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INTERNATIONAL CRIMINAL COURT AND TRIBUNALS

The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice

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Abstract

Having identified the differences between the concept of legality and the much more complex concept of legitimacy, the author scrutinizes the legality and the legitimacy of the existing international criminal tribunals. Their legality has been put in doubt only concerning the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Tribunal for Lebanon (STL), but the criticisms have been or could be overcome. Assessing the legitimacy of these tribunals is instead a more difficult task. In fact, misgivings have been voiced essentially concerning the legitimacy of the ICTY and the STL, but not the International Criminal Court (ICC) and the other international criminal courts. The legitimacy of the STL in particular deserves to be discussed: even assuming that the STL initially lacked some forms of legitimacy, it could achieve it – or confirm it – through its 'performance legitimacy'. The author then suggests what the realistic prospects for international criminal justice are. Convinced as he is that it is destined to flourish even more, he tries to identify the paths it is likely to take in future years.

Key words

international criminal justice; international criminal tribunals; legality; legitimacy

I propose to discuss two main issues: the legitimacy of international criminal courts and tribunals, and the prospects of international criminal justice.

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1. Legality and legitimacy of international penal courts

1.1. The differences between legality and legitimacy

Broadly speaking, most political scientists, philosophers, and other scholars[1] agree that one should distinguish between the *legality* and the *legitimacy* of a body politic or a domestic or international institution.

By 'legality', one means the conformity or nonconformity of a body politic, or a national or international mechanism, with the legal rules that regulate its establishment.

The notion of 'legitimacy', on the other hand, encompasses many things. First is the moral and psychological acceptance of a body (or, more broadly, of a political system or an authority) by its constituency. A body politic or a domestic or international institution is considered legitimate when the majority of the population, or the majority of the institution's constituency, expresses a high degree of *consent and approval for it*. If this condition is fulfilled, the body politic or the institution may obtain respect for, and compliance with, its commands without resort to force, except in limited circumstances. We could term this category of legitimacy 'consent legitimacy'.

In addition, a state, an authority, or an institution may be regarded as legitimate when the majority of its constituency believes that it is grounded on values, principles, and goals that reflect those of that majority. This set of values, principles, and goals are the institution's 'legitimating grounds'. The fact that a domestic or international body or institution pursues general goals that are broadly shared and approved by the institution's constituency may be termed 'purposive legitimacy'.[2] This category of legitimacy does not necessarily coincide with 'consent legitimacy', because consent or approval may be based on grounds other than the sharing of common goals (e.g., on the need to exceptionally react to a certain situation in an emergency).

There can be also another class of legitimacy, which we can term 'universal values legitimacy'. It is based on consistency of the body politic or institution with values that, whether or not shared by the body politic or institution's constituency, are based on the values common to *the whole community* within which the institution lives and operates. For instance, in the international community, we can say that an institution enjoys such legitimacy when it is grounded on, or at least is not contrary to, peremptory norms of international law (*jus cogens*) or, more generally, is based on those 'principles of justice as fairness' to which Rawls drew attention.

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1 It may suffice to recall J. Locke, *The Second Treatise of Civil Government* (1690), Chapters VI–IX, XV; M. Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (1922); see also, in English, S. N. Eisenstadt (ed.), *On Charisma and Institution Building* (1994); C. Schmitt, *Legalität und Legitimität* (1932) (English translation: *Legality and Legitimacy* (2004)); R. Dahl, *Democracy and Its Critics* (1989); D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997); T. Franck, *The Power of Legitimacy among Nations* (1990).

2 On these notions, see, among others, B. Cronin and I. Hurd (eds.), *The UN Security Council and the Politics of International Authority* (2008), particularly the paper by W. Sandholtz, 'Creating Authority by the Council: The International Criminal Tribunals', 131–53.

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However, other factors can also be used to appraise the legitimacy of an institution once it has been set up: its *answerability* to a founding authority; the *transparency* of its decision-making, such as through public reporting on its goals, its appointment of organs of the institution, and so on; and its *accountability to the institution's constituency*. This category of legitimacy may be called 'performance legitimacy'.

