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A Conversation with Antonio Cassese

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Abstract
This 'interview', prepared posthumously with original material from Judge Antonio Cassese, traces the origins of his academic and professional career. It further attempts to shed some light on Antonio Cassese's multifaceted contributions to the fields of human rights, self-determination, and international criminal law. In particular, it attempts to show in his own words the passion and rigour with which Judge Cassese approached the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as its seminal first steps, which marked a resurgence of international criminal justice and paved the way for a host of contemporary international criminal institutions.

Key words
Cassese; human rights; ICTY; international criminal law; international tribunals; positivism; self-determination; STL

Introduction

When I was first asked by the editors of the *Leiden Journal of International Law* to work on a 'posthumous' interview with Nino, I was naturally troubled by the notion.

It was not just a question of propriety, namely whether it was correct for me both to pretend to know him so well that I could develop a 'dialogue' with him and to turn myself into a honest speaker for his thoughts. It was also a question of how to develop a fictional, yet stimulating and engaging, conversation such as those he had so often struck with his colleagues and pupils.

Various reasons, however, led me to ponder the matter. First, a sort of interview, which presupposes a dialogue, appeared a fitting tribute to a man, a veritable scholar, who used discussions – legal, philosophical, ethical discussions – as a means to deepen his own, and others', understanding of life and law. Law was not something abstract and cold, to him – it was one of the ways to improve the human lot, and he definitively was interested in anything related to humankind. Dialogue and discussion were essential: hearing him speak and reason, you could hardly prevent yourself from being engaged by his reasoning, his suggestions. Whether at the onset you agreed with him or not, it did not really matter: he would get you first interested, then engaged, finally – often – convinced.

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There is another reason why an interview, or a conversation, seemed appropriate: Nino himself had engaged in several interviews with other masters of international law and clearly appreciated the format.[1] Finally, over the past months and years, he had started himself to engage in conversations about how he saw international law generally, and international criminal law in particular, and even about what made him the Antonio Cassese the world had come to know. These reasons finally made me relent in my hesitation, and actually suggested a way out of the conundrum the editors had put me in. This conversation is thus loosely based on the structure Nino himself adopted when devising his interviews with René-Jean Dupuy, Eduardo Jiménez de Arechaga, Sir Robert Jennings, Louis Henkin, and Oscar Schachter. While the questions are mine – but often grounded in what I think were his major areas of interest – all the material of his answers is taken from public speeches he gave, papers he wrote, and three important legacy documents he left behind: the *Soliloquy*, his Final Remarks in the volume about the Five Masters of International Law, and the latest book (currently available only in Italian), *L'esperienza del male*, a long conversation with an Italian journalist he had approached a couple of years ago with the idea of a book interview.[2]

Of course, no interview – and especially no 'posthumous interview' – can do justice to a man, and particularly to a man of the calibre of Antonio Cassese. My only consolation (should I say desire?) is that these few humble pages of reflections by a true giant of international law, as the UN Secretary-General called him a few months ago, might provide to the minds and souls of some of this journal's readers a spark of interest in the man and his ideas. This way, the homework he left for us in order to build a better world can be shared more widely and, hopefully, accomplished more swiftly.

When and how did you decide to study international law?

I read law only because urged to do so by my father, a somewhat impecunious historian who worked as a civil servant (he was director of the local Public Record Office). I wanted to study philosophy or humanities. We lived in a poor region of southern Italy (Campania), which was plagued by unemployment, and my father's advice was that I should choose a field that would ensure a secure professional future. I eventually enrolled at the University of Pisa, primarily because in that central Italian town there was a chance to enter a 'juridical college' (associated, in those years, with the celebrated *scuola normale superiore*) that not only provided free board and lodging, but also high-level training in addition to that imparted by the Pisa Law School. Studying law proved tough for someone whose mind was set rather on philosophy or sociology. But I learned the hard discipline of law. Almost all the teachers were excellent, their method that of strict positivism. I thus absorbed the rigorous logical and systematic approach of that method along with all the attendant technical tools of legal interpretation. Still, I gradually came to feel attracted only to constitutional and international law, for they were less distant from political and social reality than, say, torts, evidence, or commercial law. In the end, on personal grounds (the professor of constitutional law was moving to Turin University and a new professor of international law, Giuseppe

1 B. V. A. Röling and A. Cassese, *The Tokyo Trial and Beyond* (1993); A. Cassese, *Five Masters of International Law* (2011).

