

FRAGMENTATION OR UNIFICATION: SOME CONCLUDING REMARKS

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At the end of these two days of intensive debates, much of what I thought I could say has already been said—and said well: by Jonathan Charney yesterday, by Paul Szasz on an important point, and just now in the rich presentation by Michael Reisman. But I am a simple man, and I feel lost amidst all these contextual considerations. This is why I think we should come back to basics, perhaps at a very simple level, which may give us equally simple ideas about how to bring all these strands together; but first I would like to make a preliminary methodological remark.

In much of our lengthy debates, we have been speaking at cross-purposes, as a result of what social scientists call the “level of analysis” problem. We were not always looking at the same thing, at the same aspect, or from the same angle or distance. Part of the responsibility for this goes to David Kennedy’s polarized representation of positions, opposing one to the other: Europeans v. Americans, unity v. diversity, law-as-rules v. law-as-process, and so forth. Indeed, most classical as well as so-called “critical” theories are based on such sharp oppositions. In reality, however, the difference between these categories is much less clear-cut than in these dichotomous representations. In most cases, they are different faces of the same coin or, rather, images of different moments, stages, or movements along the same continuum. This is also true of the theme of unity and diversity that is the subject of our Conference.

I. THREE THEORETICAL PROPOSITIONS

My ideas in this respect can be summarized in three seemingly paradoxical propositions—but only seemingly, as I shall

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strive to demonstrate—in the form of variations on the theme of unity and diversity in law.

A. *Unity of Legal Thought and Diversity of Legal Orders*

When we speak of contract, responsibility, or a judicial organ, these terms convey to us, whatever our legal backgrounds, a certain common generic idea (but I insist on “generic”). There is, then, a certain unity or commonality of legal thought among all the inhabitants of the legal universe. But at the same time, there is also diversity of legal orders. It is always amusing when respectable jurists, including the current President of the International Court of Justice, in order to reach the conclusion that private contracts with governments can be lifted to the international level, argue that they are governed by the principle of *pacta sunt servanda*, which, they emphatically add, is a principle of international law. But *pacta sunt servanda* is a general principle of law existing in all legal orders. By itself, it does not tell us anything specific about the applicable law. Such common concepts and general principles are incarnated and managed in different ways, yielding different outcomes, in different legal orders.

B. *Unity of Legal Order and Diversity of Tribunals*

Every legal order has its own frontiers that separate it from other legal orders, because it has a different basis of legitimacy and different mechanisms for creating, applying, and enforcing its rules. In other words, every legal order generates and specifies its rules in different ways, with different results, and these rules and procedures ultimately derive their legitimacy from the fact of belonging to this legal order. It constitutes a *unicum*: an entity held together by its own internal cohesive forces, while remaining separate and distinguishable from other legal orders. Yet within each legal order (except, perhaps, for the very primitive ones, which can be assimilated to unicellular living organisms), there exists a multitude of organs charged with the implementation and application of law, including a diversity of courts and tribunals (the type and number of which differing from one legal order to another).

C. *Diversity of Tribunals and Unity of the Judicial System*

What these judicial organs have in common, in spite of their diversity, is that they belong to the same legal system and derive their legitimacy and physiognomy from it. Together, they discharge, in that particular order, one of the essential functions of any legal order, namely, the judicial or adjudicative function. They thus constitute what is called in municipal law, at least in civil law jurisdictions, the “judicial system” within the legal order. This concept is the depiction or representation of the “constellation” of courts and tribunals within the legal order, a “constellation” that is, by definition, correlated. Even the most independent tribunals within the legal order, e.g., military tribunals, are defined, in their role and the ambit of their jurisdiction, in terms of their relation to the regular courts structure.

II. THE SPECIFICITY OF INTERNATIONAL LAW

How do these three propositions apply to international law? I do not think the first two raise any problems, unlike the third, for we do not seem to have a “judicial system,” properly so-called, in international law. Why is this the case?

This year of grace 1998 marks the 350th anniversary of the Peace of Westphalia, which is commonly considered to be the turning point in the transmutation of the international legal order from a hierarchical to a horizontal structure. While this representation is an obvious simplification, there is some truth to it, as being that of the historical event marking the vindication and generalization of the maxim *ejus regio, ejus religio*; that is, the formulation, in the ideological language of the time, of the principle of sovereign equality, according to which the prince or the sovereign has the last word, or is the last instance of decision-making at the international level.

