THE INTERPRETATIVE CHALLENGES OF INTERNATIONAL ADJUDICATION ACROSS THE COMMON LAW/CIVIL LAW DIVIDE

Sir David Baragwanath*

Abstract

Interpretation is viewed, and the relationship between the interpretation and creation of international law is examined, from the standpoint of international adjudication across the common law/civil law divide. In cases where there is no settled principle, 'the highest standard of practical necessity' is proposed as the requirement for innovation. The jurisprudence of the Special Tribunal for Lebanon is considered in that light.

Keywords

Interpretation, adjudication, the Special Tribunal for Lebanon, common law, civil law

We exist in order to win some measure of justice for the victims of massive crimes.¹

1 Introduction

Like disputes among states, criminality having serious consequences for humanity is the kind of problem that requires and has increasingly given rise to international law. Interpretation in international law requires a clear understanding of the issues at stake, the roles of decision-makers, the options available to them, and their consequences. This article examines the contributions to that topic of the common law and the civil law traditions, drawing upon a common lawyer's experience of the work of the Special Tribunal for Lebanon (STL), where both legal traditions have to work side by side to find common ground. It requires me to recall John Austin's remark that, for most of us, '[...] it is only a few systems with which it is possible to become acquainted, even imperfectly.'²

* President, Special Tribunal for Lebanon.

¹ J Stewart, Deputy Prosecutor of the International Criminal Court, 'Ceremony for the Solemn Undertaking of the Deputy Prosecutor' (The Hague, 8 March 2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr879/Solemn_Undertaking_DP_08032013.pdf> [accessed 10 February 2014].

² J Austin, 'The Uses of the Study of Jurisprudence', in H L A Hart (ed), *The Province of Jurisprudence Determined; and, the Uses of the Study of Jurisprudence* (1954) 363, 373.

For reasons of unfamiliarity I will mention only in passing other great legal systems, such as those of Islam. But I underline Austin's point by contrasting the blinkered approach of a famous common law judge, displayed both in the International Law Reports³ and in a standard Arab arbitration text,⁴ and the wisdom of Guy Canivet, a distinguished French judge, who opened the legal year with the modest aphorism, '*Il est vrai que nous ne rendons justice que les mains tremblantes.*'⁵

The advice of President Canivet is of special import in interpreting international law, because it is not simply a *Ding an sich*—Kant's 'thing-in-itself', a fixed object frozen in time. While there is much settled international law, it is in a state of continuous development. This means that an interpreter can contribute to that process, for better or worse.

The first part of this article discusses legal principles of interpretation in international law. It begins with the relationship between interpretation and creation of international law. It claims that interpretation is likely to be a form of law-making and that judges must accept both that in interpreting they may have to make law; and that to do so they must identify and apply sound principles,

³ *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149 (Lord Asquith of Bishopstone, Umpire):

If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments [...].

Cf *Musawi v R E International (UK) Ltd* [2007] EWHC Ch 2981 (Mr Justice Richards) para 82:

It is [...] common ground that the arbitrator was required by agreement to apply to the subject matter of the dispute and its resolution the principles of Shia Sharia law. This was an agreement which the parties were entitled to make under section 46(1)(b) of the Arbitration Act 1996: see *Halpern v Halpern* at para 36, per Waller LJ and *Dicey, Morris & Collins: Conflict of Law* (14th ed.) at 16-050 to 16-053).

⁴ The Arab concepts of arbitration, stretching back to the Pre-Islamic period and recognised by the Koran, are discussed in A H El Ahdab and J El Ahdab, *Arbitration with the Arab Countries* (2011) 5–44.

⁵ G Canivet, *Audience solennelle du 6 janvier 2006 – Discours de Guy Canivet, Premier président de la Cour de cassation* (Paris, 8 January 2006) <http://www.courdecassation.fr/IMG/File/pdf_2006/audience_solennelle_2006_discours_pp.pdf> [accessed 10 February 2014].

which are then discussed. It moves to identify two tensions, one between certainty and flexibility, the other between the common law and the civil law. It argues that international judges, coming from various domestic jurisdictions, should employ a metaphorical periscope that rises above the idiosyncrasies of our past experience and allows us to adopt an interpretation complying either with settled principle or, where that is lacking, ‘the highest standard of practical necessity’, a test which I contend is supported by the greatest jurists.

The second part turns to discuss the characteristics of the STL and several of its decisions, focusing on the civil law/common law contributions to the result.⁶ The role of interpretation is especially important in the STL—a unique tribunal which must create its own rules and applies national and international law. Because the experience of our Chambers and bar includes the common law tradition as well as that of Lebanon and other civil law jurisdictions, we have had to work together to resolve tensions between the two which our cases have thrown up and take full advantage of their respective contributions.

2 Interpretation in International Law

To address the principles underlying interpretation in international law candidly and practically, four issues are in my mind essential. Where did international law come from, and what is the role of judges in this process? What are the particular contributions of civil law? What about the common law? What now are the interpretive challenges for international tribunals sitting at the interface of the challenges? I will then discuss two sets of tensions affecting, in my view, the work of international judiciaries in their quest for interpretation of the law.

2.1 Principles of interpretation in international law

2.1.1 *Where does international law come from?*

Interpretation is so closely linked with law-making that it may be seen as a form of the latter. So I begin with that topic which, *a fortiori*, must govern interpretation.

International law notoriously lacks any general legislature, except to the extent that multipartite treaties, including the UN Charter, and resolutions of

⁶ That discussion is limited by my role as Judge of the Special Tribunal for Lebanon’s Appeals Chamber, and the convention that judges do not elaborate reasons for their decisions.

the Security Council, have that effect.⁷ It is largely that lack which imposes added responsibility on the judges and requires interpretation to be closely linked with the creation of international law.⁸

The notion that judges can act as makers of international law has been viewed with reticence, perhaps even more than has been the case with domestic law. After all, where could judges derive authority to pronounce on the law of nations, when nations guard jealously their prerogative to accept new rules and new responsibilities? Yet if no settled custom or other source of existing law is ascertainable, to decide the case the judges must somehow secure a law to apply. And if no law is to be found—in legal vernacular, if *non liquet* is not an option—law simply must be created. So in my view, it must be recognised that a measure of law creation is simply inherent in the judicial function: those who create judicial decision-makers perforce create law-makers, and must be aware of this.