2 I took the liberty of personally translating excerpts of this book myself.

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Sperduti, had just been appointed), I opted for international law. But there, again, I picked a rather unsophisticated topic when it came to choosing a topic for my LL M dissertation: the self-determination of peoples. In addition, I asked permission to study in Germany, at Frankfurt am Main, and I spent a semester there, ostensibly to research my thesis but in reality to attend lectures held by two leading sociologists, Theodor Wiesengrund Adorno and Max Horkheimer, both of whom belonged to the famous Frankfurt Institute for Social Research (Institut für Sozialforschung). As things turned out, those lectures did not prove very useful to me: Adorno was obscure; his lectures were fashionable gatherings of elegant girls and sophisticated members of the intelligentsia who flocked to listen to a philosopher who most of them – I surmise – did not understand. Horkheimer was intellectually more accessible; he was also affable . . ..[3]

And what about the cultural and legal influences on your choices? For instance, what has your relationship with legal positivism been like?

[T]he legal method that at the time (and perhaps still now) prevailed in continental Europe: strict positivism. It is based on a rigid distinction between *lex lata* (the law in force) and *lex ferenda* (the law as it might be changed), and insists that lawyers should deal only with the former, and not with the question of whether law ought to be changed and how. In addition, lawyers should not meddle with social, historical, or sociological inquiries into the birth of *lex lata*. This approach, which concerned in particular the study of public law (private law, harking back to an old tradition, had remained immune from 'contamination' by other meta-legal disciplines), emerged in the late nineteenth century and was consolidated first in Germany and then in most European countries. . . . Later on, however, I realized that this abstract positivist approach was important in at least two respects: it did away with the confusion between legal and historical or political inquiries, which had plagued many legal works in the nineteenth and early twentieth centuries; it enabled lawyers to keep politics at bay, thereby avoiding smuggling political or ideological leanings into scholarly inquiries. Still, this dry investigation of legal institutions – devoid of any consideration of their social context as well as hindering any move from the study of existing law to a proponent approach – did not satisfy me at all. I was later to discover the limitations of this approach, when I read in the diaries of the Italian foreign minister Galeazzo Ciano some derogatory remarks about Perassi, who for many years during the Fascist era had been first (1931–36) one of the legal advisers and then (1937–43) the chief legal adviser to the Italian Foreign Ministry (without, however, ever sharing the political views of Fascist leaders or reflecting them in his legal writings – thanks to his positivism). Ciano notes on 9 April 1939 that he had to draft a document on the union between Italy and Albania (which, upon being attacked by Italian troops, had just capitulated); he then adds that he will have to consult with some 'professional pettifoggers' (*professionisti del cavillo*) at the Ministry (T. Perassi and two diplomats). To my mind, this passage from Ciano's diaries confirmed the notion that, once he has embraced a strictly positivist approach, a lawyer may easily risk becoming a Servant of the Prince, although he can claim he is merely a 'technical expert'.

In the following years I also discovered another side of positivism: its role as a powerful shield of state sovereignty. Insistence on positivism played such a role, for instance, in Paris in 1919, when the two US members of the 'Commission on the Responsibility of the Authors of the War and on the Enforcement of the Penalties' set up at the Peace Conference strongly objected to introducing the notion of 'offences against the laws

3 A. Cassese, 'Soliloquy', in A. Cassese (ed.), *The Human Dimension of International Law* (2008), lix–lx.

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of humanity', in future trials against war criminals, because 'the laws and principles of humanity are not certain, varying with time, place and circumstances, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity'. (It is striking that these considerations were not reiterated in 1945 by the US delegation to the London Conference that drafted the Charter of the International Military Tribunal at Nuremberg, which included in Article 6 the notion of 'crimes against humanity', thereby accepting that the laws of humanity were applicable in international law.) Similarly, by insisting on positivist considerations, the US, British and Italian members of the Advisory Committee of Jurists (appointed by the Council of the League of Nations in 1921 to draft the Statute of the Permanent Court of International Justice), opposed a provision entrusting the future Court with the task of applying 'principles of objective justice'.