Having repudiated hierarchical links, sovereigns did not wish to reinstate new instances above themselves that could bind them without their consent, even in the form of tribunals. Thus, for about two centuries, international adjudication in the real sense fell in abeyance. The Pope was no longer considered the final arbiter, while most of the few cases that were chronicled as arbitrations were references by sovereigns in dispute to a third sovereign, as an egalitarian way of seeking

the intercession of a peer. Moreover, the ensuing decisions almost never articulated the grounds on which they were reached.

This situation, which some authors refer to as “the catastrophe” in relating the history of arbitration, continued until the advent of a young republic, the United States of America, bringing with it new ideas about settling disputes: first, in the Jay Treaty of 1794, following the War of Independence, which introduced binding decisions by joint mixed commissions; then again in the Alabama arbitration of 1872 after the American Civil War, which can be considered the real beginning of modern international arbitration, in the technical sense. Still, resort to international arbitration remained quite exceptional.

Arbitration was the only form of adjudication existing in general international law before the advent of the Permanent Court of International Justice (PCIJ) in 1920. But unlike the situation in municipal law, where arbitration is subject to judicial control and is thus integrated into the judicial system, the question of bringing international arbitration within the PCIJ’s orbit was not even raised. For, in the circumstances, the dangers inherent in the multiplication of uncorrelated adjudicative organs were moot. These dangers arise from: the possibility of conflict of jurisdiction, either active or passive, between these organs; and the risk of contradiction or conflict of findings and interpretations undermining the substantive unity of the legal order and increasing rather than decreasing the indeterminateness of law through the exercise of the judicial function. And they were moot, even with the PCIJ, as long as resort to adjudication, through arbitration or the Court, remained very exceptional.

Sir Robert Jennings has criticized, on several occasions, the adjective “*pacific*” in the title of the Hague Convention for the Pacific Settlement of Disputes because it portrays the act of going to court or to arbitration as an act so capital and exceptional as to be the alternative to, and hence the equivalent of, the decision to go to war. In his view, it should be considered as ordinary an act as it is in municipal law. However, the title of the Convention probably reflected how resort to adjudication was then envisaged, thus underlining its highly exceptional character.

The situation did not change with the succession of the International Court of Justice (ICJ) to the PCIJ after the Second World War. An attempt was made, however, in the 1950s, by Professor Georges Scelle, to correlate arbitration to the ICJ in his draft "Model Rules of Arbitral Procedure,"¹ which he prepared as special rapporteur of the International Law Commission (ILC). These Rules purported to establish a "locking mechanism" (*verouillage*), whereby, once the parties have consented to arbitration, every time a process reaches a deadlock, the resolution of the problem would *ipso jure* fall either to the ICJ (in case of challenge of awards as *ultra vires*, or by requests for revision or interpretation) or to its President (in case of failure to nominate arbitrators or their replacements). But this draft was heavily criticized and resisted by states, thus revealing their strong preference for maintaining arbitration as a flexible, autonomous procedure which, while adjudicative in character, remains pliable to their will throughout its course.

Since the 1950s, however, in parallel with the rapidly growing complexity and intensity of international relations, international law has witnessed prodigious developments, not only in updating its traditional fields, but also in expanding into new and more specialized ones. This has been accompanied by a proliferation of specialized judicial organs, on both the universal and regional levels, such as administrative tribunals of international organizations, the Panels and Appellate body of the World Trade Organization (WTO), the new Law of the Sea Tribunal, the incipient International Criminal Court (ICC), the European Court of Justice, regional tribunals of human rights, and *ad hoc* tribunals such as the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR).

Such specialized tribunals also exist in municipal law, but the ambit of their specialized jurisdiction is well delimited in relation to the courts of plenary or general jurisdiction, the jurisdiction of the latter being the rule, that of the former re-

1. This draft served as a basis for the Model Rules adopted by the ILC. See *Report of the Commission to the General Assembly*, U.N. GAOR, 13th Sess., Supp. No. 9, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 83, U.N. Doc. A/CN.4/SER.A/1958/Add.1. The General Assembly merely "took note" of these Model Rules in Resolution 1262 (XIII), adopted in 1958. See G.A. Res. 1262 (XIII), U.N. GAOR, 13th Sess., Supp. No. 18, U.N. Doc. A/4090 (1958).

maining the specified exception. Moreover, frequently—though not systematically—the specialized tribunals are subject to the control of the higher instances of the judicial system.