What such judges create for the purpose of resolving a particular case may of course be rejected by later courts. But if accepted it will be legitimated as new law on the uncontroversial basis of becoming a new custom.⁹

Heretical as some may view that conclusion, the alternative is even less attractive. When Topsy was asked by Ophelia about heaven, and who made her, she answered:

Nobody as I knows on [...] I spect I grow'd. Don't think nobody never made me.¹⁰

Judges have always been reluctant to acknowledge that they actually make law. I suggest that this is because it would be seen as usurpation of authority never conferred upon them. So more soothing language than 'law-making' is normally used. Sir Hersch Lauterpacht spoke not of making but of 'clarifying and

⁷ The debate on this issue has been one of the hallmarks of the past decade. See among others S Talmon, 'The Security Council as World Legislature' (2005) 98 *AJIL* 175.

⁸ As recognised by I Venzke, *How Interpretation Makes International Law* (2012). See also S Darcy and J Powderly, *Judicial Creativity at the International Criminal Tribunals* (2010).

⁹ This 'dynamic' view of custom is discussed in V Lowe, *International Law* (2007) 37; see also T Treves, 'Customary International Law', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2006) 937. For an application of this theory to the realm of international criminal tribunals and their interactions with States, see G Acquaviva, 'Non-State Actors from the Perspective of International Criminal Tribunals', in J d'Aspremont (ed), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011) 185, especially at 186–7.

¹⁰ Harriet Beecher Stowe, *Uncle Tom's Cabin*, vol II, chapter XX, reproduced in E Ammons (ed), *Uncle Tom's Cabin* (2nd ed, 2010) 221.

developing' international law; hence the title of *The Development of International Law by the International Court*.¹¹

In modern democracies, judges are the servants of the community, not their masters, and must account publicly for their decisions.¹² Nowadays candour is recognised as essential to public confidence in the judicial process and judges no longer pretend that every legal decision is dictated by some pre-existing rule. That indeed is my topic, which may be put as follows: what compass should direct a judge to steer left or right when none currently exists? Expelling the metaphor, why, and by what criteria, does a judge create new law?¹³

Vaughan Lowe argues that the system of international law is now substantially complete.¹⁴ That depends on the criteria. Certainly there is an immense and sophisticated set of norms by which a myriad of international transactions are regulated every day. The *non liquet* principle is generally, if over-simply, treated as requiring a court to provide an answer to any question posed,¹⁵ even though the reach of international criminal law, for example, is still at an early stage. So international criminal tribunals are constantly forced to engage in this creative aspect of interpretation. But the interpretation of international law turns not only on existing principles but on how its future development should be directed. What is it that is to be developed and how should that be done? Hall considered that:

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree

¹¹ H Lauterpacht, *The Development of International Law by the International Court* (1982) 156, concluding that 'judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable'. See also A Boyle and C Chinkin, *The Making of International Law* (2007) 268.

¹² A Bianchi & A Peters (eds), *Transparency in International Law* (2013). See further *Kennedy v Charity Commissioner* [2014] UKSC 20, paras 8, 112 and 132.

¹³ In 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (2015, in press), D Hollis cites H L A Hart, *The Concept of Law* (2nd ed, 1994) 204: 'the open texture of law leaves a vast field for creative activity, which some call legislative. Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning'. Hollis also cites J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) 224, noting how interpretation straddles the divide between the identification of existing laws and the creation of new ones.

¹⁴ V Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M Byers (ed), *The Role of Law in International Politics* (2001) 207, 207ff.

¹⁵ J Stone, '*Non liquet* and the Function of Law in the International Community' (1959) 35 *BYIL* 124. See also Hollis, above n 13.

to that binding a conscientious person to obey the laws of his country[...]¹⁶

While that provides a useful element of a general test of existing international law—the *lex lata*—more needs to be said about the evolution of both the test and the creation of law—the *lex ferenda*.¹⁷ Brierly's contribution, classically summarised in Sir Hersch Lauterpacht's 'Appreciation' that introduces *The Basis of Obligation in International Law* (1958),¹⁸ is needed to complete it. He emphasised that:

[...] as the law exists for the sake of the individual living in society, its final appeal must be directed to the individual and not to a non-existing collective conscience.¹⁹

What sorts of development will meet the policy of that composite standard? One bedrock of international law, endorsed by Article 38(1)(b) of the Statute of the International Court of Justice, is of course custom accepted by states. Yet to seek what States customarily regard as binding as a litmus test for whether international law exists can be unhelpful when the point has never been raised with them (and when to do so is unfeasible). The same may be said of the other Art 38 criteria,²⁰ which all presuppose some existing answer. Where that is lacking the adjudicator must find a further practical and principled test. An answer must be given even if the decision, while determining the instant case, can only be a provisional statement of international law until and unless it has indeed been authoritatively accepted. Such acceptance may indeed be by customary practice or by another Article 38 source, such as a decision of the International Court of Justice. I return shortly to propose '*the highest standard of practical necessity*' as the appropriate test.

In employing such a test, different contexts may require different treatment. For example, in international law, as in private law, particular clarity and

¹⁶ W Hall, *A Treatise of International Law* (1924) 1.

¹⁷ Cf H Thirlway, 'Reflections on *lex ferenda*' (2001) 32 *NYIL* 3.

¹⁸ J Brierly, *The Basis of Obligation in International Law* (1958).

¹⁹ *Ibid.*, xix. Likewise the concept is picked up in the Preamble to the UN Charter: 'to reaffirm faith in human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]'.
²⁰ International conventions establishing rules expressly recognised by the contesting States, general principles of law recognised by civilized nations and, as subordinate means, judicial decisions and the teachings of highly qualified publicists.

precision is required in relation to status and property. Then come the requirements of commerce, both domestic and international, which must blend maximum certainty with some flexibility, as is seen in the evolving jurisprudence on bilateral investment treaties.²¹ By contrast, human rights norms, which are rapidly developing in domestic law, require the regular updating of international standards—and, to a certain extent, vice-versa, in that international standards are often implemented at the domestic level. More generally, the field of international law is dynamic, as is required by the dynamism of the issues for which it is needed. These considerations should receive effect in the jurisprudence, as they do to a degree.

2.1.2 *Contributions of the Civil Law*

While in domestic law the common law tradition may arguably have somewhat greater flexibility than the Romano-Germanic tradition, civil lawyers have created both international law's foundations and much of its modern structure. Without offering more than examples, one might mention Bartolus da Sassoferrato (1313-1357), the 14th century Italian who mastered Roman law and wrote both of conflict of laws and, for the first time, of entities '*superiorem non recognoscentes*'—independent of both Emperor and Pope;²² Alberico Gentili, also Italian, who made a transition to Oxford and whose *De Jure Belli* made skilful use of civil law concepts and the actual practice of international law;²³ and of course Hugo de Groot—Grotius—the civil lawyer and great innovator whose works on the law of war and of freedom of the sea are no doubt among the reasons why the Statute of the International Court of Justice includes among the sources of international law 'the teachings of the most highly qualified publicists of the various nations'.²⁴ Another significant figure is the Spanish theologian Francisco de Vitoria. His *De Indis* is a mixture of brilliant innovation and disastrous conservatism: creating the modern colonial law—that usages of colonized people (indigenous peoples of South America) are to be given legal force in the new society—yet with

²¹ See B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in A J van den Berg (ed), *Fifty Years of the New York Convention* (2009) 5, 10. Consider also the evolution of private law contractual principles in international developments, as proposed in *Yam Seng Pte Limited v International Trade Corporation* [2013] 1 All ER (Comm) 1321 (Leggatt J).