More generally, I wonder whether one ought not to move beyond the strict legal parameters agreed upon by states, at least whenever the need to oppose glaring injustice would oblige one to do so. This concept – i.e., that one can exceptionally depart from positivism – was proclaimed in 1946 at Nuremberg by the International Military Tribunal, when it justified non-compliance with the *nullum crimen sine lege* principle for the crime of aggression (as well as, implicitly, for crimes against humanity). Indeed, the Tribunal not only stated that in international law 'the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice' (a proposition true at the time, no longer valid today); but, more importantly, also said, 'To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, *and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished*'.

In any event, the two contradictory mindsets continued to coexist in me. A German friend from Frankfurt would scoff at my wavering between the two by quoting the well-known verses from Goethe about the two 'souls' living together in Faust, one of which wished to depart from the other. I adopted a sort of scholarly 'Dr Jekyll and Mr Hyde' attitude. My first books and other writings were dry pieces of legal scholarship, I would say today of average value. After getting a professorship and thus feeling freer to choose not only the subjects of my research but also the way to deal with them, I began to inquire into legal problems that had a strong human and social dimension: human rights and the humanitarian law of armed conflict. However, I tackled those problems from a strictly legal viewpoint, producing writings that perhaps might still be of interest – but only to scholars. . . . What is the ideal way of harmonizing the two tendencies? I believe that a lawyer should be able to inquire into a legal institution, a cluster of legal issues, or a legal provision both by applying a strict and rigorous legal method and also by inquiring into *why* the institution, the cluster of issues, or the provision have been formed the way they have; or in other words, what political, social or economic motivations have led to their present configuration. Furthermore, a lawyer should not shy away from suggesting how the institution, the issues or the rules might be improved better to take account of social needs. I am aware that, once it is so formulated, this scientific programme appears to be an easy task. I do not know to what extent I have proved up to this challenge in my endeavours.[4]

You mentioned self-determination of peoples as one of your early interests. Why is this?

At the time, there was much discussion of this topic – self-determination mainly meant anti-colonialism, the principle requiring the liberation of states under colonial rule.

4 Ibid., at lx–lxiv.

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That principle, in two different forms, had been put forth around 1910–15 by Lenin and Wilson. The Wilsonian version, the democratic one, foresaw that peoples could choose freely their government, which at the international level also had an anti-colonial undertone. Wilson merged two parts of self-determination: (i) a free people who freely choose their rulers as well as (ii) rebellion against colonial oppression. Nonetheless, Wilson had to take account of the fact that his allies were all colonial powers. On the other hand, there was Lenin, who emphasized the anti-colonial aspect. This was aimed at the dismemberment of vast empires, particularly the Ottoman and Austro-Hungarian ones. I relished this clash between two different visions of the same concept, a clash in which the concept itself was manipulated. I wondered how and to what extent international law had come to adopt these positions: was international law more imbued by Wilson or by Lenin? This question was extremely interesting for me, but I was obliged to force the political discourse into that legal 'cage' required by a thesis in law. It was a remarkable effort, perhaps not entirely successful, but I still got the highest marks. My professor said 'this thesis is very good' but never suggested to me to have it published. It was a modest attempt to merge law, politics and social reality, or rather, to see how the law reflects certain political and ideological instances.

For me it was important to put on those lenses to focus on those issues. I then started my university career in Pisa, but still continued to deal with those issues. I periodically took up the issues of people's self-determination, and at various stages of my life I revisited that concept. In the 1980s I was invited to Cambridge, England, to hold a series of lectures on the subject. In the 1990s I was at Oxford with the 'Isaiah Berlin Fellowship' which required me to hold a series of lectures for a diverse audience and went back, almost obsessively, to the subject. All these reflections were then transferred into a book, published in English. Before that, I dealt with the issue when writing about Article 1 of the UN Covenant on Civil and Political Rights, a provision which includes self-determination. Why such an interest in this subject? Because I especially like, am intrigued, to see how international law keeps track of 'earthquakes'; I am interested in how the data and the characteristics of the earthquake are marked. It is just as if these telluric movements of the earth – i.e., the peoples' liberation movements – shook the foundations of the international community. And then I wondered how the political principle of freedom of the peoples had been incorporated in the UN Charter, then the two UN human rights Covenants and then, in 1970, in the Declaration on Friendly Relations among States – which was meant to be a sort of update of the UN Charter, as agreed by the three groupings of states prevailing at the time (Western countries, Socialist countries and Third World).[5]

What about later developments? Self-determination has come to cover other significant areas of legal and political dispute, such as the fate of the Palestinian people . . .