On the international level, there is no such clear distribution of functions. Indeed, we still have two unrelated, hence overlapping, modes of exercising general or plenary jurisdiction (albeit both on a consensual basis): the ICJ and arbitration. Though not wholly satisfying intellectually, this situation was tolerable in practice as long as the use of these modes remained so sparse that the probability of their collision (conflict of jurisdiction, contradictory decisions, etc.) seemed moot. The situation resembled an exploded constellation composed of one star and the occasional rare meteor in an otherwise vast and empty universe. But with the proliferation of specialized tribunals, which necessarily tread on part of the grounds covered by tribunals exercising plenary jurisdiction (e.g., the law of the sea), such danger becomes imminent, as do the threats to the cohesion and unity of international law. This is the more so considering that almost all of these tribunals are of one—first and last—instance, with no possibility for appeal or *cassation* which make for the unity of interpretation of the law.

It is true that occasionally some vague lineaments of a structure become perceptible. For example, during the interwar period, appeals from decisions of the Mixed Arbitral Tribunals established pursuant to the peace treaties could be lodged with the PCIJ.² Similarly, appeals from judgments of the Administrative Tribunals of the United Nations (UN) and the International Labor Organization (ILO) can be lodged with the ICJ, albeit through the awkward procedure of requesting an advisory opinion.

It is to be noted, however, that, in both instances, the possibility of appeal (with the ensuing hierarchical structure) is provided for in the statutes of the “lower” tribunal itself and does not emanate from general international law or the inher-

2. See, e.g., Appeals from Certain Judgments of the Czechoslovak-Hungarian Mixed Arbitral Tribunal (Czech. v. Hung.), 1933 P.C.I.J. (ser. A/B) No. 56 (May 12); Appeal from a Judgment of the Czechoslovak-Hungarian Mixed Arbitral Tribunal (Czech. v. Hung.), 1933 P.C.I.J. (ser. A/B) No. 61 (Dec. 15).

ent powers of the International Court. In the same vein, arbitral awards can be attacked before the ICJ, as they were twice.³ But here again these appeals were introduced, like any other case, on the basis of a specific jurisdictional title rather than on the basis of unity and continuity of the adjudicative system.

III. BACK TO THEORY

As mentioned earlier, the prodigious development of international law in the last few decades, reflected in the greater density, complexity, and diversity of its normative content, has also led to the multiplication of specialized mechanisms of implementation, including tribunals. This confirms what I consider to be a law of legal physics, which can be formulated as follows: "To each level of normative density, there corresponds a level of institutional density necessary to sustain the norms" (i.e., which makes it possible to manage and apply them).⁴ In other words, in these circumstances, the multiplication of specialized tribunals is, by itself, a healthy phenomenon. Its description by the term "proliferation," with its negative connotations, is misleading. Of course, proliferation is extremely dangerous when we speak of lethal weapons of mass destruction. But it is a totally different matter when we speak of tribunals or other law-determining agencies in a system that has notoriously suffered, throughout its existence, from the dearth (not to say lack) of objective determinations.

Pierre Teilhard de Chardin has defined evolution as *complexification-conscience*, a process of conscious complexification. As things become more complex, they reflect a higher degree of division of labor, or specialization, which is a higher stage of evolution. But the participants in this process must be conscious of its direction and requirements. The further the division of labor and specialization, the greater the need for the preservation of the unity of the whole that makes specialization possible and meaningful, but which becomes harder to maintain because of the centrifugal effects of specialization.

3. See Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18); Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12).

4. Cf. Georges Abi-Saab, *Cours général de droit international public*, 207 RECUEIL DES COURS 9, 93 (1987).

In a legal order, this is the function of the overarching principles that sustain its normative edifice and keep it together. Of course, specialization means special regimes. But however autonomous and particular these may be, there cannot be a totally self-contained regime within the legal order. If the special regime is to remain part of the legal order, some relationship, however tenuous, must subsist between the two. Otherwise, if all links are severed, the special regime becomes a legal order unto itself—a kind of legal Frankenstein, or Kelsen's "gang of robbers"—and no longer partakes in the same basis of legitimacy and formal standards of pertinence.