²² See, among others, L Gross, *Essays on International Law and Organization* (1984) 12–13.

²³ A Gentili, *De jure belli libri tres* (first published in 1589 as *De Jure Belli Commentationes Tres*).

²⁴ Statute of the International Court of Justice, Art 38(1)(d) (*ICJ Statute*).

the literally fatal reservation of their accepting the colonists' religion.²⁵

Antonio Cassese, whose charming *Five Masters of International Law* contains interviews with two common lawyers, Jennings and Henkin, and three civilians, Dupuy, Jiménez de Aréchaga, and Schachter,²⁶ may himself prove to have been a Grotius of our time, an innovator who wrenched old law into a modern form. *Tadić* in the ICTY,²⁷ with its extension of Grotius' law of war to civil war, is among Cassese's many notable contributions. Whether the same may be said of his role in seeking to systematise the international law of terrorism remains to be seen.²⁸

2.1.3 Contributions of the Common Law

At this stage, I touch briefly on the common law, repeating my contention that interpretation is closely linked with, and may be seen as, a form of law-making. Here, a fundamental point is that the whole of the common law, like a great deal of international law, is made by judges. In both the first generation of international criminal courts at Nuremburg and Tokyo and the second generation, beginning with the International Criminal Tribunal for the Former Yugoslavia (ICTY),²⁹ common law judges and counsel have played a prominent part. The STL by contrast deals not with the international crimes of genocide, war crimes and crimes against humanity but the domestic criminal law of a civil law State. So it is appropriate that there is greater emphasis on aspects of the practice of civil law jurisdictions, a topic to which I will return. Such a development is a novel expression of the evolving responsibility to protect³⁰ which may be seen as initiating a third generation of international criminal courts.³¹

²⁵ F de Vitoria, *Relectio de Indis* (1539: tr J P Bate in E Nys (ed), *Classics of International Law*, 1917).

²⁶ A Cassese, *Five Masters of International Law* (2011).

²⁷ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) (*Prosecutor v Tadić*).

²⁸ See *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011). Cf *R v Gul* [2013] 3 WLR 1207.

²⁹ See also the International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Extraordinary Chambers of the Courts of Cambodia and the International Criminal Court.

³⁰ See e.g., A Orford, 'Humanitarian Intervention to the Responsibility to Protect' (Speech delivered as the James Crawford Lecture, University of Adelaide, 11 September 2013).

³¹ Other options include complementing the individual efforts of UN Member States and the work of the Security Council Counter-Terrorism Committee and its Executive Directorate with an international terrorism tribunal.

The common law judges assumed the power to make law in order to defeat infringement of their notion of injustice. Their influence is seen in the structure and practice of much of modern international criminal law. An example in tribunals such as the ICTY, where there is no civil law *dossier*, is the conferral of the function of questioning witnesses on counsel.³² The internationalists Brierly and Lauterpacht (who is claimed by civilian and common lawyers alike) have been identified as of special influence in judicial law-making.³³

2.1.4 *Current Challenges*

The challenges currently facing international adjudication, and thus interpretation, is the core issue in the present article. The credibility of each tribunal requires a wise blend of two elements—applying the law and doing justice.

A common lawyer must steer between the rock of outmoded precedent and the whirlpool of uncertainty. Equally, a civil law judge of an international tribunal, aided by a lesser concern with *stare decisis*, may perhaps bear in mind that the absence of any legislature might warrant a somewhat more expansive approach to judicial law-making than is familiar in domestic law. I will come back to the different tendencies. But it is as well to begin with fundamental principle.

Recognising the wisdom of the past, Newton acknowledged that he stood on the shoulders of others.³⁴ In law, there is a special importance in maintaining stability, which is imperiled by any interpreter who claims to know best, thus wreaking havoc upon legal certainty. Yet in interpretation, there is also a need to be alert to other considerations. The historian Marci Shore has recently written:

[...] all meanings are fragile, temporary, open to change—but for all that no less deep and binding and real [...] meaning is possible, but not above and outside ourselves. Everything around us is not found by us, but rather is, in a certain measure, our creation.³⁵

³² Other criminal tribunals of international character have a more flexible approach. The Statute and procedures of the Extraordinary Chambers of the Courts of Cambodia and of the STL seek to instil a civil law judge-led process as being appropriate for a tribunal responsible for doing justice in a local context suffused with French (and therefore civil) legal culture.

³³ A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) 2–3.

³⁴ Thomas McSweeney attributes the concept to Bernard of Chartres: T McSweeney, 'English Judges and Roman Jurists: the civilian learning behind England's first case law' (2012) 84 *Temple LR* 827, 846. See John of Salisbury, *The Metalogicon of John of Salisbury: a Twelfth Century Defense of the Verbal and Logical Arts of the Trivium* (c. 1159: tr D McGarry, 1955) Book II Chapter 9 93–95.

³⁵ M Shore, 'Out of the desert – A Heidegger for Poland', London, *The Times Literary Supplement*, 2 August 2013, 15, referring to the Polish philosopher Krzysztof Michalski.

In legal interpretation, when should stability surrender to the change involved in creation? As a practical starting point in today's world, of many religions or none, I am attracted by the standard of *practical necessity* which, stripped of the religious flavour of Grotius' term 'moral', underlies the formulation he adopts:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or *moral necessity*; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God [...]. The law of nature, again, is unchangeable—even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.³⁶

Ostensibly referring to law as derived from God, inherent in Grotius' argument was that, whatever else God may seek to do, the law is what conforms with a rational evaluation of practical necessity:

[i]f a creditor gives a receipt for that which I owe him, I am no longer bound to pay him, not because the law of nature has ceased to enjoin upon me that I must pay what I owe, but because that which I was owing has ceased to be owed.³⁷

This test of practical necessity, reminiscent of and conceivably related to Cicero's 'right reason',³⁸ also evokes techniques of the modern common law and, so far as my experience extends, the civil law as to both the creation and interpretation of law.

³⁶ H Grotius, *On the Law of War and Peace* (1625: tr F Kelsey, 1964) Book 1, Chapter 1 (emphasis added).

³⁷ Ibid.