Let us now return to the difference between the two notions under discussion. In broad strokes, the difference between legality and legitimacy has been spelled out by two authors, Vesselin Popovski and Nicholas Turner, as follows:

> The legality of an action or policy is assessed by reference to legal texts, case law, and precedents. Challenges and appeals may be raised as part of the adjudicative process, but there is a clear and final view either in favour or against. An action is always either legal or illegal; it cannot be partly legal. In contrast, legitimacy is fluid and changing – it depends on perceptions and outcomes. As a subjective interpretation of what is desirable and appropriate, legitimacy can be maintained by a constant effort to ensure conformity with the normative expectations of the affected constituents. Legitimate decisions are based in democratic participation whereby affected persons have the opportunity to raise their voices. When legitimacy is separated from democratic participation, it risks being exposed to ideological and self-concerned manipulation. Legitimacy is a relative measure – it depends upon the perceived acceptability of the rules governing the act, and upon the actor itself. Nuremberg can illustrate this – the law was problematic both in substance and in procedure, and all prosecutors were from victors' states. Nevertheless, the two alternatives – amnesty or extra-judicial execution – would have been even less legitimate.[3]

1.2. The legality of international criminal courts and tribunals

In light of the aforementioned discussion, we are in a position to try to grapple with the tricky question of whether international criminal courts and tribunals are legal as well as legitimate.

Let us first of all consider whether international courts are, or are considered, legal.

No problem has ever been raised with regard to the legality of international tribunals established by virtue of one of the traditional sources of international law, namely *treaty*. To the best of my knowledge, no objection has ever been raised with regard to the legality of the ICC, the Special Court for Sierra Leone (based on an agreement of that country with the United Nations), or the Extraordinary Courts for Cambodia (based on an international agreement). Doubts have been expressed only with respect to the International Criminal Tribunal for the former Yugoslavia (ICTY) because of its establishment by means of a binding Security Council resolution adopted under Chapter VII of the UN Charter, and with regard to the Special Tribunal for Lebanon (STL), on the ground that the entry into force of the Agreement between Lebanon and the United Nations has been authoritatively decided by the Security Council based on Chapter VII of the Charter.

As for the ICTY, it is well known that, in 1995, in *Tadić*, the defence argued that the tribunal was illegal, because, under the UN Charter, the Security Council lacked the

3 'Legality and Legitimacy in International Order', in United Nations University, (2008) 5 *Policy Brief*, 3.

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power to establish international criminal tribunals. It is also common knowledge that, in its Interlocutory Decision of 2 October 1995, the ICTY Appeals Chamber held that the establishment of the international tribunal fell squarely within the powers of the Security Council under Article 41 of the UN Charter and was consequently legal.[4] In addition, faced with the objection that the setting-up of the international tribunal was unlawful as being contrary to the general principle whereby courts must be 'established by law', the Appeals Chamber held that this objection as well was to be dismissed: indeed, the tribunal had 'been established in accordance with the appropriate procedures under the United Nations Charter and provide[d] all the necessary safeguards of a fair trial'.[5]

Doubts have also been voiced with regard to the legality of the establishment of the STL. Some commentators have objected to the legality of SC Resolution 1757 (2007) by which the Security Council, in addition to approving the Agreement between Lebanon and the United Nations containing the Statute of the Tribunal, also decided the date on which the Agreement was to enter into force, regardless of any decision on the matter by the Lebanese Parliament. It has been argued that the resolution was in breach of the Vienna Convention on the Law of Treaties, and therefore unlawful.[6]

Clearly, since this issue may be raised before the STL Chambers, as President of the Tribunal, I cannot express my views on the matter. However, various opinions have been advanced in the legal literature on the issue.[7] Thus, for instance, one commentator has argued that in fact the aforementioned SC resolution established the STL by making the provisions of the agreement negotiated with Lebanon, including the Statute of the Tribunal, an *integral part* of a Chapter VII decision.[8] Thus, according to this scholar, the STL was established by the Security Council not as a treaty-based institution, but as an independent international tribunal under the authority of the United Nations – a tribunal created on the strength of a binding SC resolution taken under Chapter VII.

