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# TRIBUNAL DISCOURSE AND INTERCOURSE: HOW THE INTERNATIONAL COURTS SPEAK TO ONE ANOTHER

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**Abstract:** This Article analyzes the development of a common law for international tribunals through the interpretation of applicable treaties and the interpretation of customary law—a decidedly difficult and amorphous process. The author notes there has been significant development in the common law of the tribunals, but that there is still a long way to go, especially on the issue of when a court should simply interpret or apply existing law and when it should “legislate” or create new law. The Article also examines the less formal rules and practices beyond formal judgments, the “soft” law and practices, which are indispensable to the continued existence of international tribunals. This Article suggests “soft” law and practices may turn out to be more influential in the overall record of these courts than the jurisprudence.

## I. THOUGHTS ON THE RELATIONSHIP BETWEEN COMMON LAW AND CUSTOMARY LAW

First, I want to clarify the relationship between what we think of as common law and the customary law norms that restrain international criminal courts in varying degrees. In our Anglo-Saxon legal tradition, common law develops from the accretion of court decisions dealing with similar problems, and through a process of refining, expanding, and distinguishing among those situations, principles of law emerge. Sometimes these principles are codified into statutory law, but often they are not. In the criminal law area, common law has

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mostly given way to statutory law, in great part because of the notion that a person has a right to know what is legal and what is not when she commits an act, and this is best done by writing it down specifically in the statute books. This transition also grew from the notion that the legislative branch ought to be involved in defining what constitutes a crime.

The concept of binding precedent, or *stare decisis*, plays an important role in common law regimes. Successive courts look to their own prior decisions and the decisions of courts higher in the judicial hierarchy and, unless distinguishable, follow them. Higher courts overturn their own prior rulings only after extra careful deliberation, usually on the ground that intervening events or unintended consequences have shown the earlier decisions to be misbegotten.

On the other hand, international courts and “hybrid” courts—defined here as courts combining national and international judges, prosecutors, and law—gain their legitimacy by proclaiming that they are bound in their rulings by international law. For the criminal courts established thus far that means international humanitarian law (the law of war) that is found mainly in treaties, such as the Hague and Geneva Conventions and Protocols, but even more critically for the tribunals, in “customary law,” those practices that states accept as obligatory in their relationships with other states and, in some cases, with their own citizens.

All international courts explicitly endorse the principle of *nullum crimen sine lege* (no crime unless the law says so). In some instances that means finding the source of the prohibition in customary law when the parties are not citizens of states which have ratified the relevant treaties, or when the tribunal charters themselves were enacted after the allegedly criminal acts took place. Thus, Kofi Annan announced, at the time of the adoption of the International Criminal Tribunal for the former Yugoslavia (ICTY), 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.”<sup>1</sup>

The constraints of customary law are less rigid on some of the other tribunals. The International Criminal Tribunal for Rwanda (ICTR) deals with crimes emanating from a civil war and the applica-

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<sup>1</sup> The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 34, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993).

tion of the entire body of international humanitarian law to internal conflicts is less comprehensive, and, in some cases, still uncertain. Hybrid courts are allowed, in many instances by their charters, to resort to national as well as international law, which provides potential elbow room in close cases. The embryonic International Criminal Court (ICC) is the offspring of the Rome Treaty, and its judges will place the greatest emphasis on interpreting their own statute and its elaborate allied document that lists the Elements of the Crimes within its jurisdiction. Additionally, the ICC only has jurisdiction over crimes committed after it came into being in July 2002, so few questions are likely to arise as to whether the statutory provisions can be applied retroactively. Article 21 of the Rome Statute sets up its own hierarchy of interpretive sources: its Statute, Elements, and Rules lead the list; followed by treaties and principles or rules of international law; general principles of law derived from national systems, if not inconsistent with the statute or international principles; and finally its own prior decisions.