³⁸ Cicero, *De Legibus* (tr C Yonge, 1856) Book I, Chapter XV: 'For there is but one essential justice which cements society, and one law which establishes this justice. *This law is right reason*, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked' (emphasis added).

The issue is, of course, whose opinion is to govern. There is the problem common to adjudication, cogently identified by Lord Hailsham LC,³⁹ that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts. It is therefore not enough for a judge who ventures to turn law-maker simply to act 'reasonably'. He or she must do better, abandoning subjective self-confidence in favour of President Canivet's trembling hands, and adding the adjective 'highest' to the standard of 'practical necessity'.

Judges are endlessly creative. Take, by way of example, the judicial device of *non liquet* already mentioned and to which I return: lifting the Latin of the Roman term for 'not proven'⁴⁰ across to the proposition that judges must find a rule to determine every issue argued, employed by judges from both common law and civil law backgrounds. But instant creation of new law for the purposes of the case is permissible only if meeting 'the highest test of practical necessity', a proposal to which I will return. If generally accepted, new international law will have resulted.

2.2 Two sets of tensions: certainty and flexibility and the common law/civil law divide

2.2.1 Certainty and flexibility

I have mentioned that international law is constantly developing. Fundamental to the process of its creation and interpretation are two overlapping tensions. The first is between certainty and flexibility in international law. It parallels the competing elements of the English judicial oath, adopted widely in other jurisdictions: 'to do right to all manner of people after the laws and usages' of a particular state.⁴¹ A *law* may be certain but unjust; to do *right* may require flexibility and so detract from certainty. The essayist Michel de Montaigne, a profound and balanced legal thinker, offered a conservative expression of the point:

[i]t [seems to me] most iniquitous to wish to submit immovable public regulations and observances to the instability of private ideas (private reasoning having jurisdiction only in private matters) [...] (even though human reason is far more involved in civil law [than

³⁹ *In re W (an infant)* [1971] AC 682, 700.

⁴⁰ Cicero, *The Orations of Marcus Tullius Cicero* (tr C Yonge, 1856) 28.76 ('*pro cluentio*').

⁴¹ Promissory Oaths Act 1868, 31 & 32 Vict, ch 72, s 4.

in the case of divine ordinances], the Law is the sovereign judge of its judges; judicial discretion is limited to explaining and extending accepted usage: it cannot deflect it or make innovations).⁴²

Yet he acknowledged that:

[...] Fortune [...] sometimes presents us with a need so pressing that the laws simply must find room for it.⁴³

Montaigne went on to ask:

[...] are there any [opinions] so strange that habit has not planted them and established them by laws [...]? And that ancient exclamation is totally right: Is it not a disgrace that the natural philosopher, that observer and tracker of Nature, should seek evidence of the truth from minds stupefied by habit?⁴⁴

Reconciling tensions between inconsistent values within the context of any case is a familiar and constant challenge to the judge. It is often impossible to simply say that one predominates, certainly not when the two components of the judicial oath are in conflict. For example, in *Douglas v Hello! Limited*, the Court of Appeal of England and Wales was unable to assert *a priori* that the right to privacy was greater than the right to freedom of expression. As Sedley LJ observed:

Neither element is a trump card. [...] the principles of legality and proportionality [...] constitute the mechanism, by which the court reaches its conclusion on countervailing or qualified rights.⁴⁵

In short, the judge must evaluate which decision in the particular circumstances does better justice, bearing all relevant considerations in mind. That requires an examination of the factual and legal context, including high principle and any particular facet or analogy, in order to find the best answer. Regular differences among judges of final appellate courts evidence the difficulty of the task. But evaluation is part of the judge's function. Indeed the challenge of reconciling change and certainty in international criminal law is a *leitmotif* of the discussion of STL decisions in Part III.

⁴² M de Montaigne, 'On habit: and on never easily changing a traditional law', in *The Complete Essays* (1580: tr M Screech, 1993) 137.

⁴³ *Ibid*, 138.

⁴⁴ *Ibid*, 125. Citing Cicero, *De Natura Deorum*, 1, xxx, 83.

⁴⁵ [2001] QB 967, para 36.

2.2.2 *The Common Law/Civil Law Divide*

The other tension is between the respective traditions of the civil law and the common law. In domestic law, their 'divide' has long been debated. I refer to the civil law as the legal systems generally known as 'Romano-Germanic', which are based on a framework of written laws of which Justinian's Code, Digest and Institutes, contributed to by the great University of Beirut, provided the classic example. This framework of written laws was adopted in many European, African, Asian, South American and Middle Eastern States, including Lebanon. I refer to common law as those legal systems derived from the decisions of judges in England and extended more recently to its former colonies in North America, Africa, Asia and Oceania.⁴⁶

Montesquieu saw civil law judges as mere robots mouthing the words of the lawmaker:

[...] *les juges de la nation ne sont [...] que la bouche, qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent pas modérer ni la force, ni la rigueur.*⁴⁷

A similar opinion is expressed in Article 5 of the 1804 Code Napoléon, perpetuated in the modern Code Civil:

Il est défendu aux juges de prononcer, par voie de disposition général et réglementaire, sur les causes qui leur sont soumises.

This approach had been seen in the process of *référé législatif* prescribed by the Constitution of 1791, requiring judges to refer questions of interpretation to the legislature. Although the process was terminated in 1837, its influence was seen in the French exegetic school of legal interpretation which became prominent in the nineteenth century. The entire law was deemed to be contained in the statutory codes and a careful study of the text was regarded as sufficient to reveal the solution in any case.⁴⁸

Moving to the present, Professor Roger Perrot suggests:

⁴⁶ See for instance, in international criminal law, the recent L Carter & F Pocar (eds), *International Criminal Procedure—the Interface of Civil Law and Common Law Legal Systems* (2013).

⁴⁷ *De l'Esprit des Lois*, Livre XI/VI (1748) 301.

⁴⁸ For references see C Germain 'Approaches to statutory interpretation and legislative history in France' (2003) 13 *Duke Journal of Comparative International Law* 195, 197–8.

*Même s'il a l'intime conviction que la Loi est injuste, le Juge peut suggérer des réformes, le Juge peut les proposer, il peut oeuvrer pour qu'elles aboutissent; mais aussi longtemps que la Loi existe il ne peut que l'appliquer, à moins de se placer dans un schisme qui ruinerait sa propre autorité.*⁴⁹

But he continues:

*Mais, l'ardeur combative du magistrat peut légitimement s'exercer dans le domaine qui lui est propre et qui est celui de l'interprétation [...] Les exemples sont légion de textes qui sont sortis de l'épreuve judiciaire, totalement métamorphosés.*⁵⁰

Perrot cites Président Bellet, the President of the *Cour de cassation*:

*[...] complétant le travail du législateur, le juge participe à l'élaboration des règles qui sont destinées à régir la cité et fait 'lato sensu' une certaine politique.*⁵¹

Perrot also cites Professeur Weill:

*Si le législateur s'abstient de modifier le droit quand la société a besoin qu'il soit modifié, il s'en remet implicitement aux Tribunaux, du soin de faire les changements nécessaires.*⁵²

The nuances of these analyses go far beyond Montesquieu's caricature and update Montaigne.