1.3. The legitimacy of international criminal courts and tribunals

Let us now move to the more difficult problem of the legitimacy of the courts and tribunals at issue.

It is common knowledge that the legitimacy of the International Military Tribunal at Nuremberg (IMT) was challenged. What should be our appraisal today? Gauged

4 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-T, 2 October 1995, paras. 33–36 (hereafter, *Tadić*).

5 *Tadić*, *supra* note 4, para. 47.

6 Misgivings about the conformity of SC Res. 1757 (2007) to the general principles of international law or to the UN Charter were already articulated on 30 May 2007 by some member states of the UN in the Security Council when that resolution was adopted; see, e.g., Indonesia (S/PV.5685, at 3), South Africa (S/PV.5685, at 4), China (S/PV.5685, at 4–5), Russia (S/PV.5685, at 5); see also Peru (S/PV.5685, at 6).

7 See, e.g., G. Serra, 'Special Tribunal for Lebanon: A Commentary on Its Major Legal Aspects', (2008) 4 *Journal of Philosophy of International Law and Global Politics* 1; K. L. Razzouk, 'The Special Tribunal for Lebanon: Implications for International Law', (2008) *The Global Community: Yearbook of International Law and Jurisprudence* 219; M. Odoni, 'Considerations on the Method Used to Establish the Special Tribunal for Lebanon', forthcoming, 1; see also the paper by B. Fassbender, 'Reflections on the International Legality of the Special Tribunal for Lebanon' (2007) 5 JICJ 1091.

8 Fassbender, *supra* note 7, at 1091–1105.

on the basis of the four notions or parameters I referred to above, it can be said that the IMT was based on the consent on the four states that set it up as well as the other 19 states that adhered to the London Agreement.[9] It therefore enjoyed consent legitimacy. It also had 'purposive legitimacy', for those states all shared the goals pursued by the four major powers in concluding the Nuremberg Charter. It can instead be doubted whether the IMT had 'universal values legitimacy'. It is striking that only the vanquished were brought to trial, that no crime committed by the victor was allowed to be tried, and that the prosecutors and judges represented the victors and did not comprise the vanquished or neutral countries. This state of affairs was contrary to the notion of justice as fairness and the consequent principle that equal situations should be treated in an equal manner. The fact that, nevertheless, the judges at Nuremberg acted at the procedural level in consonance with principles of due process shows that the IMT enjoyed 'performance legitimacy'.

Coming to more recent tribunals, it is notable that no one has ever challenged the legitimacy of the International Criminal Court. That there is a broad consent of the states behind its establishment is evidenced by the high number of states participating in the Rome Conference of 1998, namely 120, as well as by the number of states that have subsequently ratified the Rome Statute. Even those states that hitherto have preferred to remain aloof – which include major powers such as the United States, Russia, and China, as well as such important states as India, Indonesia, Pakistan, and most Arab countries – have never challenged the Court's legitimacy, for they, too, in principle are favourable to international accountability mechanisms. They have opted for not subjecting themselves to the Court's jurisdiction based on other reasons, which normally are political or practical in nature.

In contrast, at least initially, doubts were voiced with regard to the legitimacy of the ICTY. These doubts were linked to the striking novelty of the Security Council's using its Chapter VII powers to set up an international criminal tribunal with extensive judicial authority, as well as to the less legal and more political question of a judicial body established by a political organ, with the surrounding suspicion that such a judicial body might be influenced or even interfered with by the parent political organ. These doubts were, however, dispelled by focusing on two circumstances. First, the legitimacy of the tribunal could be inferred from the fact that the General Assembly, the representative body of the United Nations, had implicitly approved the decision of the Security Council in that it had elected the 11 judges sitting on the tribunal. Second, the Security Council had laid down the tribunal's independence from any state or UN organ in its statute and indeed, in its 1995 Interlocutory Decision in *Tadić*, the ICTY Appeals Chamber stated that the tribunal had the power to judicially scrutinize whether the Security Council had acted in conformity with international law when it established the tribunal.[10] In other words, the tribunal, although it had been set up by the Security Council, had the judicial authority to review the legality of its own establishment, with the consequence that, were it to decide that its creation was illegal (namely contrary to the UN Charter or to

9 For a list of such states, see L. Oppenheim and H. Lauterpacht, *International Law*, Vol. 2 (1955), 581, footnote 3.
10 *Tadić*, *supra* note 4, paras. 13–25.