I did write and think much about the situation of the Palestinian people, publishing various articles on the status of Jerusalem, on the use of land and natural resources during occupation, and pleading before the Israeli Supreme Court against targeted killings.

It is maybe also high time to disclose what has until recently been a well-kept secret: the attempt by former Italian prime minister Bettino Craxi (1934–2000) to propose a viable solution to the Palestinian problem, an attempt in which I did play a role. In September–October 1987, Craxi (who was prime minister of Italy from 4 August 1983 to 17 April 1987) set out to repeat and indeed bolster his past endeavours to push both

5 A. Cassese, *L'esperienza del male* (2011), 223–4.

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the Israelis and the Palestinians to accept the establishment of a Jordanian–Palestinian confederation. His purpose was to realize the right of Palestinians to self-determination by elevating Palestine to the status of a fully fledged and internationally recognized state exercising full control over its population and country. On 11 February 1985 Jordan and Palestine concluded an agreement designed to settle the Palestinian question. The very short agreement, after enumerating all major Palestinian demands, tersely alluded to the notion that Jordan and Palestine should set up a confederation, namely an international union comprising the two entities.

In September 1987, Craxi probably received signals from Arafat about his possible receptiveness to a settlement based on the recognition of Palestine as a state. Craxi determined that it was time to stop beating about the bush, and to advance a compromise proposal that might rally the consent of all the parties concerned. He opted for a solution that had been favoured by both Jordan and Palestine in 1985, that of a Jordanian–Palestinian confederation, which had, however, been jettisoned by Jordan on account of Arafat's wavering and lack of any firm commitment. Amato, Craxi's right-hand man, therefore contacted another leading constitutional lawyer, Professor Enzo Cheli from Florence University (who was then a member of the Socialist Party), and myself, an international lawyer not holding any party card, but generically leftist and sensitive to the Palestinian plight. He asked us to urgently prepare a memo on the details of a possible Jordanian–Palestinian confederation. The instructions were clear. We were to take up the 1985 bilateral agreement and duly flesh it out. . . . Our proposal followed those lines, and went into the specifics of how such an agreement could be achieved in practice. . . . The solution proposed would be extremely advantageous to the Palestinians, for they would become the masters of their own destiny, would be internationally legitimized and – even more importantly – would acquire sovereign rights (although subject to stringent international obligations) over the West Bank and the Gaza Strip. It would have effectively meant that the Palestinian people would have been able to exercise their rights in full autonomy in various areas, including internal affairs (police, but also legal and judicial matters), economic and financial regulations, education and culture. Moreover, the confederation could have been just the beginning of a longer-term project of independence, once Israel's concerns about its own security had been satisfactorily assuaged and the Palestinians had honoured their international commitments (including full recognition of Israeli sovereignty and Israel's right to exist). . . . However, Craxi's plan presupposed that the PLO would play a major role as a fully fledged interlocutor, while Israel adamantly refused to have any contact with that organization, which it termed 'terrorist'. There was therefore no hope that Israel would ever come to the negotiating table to discuss Craxi's proposals.[6]

This is indeed very interesting. What other topics of international law most interested you throughout your life?

If I now take a look at the subjects in which I have been interested and on which I have toiled so hard in my scholarly activity, it appears to me that they boil down to a very few areas, and always the same ones: human rights, the self-determination of peoples, the humanitarian laws regulating armed conflicts, the use of force by states, and more generally legal restraints on violence in the world community; and international criminal law. . . . These are areas where the relation between force and legal standards aiming at restraining force is more problematic; areas where the legal

6 This section is excerpted from an unpublished paper in English by Nino aimed at explaining the legal memorandum written by (then) Professor Cassese and Professor Cheli. The memorandum itself is available (in Italian) at www.antoniocassese.it/italiano/reports/home.htm.

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network thins and is full of holes, and therefore the observer may better grasp the power relations that exist between the primary actors on the international scene: the sovereign states. Not unwittingly, I was moved by the old maxim of Roman wisdom: *hominum causa omne jus constitutum est* (any rule of law is ultimately made on account of human beings). . . . I still believe that only those problems that dramatically affect the daily life of human beings are worth studying. I still believe that it is the cluster of legal rules and institutions that may have a dramatic impact on the life and suffering of human beings that should constitute the main focus of our attention as scholars.[7]

In relation to human rights law, you have not just written on it: you have also had the opportunity of participating in the negotiations and in the implementation of important international instruments. Did you have a chance to personally witness the ambiguous attitude of states in the field of human rights?