The teleological approach adopted by the STL, based on 'the search for the purpose and object of a rule with a view to bringing to fruition as much as possible the potential of the rule',⁵³ is said to be used mostly by the highest courts—the *Cour de cassation* and the *Conseil d'État*—rather than by lower courts.⁵⁴

⁴⁹ M Perrot, 'Le rôle du juge dans la société moderne', *Gazette du Palais*, 12 February 1997, Présenté aux entretiens de Nanterre, septembre 1976, organisés par l'A.N.A., 94.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² A Weill, *Droit Civil: Introduction Générale* (1973) 167.

⁵³ *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 29.

⁵⁴ Germain, above n 48, 202.

Common law judges are less reluctant to create law through adjudication. In *Fairchild v Glenhaven Funeral Services Ltd*,⁵⁵ sufferers from the pernicious industrial disease asbestosis, which can take about 30 years to display symptoms, had been unable to show which of several periods of employment by different firms, each exposing them to asbestos, had caused their condition. In the lower courts, which applied a strict settled rule that a plaintiff must prove causation, they lost their case. But the final English court allowed the workers' appeal. Lord Bingham applied two principles employed by common law judges in making law. The first is a test of fairness of result, and the second is the precedent of earlier authority—here a general principle stated over two centuries earlier and applied more recently in another common law jurisdiction:

I do not consider that the House [of Lords] is acting contrary to principle in reviewing the applicability of the conventional test of causation to cases such as the present. Indeed, [1] *it would seem to me contrary to principle to insist on application of a rule which appeared, if it did, to yield unfair results*. And I think it salutary to bear in mind [2] Lord Mansfield's aphorism in *Blatch v Archer* (1774) 1 Cowp 63, 65, quoted with approval by the Supreme Court of Canada in *Snell v Farrell* [1990] 2 SCR 311, 328: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."⁵⁶

It took some common law judges until 1972 to admit categorically that they have always made law,⁵⁷ and indeed have created the whole of the common law. But others had acknowledged their role much earlier with both candour and pride. In 1885, declining to make a book seller liable for a defamation contained in a book offered for sale in his shop, Lord Esher MR confidently stated:

The question does not depend on a statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.⁵⁸

⁵⁵ [2003] 1 AC 32. In a few states, United States judges have gone further. See M Geistfeld, 'The Doctrinal Unity of Alternative Liability and Market-Share Liability' (2006) 155 *U Pa LR* 447.

⁵⁶ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, para 13 (emphasis added).

⁵⁷ Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

⁵⁸ *Emmens v Pottle* (1885) 16 QBD 354, 357–8.

In explaining why the media should have access to documents referred to in open court, Lord Toulson extended candour to enthusiasm:

I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries [...] Collectively they are strong persuasive authority. [...] The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.⁵⁹

The common law/civil law divide does appear to have some substance. For instance, in the private international law sphere of domestic decision-making, a distinct difference concerning judicial co-operation in cross-border insolvency may be noted. Common law judges have readily adopted protocols for cross-border judicial cooperation, pioneered by Hoffman J in England and Brozman J in New York in *In re Maxwell Communications Corp.*⁶⁰ At least some civil law judges have felt more reluctant to authorise such transactions unless their State has adopted the UNCITRAL Model Law on Cross-Border Insolvency.⁶¹

⁵⁹ *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2013] QB 618, para 88. See also *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23; *Saunders v Houghton* [2010] 3 NZLR 331; *Kennedy v Charity Commission* [1914] UKSC 20, paras 46 and 133.

⁶⁰ *Barclays Bank v Homan* [1993] BCLC 680; *In re Maxwell Communications Corp.*, 93 F.3d 1036 (2d Cir, 1996); J Westbrook, 'The Lessons of Maxwell Communication' (1996) 64 *Fordham Law Report* 2531.

⁶¹ Personal comment from a distinguished South American appellate judge. See also P Zumbro, 'Cross-Border Insolvencies and International Protocols – An Imperfect But Effective Tool' (2010) 11 *Business Law International* 157, 157–8: 'First introduced nearly two decades ago, international insolvency protocols ('protocols') have become an important tool for providing a framework for communication and cooperation among courts and parties in cross-border insolvencies. Protocols can provide an important jointly agreed-on and court-authorised framework for cooperation and coordination among participants in concurrent insolvency proceedings occurring in different jurisdictions [...] Generally, protocols do not predetermine substantive legal disputes that may arise during the proceedings. Instead, they aim to harmonise management of the cases before conflicts arise. While once novel, they are now commonly employed by courts, particularly in common law jurisdictions, such as the United States, Canada and the United Kingdom, to resolve choice of law issues in advance and coordinate case administration. Courts have approved protocols in cases where there are concurrent plenary proceedings in multiple jurisdictions and where there is a plenary main proceeding in one or more jurisdictions

The leading comparative law text in English—Merryman's *The Civil Law Tradition*⁶²—contrasts the lack of structure of the common law with the system and rigour of the civil law, which is regarded as a formidable strength. But it also emphasises how the distinctions are shrinking. Merryman recounts the increasing borrowing by civil and common law systems of features of the other as mutual familiarity increases. For example, the advantages of codification, so admired by Jeremy Bentham (who invented the term 'international law'), have been adopted in respect of many areas of the law of England, Hong Kong and other common law states. And in France, *Le Monde* reported the account of the then *Garde des sceaux* (Minister of Justice) of legislative reform that counsel may in future be present throughout a client's interview (by a state official) in ordinary crimes, thus bringing French practice more closely in line with that of common law states.⁶³ And while the civil law lacks the strict common law rule of *stare decisis*, the current accessibility of appellate judgments of course bears materially on its decision-making.

Significant differences no doubt remain. That is perhaps to be expected given differences in legal tradition, such as the difference between the civil law practice of appointing judges in their early 20s, and the common law practice of appointing judges from the practising profession in middle age. The advantage of early appointment in civil law systems includes the wisdom and confidence borne of vast judicial experience seen in civil law judges of forty years service. Other differences relate to the principles guiding the law of procedure and evidence. The French-devised institutions existing in several other jurisdictions, such as the Lebanese courts—including (i) *juge d'instruction* in criminal matters (a judge tasked with investigating the crime); (ii) the use of a *dossier* for the trial chamber, to facilitate trial; and (iii) the authority of trial judges to lead questioning of witnesses—are all quite contrary to the practice of the common law criminal courts which act as referees and for the most part leave questioning to counsel. Professor Damaška has described:

accompanied by ancillary proceedings in one or more additional jurisdictions.^{3'} (emphasis added). '[FN 3]: Judges in civil law jurisdictions may be unable or unwilling to approve protocols if not explicitly authorised by the civil code of their jurisdiction. However, in certain cases, civil law courts have given tacit approval to operating under a protocol not formally approved by the court.'