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general principles of international law), it would have to conclude that the tribunal should stop operating ultra vires. By its interlocutory decision in *Tadić*, the tribunal showed that it was so independent of the Security Council as to have the authority to judicially review its political decisions, although only from the viewpoint of their conformity with the UN Charter and general principles of international law.

Strikingly, no strong doubts were advanced with regard to the legitimacy of the International Criminal Tribunal for Rwanda (ICTR). This is probably due to two factors. First, by the time it was established, the international community had already come to accept the previously created criminal tribunal, the ICTY. Second, and more importantly, the establishment of the tribunal for Rwanda had been requested by the Rwandan government itself and this was perhaps considered as an important legitimizing factor (the fact that, eventually, on political grounds, Rwanda voted against the SC resolution instituting the tribunal was regarded as being of minor relevance).

Also with regard to the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia, it would appear that there have not been any doubts as to their legitimacy. This is probably due mainly to the fact that they have all been established on the basis of the consent of the state concerned (respectively Sierra Leone, Timor Leste, and Cambodia). The international community seems to have regarded such consent and the participation of the state concerned in the establishment of those courts as a decisive legitimizing factor.

In contrast, misgivings have been voiced about the *legitimacy* of the establishment of the STL. According to some commentators, the tribunal's legitimacy is blemished by various factors:

1. An *important segment of the Lebanese population and politicians*, joined together under the rubric of the 'March 8 Coalition', and made up of Shiite parties Hezbollah and Amal and the Free Patriotic Movement of the Christian General Michel Aoun, is strongly opposed to the Tribunal, considering its institution as 'illegal and illegitimate'; this Coalition was able to prevent the Lebanese Parliament from approving the Agreement with the United Nations;

2. The *selective nature of the Tribunal* has been highlighted: many atrocities and mass killings – often amounting to war crimes or crimes against humanity – have been perpetrated in Lebanon during the last three decades; however, there has been almost total impunity for such crimes. Indeed, the authorities have preferred a policy of 'amnesia', as evinced by the law of 26 August 1991 granting a general amnesty for crimes perpetrated before 28 March 1991. Within this context, the decision to establish an international tribunal for the prosecution of the persons responsible for the assassination of former prime minister Rafiq Hariri and other connected terrorist attacks has been perceived as politically motivated selectiveness, unmindful of the general exigencies of international justice;

3. The political choice behind the establishment of the Tribunal has generated fears that the Tribunal itself might *become politicized*. In other words, that given its

politically motivated birth, the Tribunal might end up being influenced either by some major powers that pushed for its establishment, or by the Lebanese political majority, collectively designated as the March 14 Coalition (and consisting of the Sunni Future Movement (led by Saad Hariri), Christian parties including the Kataeb and the Lebanese Forces, and the Socialist Progressive Party of Druze leader Walid Jumblatt).[11]

It would thus be open to critics to argue that the STL lacks *consent legitimacy* and *purposive legitimacy*. However, it no doubt is based on *universal values legitimacy*, for it pursues goals (justice, peace, and reconciliation) shared by the whole world community. More specifically, the STL pursues goals (to prosecute serious crimes of terrorism so as to contribute not only to putting a stop to impunity and to alleviating the suffering of the victims, but also to bringing about reconciliation and the establishment of peace and the rule of law) that are consonant with international legal standards prohibiting and penalizing terrorism. Furthermore, they are consistent with the new ethos that currently pervades the world community: to stem gross violations of human rights by bringing to justice those persons who, on political or ideological grounds, seriously jeopardize the life and limb of innocent persons.