Definitively. I recall the first time I arrived in New York, in the 1970s, to participate in the work of the Human Rights Commission. Usually, the minister of foreign affairs or a colleague delivers instructions to the delegates on how to vote within important international bodies. Well, I was not told anything. My colleagues from other countries had pages on top of pages of instructions, which they consulted all the time. But I had nothing. Zero. When I found myself as the only delegate in the room, I asked an Italian diplomat as to how I should behave. He candidly answered to keep an eye on the Soviet delegate. I was extremely surprised – Italy, after all, was part of the camp opposite to that of the Soviet Union. He assuaged my surprise with these words: 'In the field of human rights we are as cautious as the Soviets are, also in light of the fact that we still have an ongoing dispute with Austria on South Tyrol, we must be very careful and moderate . . ..'

It was a great lesson in realism, because it was obvious that the issue of human rights was being manipulated by governments. Human rights became an instrument of political struggle. In my view, few politicians and diplomats really believe in human rights. Perhaps at the time of Cyrus Vance, Secretary of State under US president Carter, you could find an administration that really believed in human rights. Both Carter and Vance were thoroughly honest and men of high moral values, although they inevitably had to make compromises for the sake of general political strategy and geopolitical considerations. Then sometimes I had a good impression of the countries of northern Europe – Sweden, Denmark, Norway, the Netherlands etc. – which are very serious. Otherwise the impression is that of complete manipulation, the use of human rights as a bargaining chip for other purposes, oftentimes to attack your opponents.[8]

It looks like there is not much room for optimism, then . . .

I think that we should be sceptical of governments. We should instead encourage the work of international civil society. I am convinced that the key is there, in NGOs, in parts of the Catholic Church (the Community of Sant'Egidio, for instance), Amnesty International, Human Rights Watch, which is perhaps the most effective organization at the non-governmental level. This is because sometimes small people, even individuals, matter – if they fight with tenacity and courage for a specific issue or problem.

At the European level, the Council of Europe worked for years to negotiate a Convention for the Prevention of Torture. This is a text which came to fruition upon the initiative of the Swiss government, prompted, in turn, by a private individual, a banker named

7 Cassese, *supra* note 3, at lxx.
8 Cassess, *supra* note 5, at 74–5.

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Jacques Gauthier, who had worked for the International Red Cross. It was at that time that I realized how important single individuals may be in pushing tenaciously and relentlessly in favour of a major international initiative and how governments can then come to agree on the need to create an international control mechanism. Above all, I came to understand the concerns of the governments themselves and their constraints, their caution in not going too far. Since the consent of States is necessary in order for a convention to be ratified, it is always necessary to keep in mind the whole context. Thus, I learned to appreciate how compromises are built. Obviously, such compromises must be acceptable from the standpoint of human rights.

In the ongoing struggle between the needs of sovereign states and human rights, one must often resort to tricks: accepting a compromise without giving up too much of the humanitarian needs in order to overcome a battle which might otherwise cripple the whole effort. Realism is needed in relation to governments; at the same time, one needs the skills to enter into the brains of the Leviathan, that Moloch that is a sovereign state ('that mortal god', as Hobbes called it, 'to which we owe, under the immortal God, our peace and defence'). It is by entering into the brain of the monster that we can find out how the monster reasons, how it operates, what its motives and even its inner drives are, and how it conceives the world. This way, you can try to push it further, towards limiting its traditional prerogatives and, if possible, even towards self-mutilation.

I have often participated in meetings where new international treaties on human rights were being drafted. These experiences have been extremely interesting. I have come to understand how governments can talk about human rights, can devise standards on human rights, and then – at the same time – disregard them. These experiences have been far more enlightening than reading a whole library. The experience in the field, working together with the 'actors' dictating the rules because they come from the Great Powers, is simply irreplaceable.[9]

And, of course, you mentioned international criminal law. Why do you think international criminal justice is so important?

International criminal justice is indeed one of the few major achievements of the world community we may observe in the past twenty years. It is significant for two reasons.