The hunt for customary law is not always easy for international courts: it is uncodified, though a recent exercise by the International Committee of the Red Cross (ICRC) has made a valiant effort to compile state practices on major issues of international humanitarian law and even to derive black letter guiding principles.<sup>2</sup> But judges may and do differ on when the behavior of a majority of “civilized” states demonstrates that a particular norm qualifies as customary law. As Theodor Meron, the former President of the ICTY, points out in a recent article, international courts have not had the time or resources to conduct searching inquiries into state practices, and have mostly accepted the “distillation” of those practices contained in other courts’ decisions or in conventions—secondary sources—as their basis.<sup>3</sup> Critics of international law as a controlling factor in U.S. policies—and there are many—scoff that customary law—amorphous and inaccessible as it is—is no “law” at all.

Yet the requirement that a dispositive principle or interpretation underlying a ruling of the court must be based on customary law has permeated the jurisprudence of the ICTY and certainly imposed genuine restraints on how its law has developed. Time permits only mention of a few examples, but Theodor Meron’s insightful article

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<sup>2</sup> See generally CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

<sup>3</sup> See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 819 (2005). I am indebted to Judge Meron for many of the examples and his provocative insights in this portion of my essay.

provides many others. Among the crucial issues in which the identification of customary law, or its absence, has been controlling or important are: the nexus between crimes against humanity and armed conflict (the ICTY's charter requires the nexus; no other tribunal does); the need for discriminatory intent as an element of all crimes against humanity, not just persecution; the requirement that crimes against humanity be committed pursuant to a specific plan or policy; the requirement that torture be committed by a state-affiliated perpetrator; the requirement that genocide involve the intent to physically or biologically destroy the protected group, not just eradicate its culture; and that duress is a defense to killing innocent civilians, not just a mitigating factor in punishment.

There have, however, been times when the judges did not agree on whether the lack of customary law on a specific point should ban a ruling they believed was justified by the "objective and purpose" of agreed-upon principles of customary law. Judge Shahabudeen explained his view that if the "very essence" of an offense had been condemned in customary law, that was enough to permit the court to expand its application to situations not covered in prior customary law, if the current applications were reasonably foreseeable and furthered the basic principles of the customary law provision.<sup>4</sup> Otherwise, the tribunals would be prevented from contributing to the progressive development of the law, even if that development results in criminalizing new conduct. Other judges, including Theodor Meron, worry that such an "approach . . . would affirmatively engage the criminal tribunal in the *development* of customary law, rather than simply in its application" and so violate the legality principle of *nullum crimen*.<sup>5</sup>

The crux of the dispute—when in the process of deciding if an accused has committed a violation of international humanitarian law and when customary law validation is required—basically involves the same issue American legal scholars and politicians are continually fighting about: when does a court simply interpret or apply existing law and when does it "legislate" or create new law? The ICTY has not developed, anymore than we have at home, a clear formula for drawing that line. Meron, for example, admits that established norms of customary law must often be applied to situations which the original consensus principles may not have contemplated, but cautions that the court, in making such applications, must be "very certain" of what

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<sup>4</sup> *Id.* at 826.

<sup>5</sup> *Id.* at 825–27.

the basic principles require.<sup>6</sup> On the other hand, these tribunals are now the chief interpreters of customary law and customary law itself grows and evolves through its capacity to embrace new dilemmas and situations. Too static a judicial mode of interpretation can positively contribute to the stratification of the customary law as well. It is fair to say that the international tribunals have not satisfactorily resolved this tension.