⁶² J Merryman and R Pérez-Perdom, *The Civil Law Tradition* (3rd edn, 2007).

⁶³ *Le Monde* (Paris), 9 September 2010, 11. '*l'avocat pourra désormais être présent pendant toute la garde à vue, en matière de droit commun.*' (Ordinary crimes are here contrasted with crimes such as terrorism).

the pervasive continental distaste for rules that call for advance assessment of the probative effect of evidence [resulting from] the judicially-controlled mode of interrogation [which] accords witnesses considerable freedom to relate what they know, [so that] the free flow of their narratives [...] almost invariably includes at least passing remarks on the accused's character traits [whereas] by contrast, where evidence is adduced in the common law's *staccato* fashion, namely by questions of partisan counsel, the content of witnesses' testimony can be more closely monitored and forbidden information more easily prevented from reaching triers of fact.⁶⁴

I take Lebanese law as a paradigm example of the civil law. One begins with its Constitution, statutes, judge-made law, values and traditions. Lebanese traditions include the provision of the alphabet to ancient Greece, the contribution to and codification of the Roman law, and vital contributions to the three pillars of our civilisation: democracy, the rule of law,⁶⁵ and international order.⁶⁶ When introducing his codification of the Roman law that underlies today's civil law and much of the common law, Justinian wrote of 'the fair city of Berytus, which may well be called the nurse of laws', from whose famous law school professors had been called to contribute to the reform.⁶⁷ The continuing value of the principles of Roman law is that they form part of the heritage of both civil lawyers and common lawyers, and are readily adopted by each when there might be hesitation on either side in adopting a concept peculiar to the other. Lebanon is also a founding member of the United Nations and party to the proliferation of international law that resulted. The Universal Declaration of Human Rights is recited in the Constitution of Lebanon. The Lebanese Constitutional Council has held that the International Covenant on Civil and Political Rights also forms an integral part of the Constitution and enjoys constitutional authority. Of course many common law States share a number of these characteristics. Moreover the

⁶⁴ M Damaska, 'Propensity Evidence in Continental Legal Systems' (1994–1995) 70 *Chicago-Kent LR* 55, 56–7.

⁶⁵ This was first expressed in writings by Aristotle: A Ryan, *On Politics* (2013) 91.

⁶⁶ The pillars concept is that of A Maalouf, *Disordered World: Setting a New Course for the 21st Century* (2012) 184.

⁶⁷ The Latin phrase '*in Beyrytiensium pulcherrima civitate quam et legum nutricem bene quis appelet*' is cited by the late Samir Kassir, a bombing victim, in S Kassir, *Beirut* (2010) 53 (n 103). It appears in Justinian's preface to the Digest 'Constitutio Omnem', para 7. A translation by CH Monro is available at: <http://archive.org/stream/digestofjustinia01monruoft/digestofjustinia01monruoft_djvu.txt> [accessed 10 February 2014].

ascendancy of parliaments has increasingly seen legislation overtake the common law as a source of jurisprudence. Still, there remains a deep divide of orientation; the importance of codified legislation remains a distinctive feature of the civil law system.⁶⁸

Yet the width of the divide must not be over-stated. At the outset of the common law, Bracton permitted English judges only to improve (*in melius converti*) and not to change (*mutari*) the law.⁶⁹ Lord Justice Laws recently echoed Bracton as follows:

Politicians may re-invent the wheel; judges may not. Law is evolutive. Politics is revolutionary. Law and government both make new lamps; but law, certainly the common law, makes new lamps from old.⁷⁰

That said, it is only recently that common law judges have been prepared to recognise the interests of other states in enforcing even the civil law. As late as 1995, the Privy Council declined to permit the freezing of funds in Hong Kong of a German national who was alleged to have obtained money from Mercedes Benz in Monaco by deception. It reasoned that because the Hong Kong courts had no jurisdiction to determine the substantive claim of fraud, it lacked the power to freeze the alleged fraudster's assets.⁷¹ The decision had to be reversed by legislation. In 2010, the Final Court in Hong Kong adopted a very different approach, rejecting a submission that Hong Kong's anti-corruption legislation

⁶⁸ For citations, see *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) n 102.

⁶⁹ Bracton, *Tractatus de Legibus* (ed 1569) f. 1b, as cited in F Pollock and F Maitland, *The History of English Law* (1968) vol 1, 176 (n 4).

⁷⁰ Lord Justice Laws, 'The Good Constitution' (Speech delivered as the 12th Sir David Williams Lecture, Cambridge, 4 May 2012) 11. Available at <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-laws-speech-the-good-constitution.pdf>> [accessed 10 February 2014]. Another formulation is that of R Jennings in A Cassese, *Five Masters of International Law* (2011) 176: 'the judge [...] may change the law but he does so without moving out of the legal framework within which the law requires him to work.'

⁷¹ *Mercedes Benz v Leiduck* [1996] AC 284. Lord Nicholls distilled the reasons for his dissent (at 305): 'The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.'

should be construed to apply only to bribery in Hong Kong committed by local officials and not that by foreign officials. Bokhary P stated:

Such a course makes a positive and important contribution to the worldwide struggle against corruption, an endeavour inherently and highly dependent on cross-border co-operation. Acting cooperatively, each jurisdiction properly protects itself from the scourge of corruption and other serious criminal activity.⁷²

There exists in the common law some tendency towards:

[b]alancing what Murphy J called ‘the culture of their own community’ against the culture of others to see ourselves as part of *both* communities: local and international.⁷³

Yet, for several reasons, it is too simplistic to suggest that common law judges feel free to modify the law to avoid injustice unless there is clear legislation in the way, and that civil law judges tend to prefer to have explicit legislative authority.

To speak simply of ‘common law’ and ‘civil law’ judges lumps together the many different jurisdictions, and many more judges, whose discipline originated more or less in either the common law or the Romano-Germanic tradition, ignoring the differences among the legal systems within either tradition and among their judges. It ignores the common law’s distinct debt to Rome.⁷⁴ It overlooks the rapidly increasing tendency in a globalizing world of all legal systems and judges to learn from one another, not least via computer resources, travel, the emergence of English as a *lingua franca*, and the evolution of a truly

⁷² *B v Commissioner of the Independent Commission Against Corruption* (2010) 13 HKCFAR 1, para 21.