The first is that it responds to atrocities and endeavours to put a stop to them, not by using traditional channels – that is, through nation States – but by a more direct and effective way: by making accountable those very individuals who, normally hiding behind the shield of state sovereignty, grossly breach human rights. Bringing to book such individuals is the most efficacious manner of ensuring respect for human rights. As the Nuremberg Military Tribunal aptly proclaimed in 1946, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Consistent with this holding, the Nuremberg Tribunal did not issue orders and enjoinments to Germany. Rather, it directed its justice at individual human beings, the former leaders of the Reich.

This system of justice had been a dream for centuries. The dream came true in 1945, was then halted, but resumed in the early 1990s, with the establishment first ad hoc tribunals and subsequently of the International Criminal Court and the many hybrid courts.

9 Ibid., at 75–6.

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The second reason why the emergence of such a system of justice has been a stupendous achievement in the world community is that it brought about a revolutionary innovation in this community: a seismic shift in thinking about sovereignty. Traditionally, Leviathans only faced one another. Monarchs and princes engaged in dealings solely between themselves. Each wielded unlimited authority over his own nationals and had no say over the citizens of other rulers. The King of Prussia was not allowed to act against a British subject unless he had trampled upon Prussian laws on Prussian territory. The only circumstance that placed any state in direct contact with foreign individuals, whatever their nationality, was the fight against piracy. This exception, however, was not dictated by the need to safeguard a universal value. It was grounded in the joint interest of states to repress those trouble-makers who hampered free transit on the high seas. It is indeed notable that no *international* body or institution for the repression of piracy was ever set up. No, the task of detaining and hanging pirates was left to each individual State. Save for this relatively minor exception, individuals were insignificant pawns in the society of States.

In the aftermath of the Second World War this trend was dramatically broken and a new *nomos* was created, based on the supremacy of international law over domestic law. As a consequence, international legal imperatives began to have a direct impact on individuals. Article 6(c) of the Charter of the Nuremberg Tribunal provided that crimes against humanity would be punished even if they were not 'in violation of the domestic law of the country where perpetrated'. This meant that a person, although acting in conformity with his own national law, could nevertheless be punished for violating legal imperatives laid down by an entity other than the national legislature, namely the international community. As a US Military Tribunal sitting at Nuremberg held in the *Flick* case, 'international law, as such, binds every citizen just as does ordinary municipal law'.[10]

These are interesting words – but how do you see such concepts working in reality? What are the difficulties of making international criminal law work in practice?

In sum, with the establishment of international criminal tribunals, international bodies penetrated that powerful and historically impervious fortress – state sovereignty – for the first time, to reach out to all those who live within the fortress.

However, international criminal justice pays heavily for being at the cutting edge of a global society in which the Westphalian model of world order – the model that took shape after the peace of Westphalia in 1648 – is still deeply ingrained; a society where self-interest still plays an overwhelming role and where community values are considered more as lofty proclamations than as effective guiding standards; a society that, as noted by a German scholar in 1932, is still built on a volcano – sovereignty – with the consequence that any tremor of the volcano poses a threat to the network of fine edifices patiently built over centuries. And here lies the heavy price that criminal justice has to pay to the traditional structure of world society: international criminal courts remain entangled in, and fettered by, the intricacies of sovereignty. In other words, they too are built on the volcano. States shy away from taking the audacious step of making international criminal courts fully autonomous and effective; that is, authorizing once and for all that international investigators, police officers, and court marshals be allowed freely to enter the territory of sovereign states and execute international judicial orders there – in order to gather evidence, interview witnesses,

10 'Some Reflections on International Criminal Justice', speech delivered by A. Cassese in The Hague, on 13 November 2009.

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and arrest suspects or indictees. Such a step has been seen as an intolerable intrusion into the sovereign domain of each state. States have established international courts and granted them authority to judge crimes of individuals – but they have stopped short of backing up this authority with all the enforcement tools required to make it fully operational. International courts have been bestowed with the sceptre and the gavel, not, however, with the attendant sword.[11]

This brings us to your judicial experience. In the 1990s, you were selected as a judge, and then elected president, of the newly established ICTY. How did you go about 'inventing' this new job of yours? Can you recount what you had to face?

When I came here, I hoped the Tribunal would start operating right away but then I realized that actually we had nothing, zero. I remember we had no budget, no headquarters, no place to meet and to work and only three or four part-time, actually secretaries, with contracts of three months only and four or five computers. So, therefore, when we met after the election of the president and vice-president and the chairman or presiding judge of the appeal chamber all the judges, said let's go back home and wait for General Assembly to adopt a budget because there is no point in remaining here. But I said, 'Look, we are going to be paid. How can we justify being paid without working?' They said, 'But what can we do'? There was nothing, zero, there was no rules of procedure, no case, no Prosecutor.