This is true not only for norms but also for the institutional components of the legal order: the mechanisms and procedures by which it discharges its functions, including courts and tribunals. Complexification creates a need for specialized tribunals to accommodate normative diversification and specialization. At the same time, it generates a parallel need, equally important and demanding, for a common understanding and interpretation of the overarching principles by this widening spectrum of tribunals, in order to keep the system together and prevent it from exploding into a multitude of small particles. This requires, in turn, a certain coordination or harmonization between the diverse tribunals; in other words, their correlation into a kind of constellation, however loose it may be.

The problem is that here, as elsewhere in international law, there is no centralized authority, no judicial power, to underlie such a constellation. Indeed, in international law every judicial organ has its own separate source of legitimization, or legal empowerment, which invests it with judicial power (whether it be the consent of the parties or, in exceptional circumstances, the decision of a constitutionally authorized organ), rather than deriving it from a common, centralized pool that infuses all courts with judicial power and by the same token relates them to each other.

IV. THE WAY FORWARD

The question then becomes: Can there be a "judicial system" without a centralized "judicial power" invested in it, and with the jurisdiction of its components remaining in general ultimately consensual? I answer in the affirmative. Such a sys-

tem can develop through the “cumulative process” of international law, of which custom is the most visible, but not the only, example. This process would progressively condense and crystallize the different particles of consensual or authoritative jurisdictional empowerment into a certain structure.⁵

However, this process depends on the behavior of the relevant legal actors. These are not only states—whether as litigants or when creating or referring a case to a tribunal by agreement—but also the courts and tribunals themselves, as well as organs of international organizations when creating tribunals in the exercise of their constitutional powers. The process can operate only if these actors are conscious of the objective (the need for a judicial system and the requirements of such a development) and if they seize on all opportunities to inch the process in this direction.

Such opportunities are present “at the creation”—that is, when establishing a new arbitral or judicial organ. As mentioned earlier, on two occasions, a case was introduced before the ICJ contesting the validity of a prior arbitral award. These cases were introduced as new cases, by virtue of a separate jurisdictional title, other than the one at the basis of the initial arbitration. However, such an appeal can be provided for in the compromise or compromissory clause that creates or refers to the arbitral tribunal. If such a provision were generalized in arbitration treaties to the point of becoming a *clause de style*, we might reach Professor Scelle’s solution through a process from below.

More important, from a practical point of view, are the examples of appeal from the decisions of the Mixed Arbitral Tribunals to the PCIJ, and from the decisions of the Administrative Tribunals of the UN and the ILO to the ICJ, through a request for an advisory opinion. Considering that much of the recent judicial “proliferation” took place within the UN (the *ad hoc* International Criminal Tribunals), under its auspices (the Law of the Sea Tribunal and the ICC), or within its spe-

5. I have argued elsewhere, along the same lines, that international law has developed a “legislative process” in the absence of a centralized legislative power. See Georges Abi-Saab, *La coutume dans tous ses états, ou le dilemme du développement du droit international général dans un monde éclaté*, in 1 INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 53 (Giuffrè 1987).

cialized agencies (ICSID) or equivalents (WTO), their statutes could have provided for a structural link between these new tribunals and the ICJ, registering, for example, the authorization by the General Assembly for them to request advisory opinions from the ICJ. In content, these requests can take the form of appeal, as in the case of the Administrative tribunals, but they can also take other forms. One such form, of a preventive or *ex ante* character, similar to the European Union's procedure of reference in Article 171 of the Treaty of Rome, would be to allow these specialized tribunals to refer to the ICJ "prejudicial questions" pertaining to the interpretation of the UN Charter, or even to questions of general international law that go beyond their field of expertise, in cases pending before them.