As for the so-called 'selective nature' of the tribunal's jurisdiction – that it has been called upon to pronounce only on some of the terrorist crimes recently perpetrated in Lebanon – it is not difficult to respond to such an argument. If the tribunal proves to administer justice in a fair, efficient, and expeditious manner, nothing would prevent the government of Lebanon and the United Nations from expanding its jurisdiction to other terrorist crimes committed in Lebanon. The path to be followed to this effect is already indicated in Article 1 of the Tribunal's Statute, which provides that the UN Security Council and Lebanon may agree to extend the Tribunal's jurisdiction to a 'third category' of terrorist crimes (namely those that are connected to the Hariri assassination and have occurred after 2005). Since the government of Lebanon and the United Nations are legally free to agree upon an expansion of the Tribunal's jurisdiction, they could entrust the Tribunal with the task of pronouncing on other terrorist crimes *unconnected* with the Hariri assassination.

Does the STL also enjoy *performance legitimacy*?

It was suggested by some commentators that the STL could nevertheless establish its legitimacy by various means. First, it was noted that it could ensure *transparency* through an open and fair selection of judges and senior officials, based on experience and competence and not on political affiliation. Second, the tribunal could attract funding from a variety of sources and states, so as to ensure that diverse states of different political or ideological leanings support the tribunal. Third, the tribunal could ensure effective outreach in Lebanon, thereby achieving the eventual approval of large segments of the Lebanese population and institutions.[12]

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11 See A. Lelarge, 'Le Tribunal spécial pour le Liban', (2007) 53 AFDI 397 (emphasis in original); M. Wierda, H. Nassar, and L. Maalouf, 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon', (2007) 5 JICJ 1065.

12 See Wierda, Nassar, and Maalouf, *supra* note 11, at 1075–81.

So far, these requirements have been met. The selection and appointment of the judges were made in an impartial and transparent manner. Candidates were nominated by states or private individuals. The UN Secretary-General, assisted by a Selection Committee consisting of two distinguished international judges (or former judges) and chaired by the UN Legal Counsel, selected those considered the most competent and experienced, regardless of nationality and political or ideological affiliation. The process for the appointment of the Lebanese judges was similarly transparent: upon recommendation by the Lebanese Superior Council for the Judiciary, the UN Selection Committee proposed to the UN Secretary-General those judges who were, in its view, the most competent. Similarly, objective criteria have been applied to the appointment of staff.

In addition, the Tribunal enjoys broad financial support, being financed by a variety of states, which do not belong to the same grouping. The Tribunal has also benefited from broad political and moral support from a wide range of states.

Furthermore, the Tribunal is accountable to the Management Committee, the UN Secretary-General, and the government of Lebanon. In addition to the Annual Report required under the statute, the president, on his own initiative, also submits a Six-Month Report, so as to be answerable on a more frequent basis to the United Nations, the government of Lebanon, and world public opinion.

The Tribunal is also endeavouring to reach out to the Lebanese population and institutions, so as to explain the significance of, and the rationale for, its establishment, its goals (to dispense justice in an absolutely impartial and fair manner, thereby contributing to reconciliation, peace, and full respect for the rule of law), and its modalities. In so doing, the Tribunal intends to be prepared to respond to queries and criticisms coming from Lebanese civil society. In this way, the Tribunal will show that it holds itself accountable to Lebanese public opinion and institutions.

In sum, even assuming that the STL *initially* lacked some forms of legitimacy, it could achieve it – or confirm it – through its 'performance legitimacy' – that is, by showing that it is independent of any state or other authority or political grouping and that it strictly and scrupulously adheres to fundamental principles of international justice, namely fair trials and full respect for the rights of both the accused and the victims. In other words, whatever the political, ideological, or legal reasons for its establishment, the Tribunal's legitimacy would be grounded on its own proper functioning as an impartial, independent, and absolutely fair international court, which dispenses justice in an unimpeachable manner. In sum, the Tribunal is legitimate as long as its polar star is Plato's maxim that 'justice is a thing more precious than many pieces of gold'.[13]

It can thus reasonably be maintained that, to a very large extent, the Tribunal is a legitimate international institution. Of course, one should not be oblivious to possible inconsistencies or, to put it differently, 'chinks' in the armour of the institution; these are normal occurrences in any social compact. Nevertheless, the Tribunal will not need to resort to a distinguished academic able to make everything

13 Plato, *Republic*, I, 136.

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coherent and watertight, by then 'plugging the gaps' of the institution's structure with his 'night cap and night robe's rags' according to the ironic metaphor of a famous poet.[14] It will fall to the Tribunal's organs to ensure its full and enduring legitimacy by attending to their daily task in the most unbiased, fair, and conscientious manner.