Two examples illustrate this tension. In one case, the court agreed that command responsibility—the concept that a superior officer is responsible for the crimes of his subordinates if he knew or should have known of their commission or if he did not seek their punishment afterward—was an accepted principle in customary law. But the ICTY judges split as to whether command responsibility covered a situation where the officer had not yet taken command but was about to do so within hours.<sup>7</sup>

The second example involves deportation, which all tribunal charters since Nuremberg have listed as a crime against humanity if part of a systematic, widespread campaign against civilians. Deportation has historically been defined to mean expelling persons from a state. In many current internal conflicts, however, one side may forcibly transfer civilians from one part of a country to another, not across national boundaries. The harm and disruption to the victim obviously is similar, if not identical, to inter-state transfers. The issue of whether forcible transfers inside a country could be covered in a prosecution for deportation under a more liberal interpretation of that term arose in several ICTY proceedings. The court's answer was no: forcible transfer might itself be a customary law violation (it is specifically banned in the Rome Statute), but there was no basis in customary law for reading it into the ban against deportation.<sup>8</sup> One judge has opined that the objective and purpose of the two are the same and inclusion of forcible transfer into the crime of deportation was a logical extension mandated by the new forms of old violations the perpetrators had committed.<sup>9</sup> His remains a solitary voice.

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<sup>6</sup> *Id.* at 825.

<sup>7</sup> *See* Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 51–56 (July 16, 2003).

<sup>8</sup> Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 521 (Aug. 2, 2001).

<sup>9</sup> Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg, ¶¶ 13–16 (Sept. 17, 2003).

The U.N.-affiliated international courts, especially the ICTY, have felt constrained from developing the law of war in what we know as a typically common law fashion. Ephemeral as the concept of customary law seems to many, it has acted as a brake—some think too much so—to these courts. This may not prove equally true for the ICC, which will be working with a far more detailed statute.

## II. THE SOFT LAW OF THE TRIBUNAL

Since I am at heart a legal realist, I was interested during my tenure at the ICTY not just to learn about the law ensconced in the formal judgments of the court, but about the myriad of less formal rules and practices which frequently have just as much or more impact on the final outcomes of cases. Some of this “below the radar” law is formalized in the Tribunal’s Rules of Procedure and Evidence, which at the ICTY is determined by the judges in plenary session. By contrast, at the ICC the Assembly of State Parties (the Rome Statute ratifiers) must approve the Rules. Vital parts of the court’s operational practice are also developed in its non-judicial units, such as the Victim and Witness’ Unit, which safeguards crucial witnesses whose safety is at risk. Both sources of “soft” law and practice have been indispensable to the survival of the ICTY and ICTR, and have been intensively mined by more recently established courts for “best practices” replication. Prosecutorial norms and guidelines may turn out to be even more influential in the overall record of these courts than the jurisprudence. The prosecutors in these courts have enormous discretion on whom to charge, with what, and when; in recent years, it was the Office of the Prosecutor, for instance, that introduced a negotiated guilty plea regime into the ICTY. As far as transfer of these Rules and practices from one court to another, the criteria is fundamentally pragmatic—a question of whether the criteria has worked, rather than whether its roots can be found in customary law. This less visible facet of court operations is entirely familiar to students of our national courts and is, in my view, embedded in all courts’ DNA.

### A. *The Tribunal’s Rules*

First, let’s talk about the preeminent role of the Tribunal’s Rules; their content, candidly, often cannot be easily distinguished from the substantive law found in judicial opinions, especially when, as with the ICTY, the judges are the authors of both. The U.N.-affiliated courts are required by charter to conform to basic principles of the International Compact on Civil and Political Rights (ICCPR), itself accepted

as customary law, including: notice to the accused of the charges; defense counsel, appointed if necessary (well over ninety percent of ICTY defendants get appointed counsel); access by the accused to the evidence against them; public trial; the right to mount a defense; and protection from self-incrimination. Of course, no Compact or Charter can cover all the issues that arise in year-long trials, and the Rules at the ICTY have served as a vehicle for filling the gaps. The Rules have been amended dozens of times in their fifteen-year history. The recent rules on guilty pleas and prosecutors' recommendations for reduced sentences are an example. Virtually all of the extensive practices of pretrial discovery and pretrial status conferences, as well as the treatment of detainees and convicted prisoners, were brought into being through Rule additions.