⁷³ D Baragwanath, ‘The Community of the Common Law’ in J Young & R Lee (eds), *The Common Law Lecture Series* (2010) 83, 118, citing *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, para 57.

⁷⁴ Seen in the civil law experience of some outstanding English judges, as in: G Burnett, *The Life and death of Sir Matthew Hale* (1682) 4: ‘He set himself much to the study of the Roman law, and though he liked the way of Judicature in England by Juries, much better than that of the Civil Law, where so much was trusted to the Judge; yet he often said, that the true Grounds and Reasons of Law were so well delivered in the Digests, that a man could never understand Law as a Science so well as by seeking it there, and therefore lamented that it was so little Studied in England’. Other jurists, including the English Julius Caesar and Francis Bacon, lived for a period in France in the household of a practising civil lawyer: L Jardine & A Stewart, *Hostage to Fortune, The Troubled Life of Francis Bacon* (1998) 59–61. As to the common law’s reception of French law, see D Baragwanath, ‘The Law of France and the Law of New Zealand’ (1999) NZLJ 13.

international jurisprudence in many spheres. Most importantly, the suggestion disregards the historical fact that to a great extent international law emerges from decisions of civil law judges and ‘the teachings of the most qualified publicists of the various nations’, such as Grotius, referred to in Article 38(1)(d) of the Statute of the International Court of Justice. Comparing legal systems is an exacting task. Having noted the limits on comparative law familiarity already mentioned, Austin added less happily:

From [the ‘few systems with which it is possible to become acquainted’], however, the rest may be presumed. And it is only the systems of two or three nations which deserve attention: the writings of the Roman Jurists; the decisions of English Judges in modern times; the provisions of French and Prussian Codes as to arrangement.⁷⁵

Despite the emphasis in the UN Charter of the sovereign equality of *all* its members,⁷⁶ Austin’s *de haut en bas* attitude to other legal systems, as being less than ‘civilized’, is sadly retained in the Statute of the International Court of Justice. Among the sources of law to be applied by that Court are ‘general principles of law recognised by *civilized* nations’.⁷⁷ We are however coming to appreciate that civilization is more complex than appeared to colonial powers in an age of empire.⁷⁸

While substantial equality is still at a distance,⁷⁹ it is among the values that together make up the ideal of a system of law that delivers on the ambitions of the Charter. So too is the best use of the range of legal techniques that can be drawn on to achieve optimum justice. The decisions discussed in Part III seek to draw on and to meld both the civil law and the common law. For an outsider, increasing exposure increases respect for the civil law for a range of reasons: the clarity and precision of the various Codes; the relative accessibility of law to the layman; the independence of the *juge d’instruction* and the efficiency that can be provided by that judge’s *dossier* which allows the trial judges to understand the case from the

⁷⁵ Ibid.

⁷⁶ UN Charter, Art 2(1).

⁷⁷ ICJ Statute, Art 38(1)(c) (emphasis added).

⁷⁸ See K Kwarteng, *Ghosts of Empire: Britain’s Legacies in the Modern World* (2011).

⁷⁹ Compare the majority opinion in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 with *AXA General Insurance Limited v The Lord Advocate* [2012] 1 AC 868, 97 (Lord Mance): ‘fundamental rights or the rule of law, at the very core of which are principles of equality of treatment’.

outset; and such efficiencies as the practice of the French *Conseil constitutionnel* to deliver its decisions within about two months.⁸⁰ These are among the reasons why the civil law is so widely adopted in various forms. Common lawyers also see virtues in their system. Kept within bounds by experienced appellate judges, the ability to update the law through processes of interpretation and, in limited cases, overt law-making can both avoid injustice in the instant case and contribute to a fairer and more principled jurisprudence.⁸¹ The primary topic however is not of the respective virtues of civil and common law but the relevance of these and other differences to interpretation in international law, to which I turn within the specific context of the STL.

3 A case study: the Special Tribunal for Lebanon

3.1 Characteristics of the STL

While the present article concerns interpretation in international law, that is not the primary focus of the STL. Our Statute requires us to apply the substantive law of Lebanon (Article 2), and we are also directed to apply adjectival law (procedure and evidence) which reflects the highest standards of international criminal law (Article 28). Particular reference is made to the law of Lebanon. So the Constitution, legislation and judge-made law of Lebanon comprise our substantive law and are important to the making and interpretation of our adjectival law.

In stating the law of Lebanon and in formulating the highest standards of international criminal law, like the Lebanese courts, we bear in mind the great traditions of Lebanon already mentioned. The values of Lebanon, expressed in its Constitution, statutes and judge-made law, are of the highest importance to our decisions.

⁸⁰ *Le Monde* (Paris), 2 March 2013, 9.

⁸¹ A notable example is the judge-made development of the law of restitution, illustrated by the recent statement of principle by Lord Walker in *Test Claimants in the Franked Investment Income Group Litigation (Appellants) v Commissioners of Inland Revenue* [2012] 2 AC 337, para 79: 'where tax is purportedly charged without lawful parliamentary authority, a claim for repayment arises regardless of any official demand (unless the payment was, on the facts, made in order to close the transaction). The same effect would be produced by saying that the statutory text is itself a sufficient demand, but the simpler and more direct course is to put the matter in terms of a perceived obligation to pay, rather than an implicit demand.' As with earlier stages in systematising restitution, the law was changed in an important respect without reference to Parliament.

But given the topic of this article, it is the contribution of international law, and those of the civil and common law rather than the law of Lebanon, on which the following discussion is focused.

While drawing heavily on the lessons of other international criminal tribunals, as in the listing of specific rights of the accused (Article 16), the STL Statute and Rules make more use than some tribunals of civil law practices. These include the rebuttable presumption that examination of a witness shall commence with questions posed by the presiding judge, then other judges, followed by the Prosecutor and the Defence (Article 20(2) and Rule 145); specific recognition of status for victims (Article 17 and Rules 50–51 and 87); and provision for trial *in absentia* (Article 22 and Rules 105–109).

The Pre-Trial Judge, independent from the Trial Chamber, is a valuable innovation drawing in part on the *juge d'instruction* and used for many purposes, including confirming an indictment, overseeing and facilitating preparation of the case for trial, and generally promoting the policy of the STL Statute to ensure both fairness to the accused and expedition (Articles 16 and 21).

Common law elements include the contempt provisions (Rule 60 *bis*) and the ability of the Trial Chamber to give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial (Rule 130).