2. Prospects of international criminal justice: three possible paths

I will now move to the other issue mentioned above: the current prospect of international criminal justice.

What are the realistic prospects for international criminal justice? Is it bound to gradually wane in the long period, or is it instead destined to flourish even more? If the second alternative is the more plausible, as I believe, what trends in international criminal justice are likely to take shape in the next few years?

In light of current developments, I would suggest that, in the near future, international criminal justice is likely to take *three different paths*.

First, the *ICC is likely to gradually move from its present stand*, where it is still testing the waters and experimenting with its complex procedural rules, to a firm position where it will fulfil its important mission expeditiously and effectively. Its universal potential may be expected to bear fruits, with the consequence that a growing number of states will become parties to the Court's Statute. The ICC will thus come to occupy its right place in the constellation of international judicial bodies, thereby constituting a judicial institution parallel to, and mirroring in its scope, the International Court of Justice, one dealing at the world level with inter-state disputes, the other handling – again at world level – issues relating to individuals' criminality.

However, the ICC rightly intends to be only complementary to the criminal jurisdiction of national courts, stepping in only when such courts prove unable or unwilling to repress international crimes. This is the second path that international justice is likely to take: *the expansion of national jurisdiction over war crimes, crimes against humanity, torture, and genocide*. This expansion is justified on two grounds: first, the courts of the state in which a crime has been committed or of the state to which the alleged perpetrator belongs are those best suited to pass on the crime, for they are in a better position to collect the necessary evidence. Second, while international criminal tribunals for various reasons must concentrate on military and political leaders, namely those most responsible for crimes, national courts can also bring to justice the executioners and other 'secondary' perpetrators, who indeed should be punished no less than those who masterminded or planned or instigated the crimes. Unfortunately, however, on a number of political and practical grounds,

14 See H. Heine's poem *Zu fragmentarisch ist Welt und Leben*, part of the 'Buch der Lieder', in *Die Heimkehr* (1823–24): 'Are our world and life too fragmentary?/I will betake myself to a German Professor./He knows how to set life straight again/He will make an intelligible system out of it;/With his night-caps and night-robe's rags/He will then plug the gaps in the structure of the world' (translation mine). (German original: *Zu fragmentarisch ist Welt und Leben?/Ich will mich zum deutschen Professor begeben./Der weiß das Leben zusammenzusetzen,/und er macht ein verständlich System daraus;/mit seinen Nachtmützen und Schlafrockfetzen/stopft er die Lücken des Weltenbaus*'.)

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courts in many states are loath to exercise territorial jurisdiction or to act upon the active nationality principle, even with respect to such atrocious, organized and large-scale offences as war crimes, crimes against humanity, and other international crimes. As a consequence, the moral imperative – stemming from the human rights doctrine – not to let authors of atrocious crimes go scot-free imposes resort to extraterritorial jurisdiction based on the universality principle. Indeed, exercise of such jurisdiction is bound to increase in importance. I am fully aware that many states, particularly in Africa, claim that the universality principle is being used by Western countries and, in particular, by some European countries, as a subtle and pernicious way of interfering in the sovereignty of those African countries in which the defendants live. African countries also insist on the emergence of a double standard in international criminal justice: in their view, Western countries or other great powers whose state officials engage in war crimes or crimes against humanity in fact eschew any effective prosecution, because those countries have remained outside the ICC and in addition fail to prosecute their own nationals; in contrast, so the argument goes, nationals of African countries are brought to trial or at least accused either by the ICC or by the national courts of some European states. I feel that there is some truth in this double-standard argument, although things are more complex and there is a far from black-or-white approach. Furthermore, a sound solution could be found both in pushing African states to exercise their jurisdiction over their own nationals suspected or accused of international crimes and in prompting European states to subject the exercise of their extraterritorial jurisdiction to a set of conditions designed to prevent international justice from causing undue inter-state friction and tension.