Perhaps the most prominent area of Tribunal law dominated by Rule changes involves the gradual substitution of written evidence for live testimony, especially as it pertains to witness statements. This is with no doubt a critical issue in many proceedings because witnesses can seldom be forced to come to the Tribunal; it has no police force to enforce its summonses. Many, if not most, witnesses would prefer to stay home and have their out-of-court statements read into the record. In the beginning, the Tribunal Rules expressed an explicit preference for live testimony even though Rule 89 did not bar hearsay, but rather allowed "any relevant evidence [the court] deems to have probative value."<sup>10</sup> Depositions were also permitted under special circumstances. The Appeals Chamber initially interpreted the Rules to require specific indicia of reliability for admission of written witness statements, which were to be the exception, not the rule. Under the press of backlogs and pressure for more expeditious trials, in 2001 the court amended its Rules to allow written evidence to prove background, historical, or peripheral facts so long as the written statements did not purport to concern the role or conduct of the accused as to the charges being tried. Transcripts of testimony in prior proceedings could also be introduced subject to demands for cross-examination if a new line of questioning was justified. Perhaps most revealing, the original preference for live testimony was

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<sup>10</sup> ICTY Rules of Procedure and Evidence, Rule 89(C), U.N. Doc. IT/32/Rev. 38 (2006), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>; see JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 298–302 (1998) (noting interpretations of Rule 89).

dropped altogether.<sup>11</sup> Still restive, the prosecution and some judges would be hospitable to more inroads through the Rules for written testimony in lieu of live witnesses. If there are future changes, it will as likely be through Rule changes as through judicial opinions.

A special Rule on Gender Crimes, Rule 96 in the ICTY Rules, has been picked up by all the other Tribunals, relatively unchanged, and is another example of Rule-based law which might not meet strict customary law standards.<sup>12</sup> The Rule was pushed strongly by international women's groups and sets out liberal standards for doing away with the corroboration requirements of gender crimes and tightly cabins any consent defense to such crimes.

A third area in which the Rules have been amended and have substantively affected the law is pretrial release. Nothing is said about pretrial release in the ICTY Statute and the original Rule contained a strong presumption against pretrial release, authorizing it only in "exceptional circumstances." Only a few defendants were released in the first several years and then only for humanitarian reasons. As the number of detainees grew and the length of their detentions raised concerns about violation of human rights, the Rules were amended to delete the "exceptional" requirement. The granting of pretrial and even pre-appeal release has grown perceptibly, now encompassing dozens of defendants, including those of the highest rank.

Apart from Rules-based tribunal "common law," there are other areas where judges do not feel bound by customary law and in which they more freely act with discretion. Sentencing comes most quickly to mind. The ICTY and ICTR Statutes and Rules give scant direction to sentencing; the ICTY Charter rules out capital punishment (as do all U.N.-related courts), but authorizes sentences ranging from one day to life. The court, in its Charter, was told to "take account" of sentencing in the former Yugoslavia, but was obviously not bound by that admonition; otherwise, it was told to consider the gravity of the crime and mitigating and aggravating factors, but such factors were not listed anywhere. Early on, the Tribunal rejected the notion of any sentencing tariff based on a hierarchy of the four basic crimes (genocide, aggression, war crimes, and crimes against humanity).

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<sup>11</sup> See Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L. J. 535, 545-48 (2001).

<sup>12</sup> See KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 303-05 (1997) (discussing origins of Rule 96).

I regret to say that—even with the considerable leeway given—the ICTY has not yet arrived at a discernible common law of sentencing any more than pre-Sentencing Guidelines U.S. courts did. Victim groups generally complain the sentences are too low; they are unhappy, too, with the even lower sentences resulting from guilty pleas when the perpetrator provides information or testimony against other indictees. Only a few life sentences have been given and some surmise that until the two most prominent fugitives, Ratko Mladic and Radovan Karadzic, have been captured, judges fear to dilute the currency of their highest penalty. There has been confusion, too, on the court and off, over the application of cumulative sentencing—how many cumulative sentences can be given when convictions on several different counts arise from the same acts? The Appeals Chamber itself often revises sentences of the trial court up or down, not always on clear-cut criteria. Life sentences are more common in the ICTR, perhaps because the Rwandan courts, where thousands of war crime perpetrators have been, or will be, tried, retain the death penalty, and that gap in punishment potential has provoked local criticism of the international court as too soft on the genocidieres.