A recent incident provides a good example of what is at issue here. In its judgment of October 2, 1995, in order to dispose of a preliminary objection to the jurisdiction of the Tribunal, the Appeals Chamber of the ICTY had to address the very important question of the constitutionality of the Security Council Resolution creating the Tribunal.⁶

In a Conference held at the University of Rome in December 1995 to celebrate the 50th anniversary of the UN, Ambassador Shabtai Rosenne criticized this decision, contending that the Tribunal should have asked the Security Council to request an advisory opinion from the ICJ about the constitutionality of its decision to establish the Tribunal. Obviously, under the circumstances, this suggestion was unrealistic in the extreme. The Security Council, particularly in its present mood, would have never agreed to submit the constitutionality of its decision to the Court's scrutiny. Moreover, the Chamber had to render its decision on an interlocutory appeal on jurisdiction within a reasonable lapse of time, incommensurably shorter than that required for the suggested alternative. However, the situation would have been much better had the Security Council initially empowered the ICTY, in its Statute, to request opinions from the Court on prejudicial questions in-

6. See *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Int'l Crim. Trib. Former Yugo., App. Chamber, Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996).

volving the interpretation of the Charter (or general international law).⁷

Opportunities also present themselves to the tribunals once they are established, as they exercise their judicial activities. Here again it is a question of the tribunals being conscious of both the need for a common framework and the requirements of such a framework; in other words, the need for a common understanding of the overarching principles, and for a certain division of labor between the different judicial organs that can develop progressively through appropriate unilateral adjustments of deference and assertion, within the permissible margin of judicial discretion.

The consciousness of the need for a common framework, and the requirements of such a framework, together with the adoption of judicial policies supportive of them, would serve as a self-fulfilling prophecy. Thus, from the exploded constellation of proliferating judicial organs, each endeavoring to fulfill all the components of the judicial function as best as it can and *faute de mieux*, a tendency would form towards the coalescence of judicial activity in a manner conducive to the emergence and hardening of an international judicial system.

For such a structure to emerge, however, it needs a catalyst and a pivot around which to form. In the present-day international legal order, only the ICJ can play this role—provided, of course, that the Court accepts to play the part and integrates it as an essential part of its judicial policy. The ICJ has to play this central role and act as a higher court in a legal order that does not provide for formal hierarchy (except within the UN institutional system, where the ICJ is the principal judicial organ), a part that must then be earned as a *primus inter pares*, followed not out of legal compulsion, but through recognition of and deference to its intrinsic authority and the quality of its legal reasoning and findings.

The part implies that the ICJ puts the emphasis on its status as an organ of the international legal order—exercising

7. This can be done within the existing Statute of the ICJ, as long as the new tribunal is established as a subsidiary organ within the United Nations framework, or even the United Nations family *lato sensu*. However, to allow such reference of prejudicial questions from Tribunals beyond this circle, or, even more ambitiously, from national tribunals, would require an amendment of the Court's Statute.

the function of *jurisdictio*, (i.e., stating the law)—rather than, as with arbitration, an organ of the parties or a mere mechanism in their hands whose sole purpose is to settle their dispute, be it through the exercise of “transactional justice.”⁸ This role also implies more hardiness on the Court’s part in grappling with difficult problems and not shirking controversial tasks, as long as they can be situated within its jurisdictional confines. These tasks may include exercising incidental constitutional review of acts of organs of international organizations (including the Security Council), deciding conflicts of jurisdiction between judicial organs, acting as a *cour de cassation* (as well as pronouncing itself on other major legal policy issues, such as classifying norms as *jus cogens*, obligations as *erga omnes*, and certain illegal acts as international crimes), and seizing all opportunities to provide an authoritative interpretation of the principles and rules of general international law, rather than always trying to base its decision on the narrowest, and, preferably, consensual, grounds.

In this way, by rendering services that otherwise would have been left undone, the ICJ can impose itself at the hub of an international judicial system which stands at the center of the international legal order.

V. AN AFTERWORD ON INTERNATIONAL CRIMINAL TRIBUNALS

I cannot conclude these remarks without alluding to the controversy that has permeated our debates over the usefulness of international criminal tribunals. It is all well and good for us to sit here at NYU Law School, in the serene atmosphere of Greenberg Lounge, disquising on the cost-benefit analysis of international criminal justice. But we all know that international law is not made in such a cool-headed way. Its development is usually precipitated by crises and atrocities, through decisions taken hastily and under great pressure. Unfortu-

8. For the evolution of the Court’s juridical policy in this respect, see Georges Abi-Saab, *De l’évolution de la Cour internationale: Réflexions sur quelques tendances récentes*, 96 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 273, 284 (1992). See also Georges Abi-Saab, *The International Court as a World Court*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 3, 9 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). Unfortunately, the Court seems to have been drawn back to this pattern of “transactional justice” in the later part of the nineties.

nately, in the absence of an international legislature, international law does not dispose of sufficient autonomy to develop rationally “by its own bootstraps,” for it does not have any boots and perhaps not even any feet. It has to develop like a parasitic plant, by seizing on all opportunities and latching onto anything that gives it the possibility of moving upwards towards the light. This is another way of describing the “cumulative process” that I mentioned earlier, which can take place only through trial and error, by successive approximations.