We were sworn in on 17 November and in early December we decided to go back home. I said: 'You go back home, I must remain here. I will go just for the Christmas holidays but I will start working at least on Rules of Procedure and Evidence. Let us do something'. And this is what I did. I went home and I worked even on Christmas Day – 6 hours only – on the Rules of Procedure and Evidence.

I was naive, but I also thought that this was a unique opportunity; that, in a way, to waste it would be a disaster. I thought that probably by putting a lot of pressure on some countries we would achieve something. I thought: 'We have to do something.' I thought it would be utterly impotent of us to stay idle and wait for the General Assembly to pass our budget. . . . We had a provisional budget which was just peanuts, of course, and the budget would be adopted by the next General Assembly so in 1994, in October or November, and we were in December 1993. So, I mean, I thought it was a question of morality. I thought it was immoral not to do anything. So, therefore I said: 'Let us at least show that we are prepared and willing to work hard', and the commitment when we went home was that we would meet in February and try to push Boutros Ghali to appoint the Prosecutor, actually to propose a Prosecutor, a new Prosecutor to the Security Council and then meanwhile I said to the judges: 'We prepare the Rules of Procedure and Evidence because we need this legal framework.' . . . Do you know the famous expression by the famous Italian writer and politician Gramsci who spoke of the need for optimism of the heart and of the pessimism of the mind? I knew coldly, if I could think in a cold way, I knew we had no chance of succeeding but I thought we should show a lot of enthusiasm and at least work, do whatever we should. We met again in February. I came immediately after Christmas and was alone until the judges came in February and in February we spent three months drafting the Rules of Procedure and Evidence.[12]

11 Ibid.
12 *Sense* interview, 15 June 2003.

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And how do you see the role of the president of an international tribunal?

The Prosecutor has to feed the judges by giving them indictments and can be aggressive, can afford to talk to the media, whereas the judges have to be reserved. Except for the president, who has to be a driving force, which has not been the case at every tribunal and seems to be lacking at the ICC, too. Once in New York, when I was appointed as a monitor for the Special Court for Sierra Leone, I spoke to an American lady who had been in the office of the prosecutor in Sierra Leone and had resigned within two years. I asked her why she had resigned, and she said: 'What we missed in the Special Court for Sierra Leone was a sort of a father figure, a leader, as you had been in the ICTY. Somebody who can be there from the outset, whereas in our case, the president had never been in Freetown.' And she was right. The judges would elect the president of the Sierra Leone court and then he could go back to London or Sri Lanka and communicate by fax or email. Ridiculous! You have to be there! Everybody must see you working there every day and being concerned and preoccupied, talking to the diplomats, going to see ambassadors, going to the UN.[13]

What is your view as to how the international community, and Europe in particular, should continue and strengthen the fight for human rights over the coming years?

There is no doubt that bringing the authors of serious and large-scale violations of human rights to justice constitutes the most efficacious means of reacting to such violations. Plainly, to make the perpetrators personally accountable means that they cannot shelter behind the state on whose behalf they normally act as state officials. To bring individuals to account means to strike at the very originators of grave misdeeds. *Individual criminal liability* is more effective than *state responsibility* for the purpose of both preventing future violations and alleviating the suffering of the victims or their next of kin. However, criminal justice is far from being a panacea. Indeed, the deterrent effect it aims to produce is less apparent than the other two effects attaching to international conviction and sentence: stigmatization of the criminal conduct and retribution.

In spite of these limitations, criminal-accountability processes remain a valid tool for addressing the range of gross violations of human rights, in particular those violations that, being uniquely odious in character and collective in nature, amount to such international crimes as torture, crimes against humanity, genocide, war crimes or terrorism.[14]

But what should be done to enhance the existing accountability procedures and bolster their effectiveness?

I would suggest that one should endeavour to take a number of different avenues:

1. to make the *International Criminal Court* more effective so as to better use its universality potential;
2. to strongly urge the implementation of the principle of *universal criminal jurisdiction* over such international crimes as torture, crimes against humanity, genocide, and terrorism;

13 'The Judge: Interview with Antonio Cassese', in H. V. Stuart and M. Simons, *The Prosecutor and the Judge: Banjamin Ferenz and Antonio Cassese* (2009), 54–5.