In short, no principled common law of sentencing has emerged from the Tribunals, and it is interesting that the ICC has chosen to incorporate in its Charter and Rules greater guidance on sentencing criteria—listing mitigating and aggravating circumstances (drawing on ICTY and ICTR opinions for the list) and setting up a dividing line between sentences of up to thirty years and life sentences. Special procedures are required for the latter, which must be specifically justified by the gravity and circumstances of the crime.

### III. THE PATHWAYS OF TRIBUNAL “COMMON LAW”

There can be little doubt that even within the constraints of customary law adherence, tribunal law has exploded quantitatively and qualitatively. The pathways for its development and refinement across court boundaries are not, however, the same as in national court systems. International courts are not part of a hierarchical judicial system where higher courts can supervise and, if needed, overturn lower courts; neither is there a popularly elected legislature to codify or prospectively change rulings made by the courts. It is true international and hybrid courts have Appeals Chambers which can revise or reverse trial court holdings, but one court has no say over another’s jurisprudence. Recurrent suggestions that the International Court of Justice (ICJ) be given a final say over other U.N.-affiliated courts have been

rejected and the various courts do, on occasion, differ and flatly contradict one another.

Most scholars are sanguine about the “let a thousand flowers bloom” status of international criminal jurisprudence, though some have offered sensible suggestions about voluntary comity guidelines to minimize the contradictions. Hybrid courts, which administer both international and domestic law, may be pulled in the direction of harmonizing the two, though it is interesting that the Iraqi Special Tribunal was specifically instructed in its enabling law to consult international court interpretations of the basic international crimes.<sup>13</sup>

In sum, one court’s jurisprudence must rely on the persuasiveness of its reasoning, supplemented by the critiques of academics and international law scholars, if it is to be picked up by other courts. As another route to convergence, there are out-of-court exchanges in person and on paper between judges and practitioners in different tribunals, as well as common training for the prosecutors and defense counsel to insure that they know other courts’ jurisprudence and have an opportunity to probe its attractions or deficiencies.

One circumstance militating toward coherence of doctrine is the fact that the authorizing laws of all international and hybrid courts define the same four basic genres of international crimes in basically the same way. There are minor differences, but in general the similar definitions provide an umbrella framework for interpretations that do not allow for radical departures. No new genres of international humanitarian violations have been articulated—war crimes, crimes against humanity, grave breaches of the Geneva Convention, and genocide are “it.” Thus, rulings of one court are bound to be relevant to others. This is not to say that under the genre definitions there have not been new additions of the kind of actions that qualify for inclusion in the master headings: disappearances and apartheid have been added to the list of crimes against humanity; and rape has been explicitly listed as a war crime and crime against humanity. Sexual slavery, forced sterilization, and forced prostitution were first prosecuted under the rubric “other inhumane acts,” but were later added to the formal list of war crimes in the Rome Statute. On the other hand, the definition of genocide, despite its difficulties in application to new forms of mass murders in the Balkans and in Darfur, has remained virtually untouched for fear that the Genocide Convention’s half-century struggle for ratification might

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<sup>13</sup> Only recently, however, has the process of translating the decisions into Arabic been undertaken.

be undone if the amendment process required it be gone through again.

There is also ample evidence that some of the Tribunal jurisprudence has been rejected by the drafters of the Rome Statute and its Elements and Rules. For example, contrary to ICTY rulings which held that genocide can be committed by a single individual and does not require a state plan or policy, the Rome Element of Crime insists that there must be proof in a prosecution for genocide that the conduct took place in the context of a manifest pattern of similar conduct directed against the protected group, or that the conduct involved could by itself affect the destruction of the group. As aforementioned, the ICC has chosen to spell out in far greater detail criteria and procedures for sentencing rather than depend almost entirely on judges' discretion.

