured combatants and civilians under the authority of the adverse party are entitled to respect for their ... convictions."[54]

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51 Jean-Marie Henckaerts & Louise Doswald-Beck, eds., Customary International Humanitarian (Cambridge Univ. Press: Cambridge, 2005) (study for the International Committee of the Red Cross) ["ICRC, Customary IHL"].

52 1 ICRC, Customary IHL xxxvi (Introduction).

53 1 ICRC, Customary IHL 375 (Rule 104).

54 2 ICRC, Customary IHL 2525, para. 3900 (a footnote noted the source was an "ICRC archive document," but did not name the opposition group).

The second does not:

> In 1986, an armed opposition group was said to release or execute captured combatants according to their willingness to convert to Islam and their behavior in detention. If no solution was found to their case after two years of detention, the prisoners would have been executed.[55]

In other cases, the ICRC Report generally cites examples of acts by non-state armed groups which support the existence and development of norms of international humanitarian law. These include agreement of groups, both named and unnamed, to abjure torture and terrorizing the civilian population, and to allow members of a non-state armed group to disobey illegal orders.[56] Occasionally, it cites contrary examples. One of these is a declaration—by the same group that allowed for disobedience of illegal orders—that anyone who advocates "oppress[ive]" ideas or philosophies are targets, regardless of where in the world those ideas are expressed.[57]

Both the good and the bad comes with any change in the tradition to admit the private acts of non-state actors as part of the practice counting as customary international law. Here are some examples of questions that might arise: Does the decision of leaders of a non-state military force to recognize and accept the duty to act in accordance with the Geneva Conventions and Additional Protocol II count as an instance of practice that the rules of those documents are customary international law in non-international conflicts? Does the statement by such leaders that they are bound by international law to do so count as *opinio juris*? One's instinct here might be to wish that the answer were yes.

However, we must be careful what we wish for, because what we wish for always has unintended, or at least un-hoped for, consequences. For example, how could the answer to the above questions be 'yes', while still answering 'no' to the following questions? Do the acts of leaders of a non-state group and a suicide bomber who attack a civilian market count as an instance of practice suggesting that attacks targeted at civilians are not war crimes? Does the act of a civilian moving residence

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[55] 2 ICRC, Customary IHL 2525, para. 3901 (a footnote noted the source was an "ICRC archive document," but did not name the opposition group).

[56] For examples of armed non-state actors accepting obligations under international humanitarian law and international criminal law reported by the ICRC as examples of practice, see e.g., 2 ICRC, Customary IHL 64-65, paras. 466-67 (two armed groups accepting IHL and the principle of distinction generally); 2 ICRC, Customary IHL 77, para. 564 (armed group accepting IHL and obligation not to terrorize population); 2 ICRC, Customary IHL 3790, para. 719 (armed opposition group undertaking not to torture, and stating that commanders responsible for torture had been sanctioned); 2 ICRC, Customary IHL 3184 para. 853 (Sudan People's Liberation Movement Human Rights Charter allows for disobedience of unlawful orders).

[57] A Sudan People's Liberation Movement's Penal and Disciplinary Law declares those who "propagate or advocate ideas, ideologies or philosophies... inside the country or abroad, that tend to uphold or perpetuate the oppression of the people..." to be "enemies of the people and therefore target[s]…" 2 ICRC, Customary IHL 126-27, para. 864.

from the territory of a state, at the urging of a non-state entity of which the civilian is a member, into territory occupied by that state count as an instance of practice suggesting that the movement of civilian populations into occupied territory is not a violation of international law?

When we assert the customary international lawmaking power on behalf of individual persons around the word, to which of us do we give the authority?