I agree with Philip Allott that the criminal law approach may not be the best way to serve the norms whose violation is criminalized. But here we can seek inspiration in Churchill’s definition of democracy, particularly in evaluating Philip’s preferred approach, which also draws on Churchill’s initial position on the problem of punishing war criminals. I wonder whether the expedited solution he envisaged—the summary execution of the Nazi leadership and suspected war criminals—would have been better than the Nuremberg trials. Of course, Nuremberg is open to criticism (and I have criticized it) on many scores, but the balance remains positive, in my opinion. Nuremberg introduced a new idea and made some headway (however clumsily) towards realizing it: the prosecution of war crimes by an international tribunal, under international law, rather than by municipal (typically military) tribunals, under municipal law.

Since Nuremberg, this idea remained dormant, notwithstanding sporadic efforts within the UN, until the tragic events in the former Yugoslavia led the Security Council, perhaps for the wrong ulterior motives, to establish the ICTY. And if there were no tribunal for the former Yugoslavia, nobody would have dreamt of establishing (or cared to establish) a tribunal for a far-away African country, Rwanda. The two *ad hoc* tribunals rendered the establishment of a permanent court more palpable and practicable, which is a much better solution, because at least it takes care of the selectivity issue. This whole chain of events provides a good example of the cumulative process in action.

I also totally agree with Michael Reisman and José Alvarez that prevention is a much better approach than punishment. But prevention also requires international action, which cannot always be mobilized before the fact. On the eve of the Rwandan genocide, then-Secretary General Boutros Boutros-

Ghali made a desperate effort to raise 5,000 troops to strengthen the peacekeeping force there. But nobody—East, West, North, or South—was willing to commit any troops in those circumstances. Prevention was considered, but there was no political will for it. Does this mean that, after the tragedy, nothing should have been attempted or done?²

It is likewise true that the “natural judge” in criminal matters is the territorial judge, because he is the nearest to the facts and the best able to reconstitute what happened and to understand the mentality and motivation of the local people involved. But this natural judge is not always available or credible. This is why it is of crucial importance to devise a good working relationship between international tribunals, as a last resort against impunity, and internal courts and tribunals that continue to play the role of the “natural judge” in normal circumstances. Indeed, neither in terms of resources nor in terms of proximity and access to relevant persons, evidence, and events does criminal justice provide an optimal solution. It is a second best. But in certain circumstances, the best is not available, or not credible. In these circumstances, a less perfect machinery of justice is better than no justice at all.

Whatever the criticisms that can be addressed to the International Criminal Tribunals, it is clear that their establishment has thrust the issue of international criminal justice from the realm of theoretical speculation into that of practical politics. This shift in itself is a breakthrough in the development of international law. This is not to mention the potentially major contribution of international criminal tribunals in the long run—of integrating, through their jurisprudence, the disjointed and overlapping concepts we inherited from Nuremberg and Tokyo into a coherent normative system of international criminal law.⁹

In the face of all the practical problems raised by tragic events, if something can be done about them, however partial and imperfect a response this may be, I do not consider that the best course of action is to say that unless this response is perfect in every way, it should not be tried at all (assuming that we can know beforehand what the perfect response is). We should first try what is feasible, then try to improve on that, in

9. I have discussed this aspect in my separate opinion in the *Tadic Case*. See *Prosecutor v. Tadic*, *supra* note 6 (separate opinion of Judge Abi-Saab).

the light of experience. Improvements do not necessarily have to be marginal. If a radical alternative exists, it should be put on the table and scrutinized. If it is convincing, then we should all try to see how (and how much) we can bridge the gap.

This is my plea in this regard: it is for constructive rather than nihilistic criticism. I realize that we live, as the “critical school” keeps reminding us, in the age of post-modernism, but I purport to be a post-post-modern.