The third avenue that international justice is likely to take hinges on the establishment by the UN Security Council of *ad hoc hybrid criminal tribunals entrusted with a limited and very specific task* concerning some particular situations that neither national courts nor the ICC are able or prepared to tackle. Three examples of such tribunals come to mind: the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the STL.

These courts should offer the advantage of acting swiftly to prosecute and punish the authors of crimes perpetrated in a specific country. They are intended to be specially tailored to the unique features of the crimes they are designed to handle. To be effective, such courts must be different from most permanent judicial bodies, which are encumbered with a huge judicial apparatus; they should be lean and inexpensive, as well as expeditious in their action. Given these characteristics, I believe that there is room in future for the institution of these hybrid international courts, provided, of course, that the existing ones prove to satisfactorily meet the special needs for which they have been established.

I am not unmindful of the objections frequently voiced against hybrid international courts. The political decisions at their origin are often assailed: why set up a court with regard to a certain situation or country and not with regard to another, probably more serious, set of events? For instance, I am not unaware that – as I have already mentioned above – in some Arab countries, many ask publicly why an international tribunal has been established to look into a string of terrorist

attacks in 2004–05, while no tribunal has been created to deal with the 2006 short war in south Lebanon or the recent fighting in Gaza with all its exceedingly serious consequences in terms of civilian life and limb. As a judge, I can only answer that these are choices made by politicians. Once a tribunal is set up, it is for its judges to act professionally and dispense justice freely and fairly, unfettered by any political consideration whatsoever.

Let us ask ourselves briefly whether the hybrid tribunals established so far have lived up to the high expectations surrounding their creation. It is widely felt that, so far, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia have not proved to be up to the demand for swift and economic judicial action.

The STL, which has just been set up, must still be tested. Will it prove that it may initiate a new experiment in rapid, effective, and inexpensive criminal justice? So far, the novelties of its Statute and its Rules of Procedure and Evidence have shown that significant innovations can be introduced in international justice with a view to making it more fair and efficient. Let me in particular draw your attention to five legal techniques adopted to streamline the procedure and render it very fair: (i) the new and original role assigned to the pre-trial judge; (ii) the full implementation of the principle of equality of arms realized by putting the Head of the Defence Office on the same footing as the prosecutor; (iii) the broad role assigned to victims that intend to take part in proceedings; (iv) a set of measures alternative to detention designed to ensure as much as possible the principle that an accused is presumed innocent until conviction; and finally (v) the modalities for accepting at the judicial level reliance on sensitive information affecting national security; this last point should not be neglected. Indeed, when dealing with crimes of terrorism, investigations must rely, much more than in cases of war crimes or crimes against humanity, on sensitive and confidential information; there therefore arises the need to put in place judicial mechanisms that ensure that the use of such information by one party to the proceedings does not jeopardize the rights of the other party.

These are clearly significant innovations that should enable the STL to remedy – at least to some extent – a number of flaws that have emerged in the practice of other international criminal tribunals. However, the STL must meet *two formidable challenges*. One is that the Tribunal is the first international judicial institution tasked to repress the crime of terrorism. Terrorism is a protean notion, difficult to handle, also because there is no international case law on which to rely. The Tribunal should prove to be able to apply a sound and generally acceptable notion of terrorism in a well-balanced manner. The second big challenge is that the Tribunal is the first international criminal court operating within the Arab world. So far, these countries have shown scant interest in, and in some instances have even cast a suspicious glance at, supranational criminal justice. To make them amenable to this system of justice would constitute a significant achievement. To do so, one ought to show beyond any reasonable doubt that international justice can be impartial, fair, and immune from any political or ideological bias.

Only time will tell us whether this new attempt to bring justice into the international arena and open up new vistas will be successful.