On the heated issue of duress as a defense to a war crime or crime against humanity, the ICC-written law has chosen to follow the dissent of ICTY President Antonio Cassesse rather than the ICTY majority in supporting such a defense. This example, incidentally, reinforces for me the value of dissent in a rapidly moving international jurisprudence. Originally, some scholars thought dissents should not be allowed in order to preserve the cloak of unity. Time has, I believe, shown that in international courts, as well as national ones, dissent is especially vital and particularly useful when precedent does not rule out choices for later courts, and yet there may be few, if any, rulings in different courts for newly-constituted courts to choose from.

My main point is that so far Tribunal "common law" has developed horizontally across courts by persuasion and vertically by culmination in the ICC's written law. The ICC drafters have cherry-picked what seemed to them the best rulings and practices from the earlier courts and discarded those that did not meet their standard. It is interesting that this pathway is not dissimilar from the gradual transformative journey of the common law into statutory law in our own country. So far, the ICC law is much more extensively written down (see, for example, the long list of specific rules on admissibility of particular kinds of evidence) and though the judges will certainly add to the body of law once their cases start going, their rulings may be more focused on interpreting the written law than on finding customary law to justify their rulings.

Given the pathway from early courts to later ones, and the numerous examples of how the ICTY and ICTR have provided experience and choices for the ICC, it has to be a cause for concern that all of the earlier international courts, and most of the hybrid courts, are

scheduled to go out of business within a few years. New ones may arise but are apt to be of limited duration. National courts may pick up some of the slack, but can be expected to show sharper variations in jurisprudence reflecting a greater input of local law. Thus, while the ICC will be the flagship of international humanitarian law, it is less clear where the grist for its mill will come from—the percolation process may have largely dried up. In this respect, a monopoly jurisprudence is perhaps more to be feared than the more familiar spectre of too many voices at odds with one another. Some competition may be a good thing for international, as well as national, tribunals.

The demise of the early courts will produce many problems. Logistically there is the problem of what to do with their records so that future courts can access them to evaluate the value of their judgments. There is also a scholarly task of sorting their good work from the less good. These courts have produced remarkable feats of creative and sensitive judging, but in some cases, the jurisprudence has been uneven; not all the judges have had judicial or practitioner backgrounds, and some of the judges have not recognized the legitimate limits of even customary law. Unlike national courts, the early international courts will not be given the time to mature their jurisprudence, to correct midstream mistakes, and to arrive at seasoned rationales. Someone else may have to do that job for them.

The importance of the development of international law by international courts will and should continue. Many national courts increasingly cite to international court law in their own work and as the ICC works into a full schedule of cases, the complimentary doctrine will require that states which want to do their own investigations and prosecutions in order to defeat ICC jurisdiction be able and willing to draft national laws dealing with international crimes. An increase in national prosecutions—universal jurisdiction may also account for additional cases—will likely involve looking at the international court cases for guidance and a safe harbor. The ICC—without U.S. participation, I note—may have to bear this burden of advancing international humanitarian law in the courts alone.

#### IV. CONCLUDING THOUGHTS

Over the past fifteen years, a group of international and hybrid courts have produced an impressive body of international humanitarian law, as well as the first concerted attempt at applying it to a myriad of fact situations since Nuremberg. Although the ICTY, the ICTR, and the Sierra Leone courts have flown the flag of customary law, many

new doctrines have grown up and many new fact situations have been accommodated under old labels and rubrics. The Tribunals' Rules and operational practices have supplied additional opportunities to improvise and experiment. The Tribunals have looked to each other's work and the new ICC has adopted in written form what its drafters considered the best rulings and practices of the earlier courts.

When these courts die, the ICC will lose an important source upon which to draw for substantive and procedural guidance. It is probably not a good thing for international law to have a monopoly court. Academics and court watchers will have to be especially vigilant and productive in their critique of ICC work product to help that court fulfill its paramount function.