14 From Statement by Antonio Cassese, President of the Special Tribunal for Lebanon, on the occasion of the third part of the 2009 Ordinary Session of the Council of Europe Parliamentary Assembly (Strasbourg, 22–26 June 2009), available at http://assembly.coe.int/Sessions/2009/Speeches/20090624_SpeechCassese.htm.

3. to insist on the notion that *no amnesty* for gross violations of human rights amounting to international crimes is permissible under current international law;
4. to prompt the *European Court of Human Rights* to give greater bite to its decisions by making explicit what is now mostly implicit in some of its rulings;
5. to establish a *Commission of Inquiry* available to states and individuals for promptly establishing whether egregious violations of human rights have occurred that amount to international crimes, thereby triggering the necessary sanctioning mechanisms.[15]

Allow me to pose you some final, more personal, questions. Why did you accept, at your age, to once again don the judicial robes and even to become president of a new international tribunal, the Special Tribunal for Lebanon?

There might be four main reasons for this choice. The first two are the most important ones. This new Tribunal may constitute a unique opportunity to test new ideas for the fight against terrorism, new ideas for a more expeditious and more efficient – yet less expensive – international justice. (International tribunals, for various reasons, are extremely onerous from a financial perspective.) Thus, the Special Tribunal for Lebanon may provide an extraordinary opportunity to experiment with new forms and modalities of international criminal justice. All of these aspects were too alluring not to pursue them. Thus, I threw myself into this new moral, legal, and intellectual adventure. It would be nice if at least a small part of this dream could be realized.

Second, the Special Tribunal might truly contribute in finding out what really happened in the case of Hariri and other connected cases. I see this as a great opportunity for the Lebanese people in their entirety. The Lebanese demand justice for the specific case of Hariri and, more generally, expect that violence never be used again as a means to solve political struggles. The rule of law in Lebanon and the region will benefit from such an experience. One must keep in mind that, although the Tribunal is international in character, we work daily together with Lebanese colleagues – judges, lawyers, interpreters, translators, all the staff of the court – who learn from us and, at the same time, teach us about local culture and society. There is mutual enrichment in the cultural and legal spheres which should not be underestimated and can have a great impact.

Other motivations are more personal and maybe even intimate. To explain one, I will recount an episode that occurred several years ago. I was a young university assistant in Pisa, and often met colleagues from other faculties. One of them – a physicist or a biologist – came from Trentino, in northern Italy. He was a great skier and an accomplished hiker – which, for somebody like me who was born in Campania and then moved to Tuscany, lacking any such skill, was extraordinary. Once, he told me that he had attempted to climb an almost impregnable mountain. He went about it with some friends, but at a certain point he fell off a cliff and suffered a very serious injury. He remained in a coma for a few weeks, then he spent one year in hospital to recover. Well, three years after the accident, on the day of its anniversary actually, he rose at dawn and without telling anybody he went back to that mountain. This time he made it and came back down a happy man. I remembered this story when I decided to get into the Special Tribunal. True, I had never been 'defeated', but I had resigned from the ICTY in 2000 after almost seven years of judicial experience. I had resigned for personal and health reasons, but also because I had frequent tensions with my successor as president. I had not completed my 'mission'.

15 Ibid.

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The fourth reason relates to my study and working method. I have always in my mind the image of Giambattista Vico, who authored his book *New Science* in 1725 writing on a desk made up by joining two tallboys amidst the clatter of children and family (he described it as 'domestic hubbub'). Without appearing immodest, I must say that I, too, am not able to work by spending weeks in peace and silence. In order to write a study I need clatter and human contacts with colleagues and friends. If I do not submerge myself in practical daily activities, I am simply unable to retreat and spend some time in solitude to reflect and attempt to write something passable.[16]

Do you have some 'antidepressants', so to speak, in the pursuit of your dreams?

Yes, two amongst many: other people's thoughts and examples. Let's keep in mind the last page of Nelson Mandela's memoirs (*Long Walk to Freedom*), where he says: 'I have walked that long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb. I have taken a moment here to rest.' Then he continues, with even more meaningful words: 'But I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended.' An extraordinary moral example. It would be enough to draw inspiration from Mandela.[17]

16 Cassese, *supra* note 5, at 209–10.
17 Ibid., at 248.

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