An important innovation is the addition to the conventional three organs—Prosecutor, Registrar and Chambers—of the Head of the Defence Office, who is responsible for protecting the rights of the Defence and helps equality of arms with the Prosecutor (Article 13). The creation of the Head of Defence role and appointment to it of François Roux, an able and experienced international defence counsel, is of the greatest importance to the performance and credibility of the Tribunal, just as is the appointment of the no less able Prosecutor, Norman Farrell. The Prosecutor of an international tribunal has the formidable task among many others of defining what investigation is undertaken, overseeing its performance by the investigators, deciding what charges are warranted by the evidence, and overseeing the prosecution. The legitimacy of the Tribunal as a truly independent body which places fair trial and the presumption of innocence above all other interests depends to a large degree on the Head of Defence. He is responsible for the appointment of defence counsel, for the policies of his office, and, as a member of the Senior Management Board together with the Prosecutor, Registrar and President, for contribution to major policy decisions of the organization as a whole.

Lacking the inherent standing of judges appointed to a respected domestic

court, an *ad hoc* international tribunal must secure its credibility by the quality of its processes and decisions. Only real equality of arms, which includes the status of the Defence,⁸² will allow such a result.

3.2 The tests applied by the Lebanon Tribunal

In the STL, we have encountered a variety of means by which international law has been found, interpreted or created.

3.2.1 Jurisdiction

In an early proceeding, counsel appointed to represent four accused contended that the Security Council lacked jurisdiction to create a criminal tribunal. The principal argument was that Chapter VII confers jurisdiction on the Security Council only where there is a threat to *international* peace and security. Since most attacks listed in Article 1 of the Statute took place in Beirut, a condition precedent to jurisdiction was not met. The Trial Chamber and the majority of the Appeals Chamber held, with the support of high authority, that the STL had no power to investigate its own legitimacy. Expressing another view, I began with Article 24(2) of the UN Charter which requires the Security Council to act in accordance with the Principles of the United Nations, among them the principle in Article 2(7) that nothing in the Charter authorises the United Nations to intervene in matters essentially within the domestic jurisdiction of a State apart from enforcement measures under Chapter VII (Article 2(7)). It seemed to me that, as a court of law, albeit one created by Security Council Resolution, we must examine whether the conditions for applying those measures were satisfied. I did, and concluded they were. I considered that there was no reason in principle why the *ultra vires* principle of domestic law should not apply in international law. Why else did the Charter not give *carte blanche* to the Council?⁸³ Like the similar ICTY appellate decision in *Tadić*,⁸⁴ where President Cassese's more

⁸² *Prosecutor v Ayyash* (President's decision on Head of Defence Office request for review of Registrar's decision relating to the assignment of a local resource person) (Special Tribunal for Lebanon, The President, Case No STL-II-01/PT/PRES, 21 December 2012) paras 22–4.

⁸³ For academic discussion, see J Alvarez, 'Tadić Revisited: The Ayyash Decisions of the Special Tribunal for Lebanon' (2013) 11 *JICJ* 291; M Nikolova & M Ventura, 'The Special Tribunal for Lebanon Declines to Review UN Security Council Action: Retreating from Tadić's Legacy in the Ayyash Jurisdiction and Legality Decisions' (2013) 11 *JICJ* 615.

⁸⁴ *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-AR72, 2 October 1995).

succinct opinion had commanded a majority, my minority view turned ultimately on a characterization of the judicial role as requiring me to implement the legal limitation on the authority of the Security Council. Notwithstanding their commitment to the rule of law, my colleagues, predominantly civil lawyers but also including experienced common lawyers, regarded the judicial role as requiring abstinence here.

I do not venture to elaborate on any considerations beyond those in our judgments, which may have contributed to our respective decisions. The time and place for judges to give reasons for their decision is in the judgment, not afterwards. But I venture a general comment on a particular example of moving from the familiar common law world into a mixed Lebanese and international sphere.

Following the major attack of 14 February 2005 which killed 22 victims and injured many more, the UN established an Independent International Investigation Commission (IIIC). Mr El Sayed was one of four generals detained during the period of the IIIC's enquiry. When the STL commenced operation on 1 March 2009, the Prosecutor took over a great volume of materials from the IIIC. Mr El Sayed, who had then been in custody for some three and a half years, was immediately released. On the application of the Prosecutor, he applied to the Prosecutor to see the documents on which his detention was based. On the Prosecutor's refusal, Mr El Sayed applied to the Pre-Trial Judge for an order to that effect. His decision that the STL possessed jurisdiction to make such an order was upheld by the Appeals Chamber. So too was a later decision of the Pre-Trial Judge ordering specific disclosure.

Two issues of principle arose. The first was whether the STL had jurisdiction to deal with the claim for access to documents, even though the Statute and Rules did not contemplate civil litigation over documents held by the STL. We analysed the difference between the scope of jurisdiction of domestic courts and that of international tribunals.

We held that whereas the former is normally defined by law, things were different at the international level:

In this field, there is no judicial *system*. Courts and tribunals are set up individually by States, or by intergovernmental organizations such as the United Nations, or through agreements between States and these organizations, but they do not constitute a closely intertwined set of judicial institutions. [...] As was aptly noted in 1995 by the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*, interna-

tional law 'lacks a centralized structure, [and] does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others'.

[...] It follows that international courts and tribunals may not rely on other international courts for the determination of jurisdiction and the host of other procedural matters not addressed by their own statutes. They have perforce to settle such issues for themselves. In other words, international judicial bodies must each exercise powers which in other legal systems are spread across a hierarchy of courts.

[...] Whenever a question relating to the jurisdiction of an international tribunal is raised, therefore, it falls to the court itself to adjudicate it, for lack of any other judicial body empowered to settle the matter. In instances where that court's constituting documents do not expressly grant the court the power to decide on its own jurisdiction, the resulting condition may appear to be paradoxical. Indeed, in such instances, a court exercises a power not provided for in its statutory provisions, with a view to determining whether, under those provisions, it has the power to pass on the merits of the question at issue. The paradox, however, disappears if one recognises that a customary international rule has evolved on the inherent jurisdiction of international courts, a rule which among other things confers on each one of them the power to determine its own jurisdiction (so-called *compétence de la compétence* or *Kompetenz-Kompetenz*). This rule is attested to, inter alia, by the numerous international decisions holding that international courts are endowed with the power to identify and determine the limits of their own jurisdiction.⁸⁵

I suspect we adopted the approach which I have attributed to Cicero and Grotius.

We went on to consider whether the Appeals Chamber could and should exercise jurisdiction to consider the Prosecution's appeal against the decision of the Pre-Trial Judge in favour of Mr El Sayed. We further held:

⁸⁵ *In the matter of El Sayed (Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing)* (Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, 10 November 2010) paras 41–3.

The Appeals Chamber also exercises its inherent jurisdiction to consider this interlocutory appeal. The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.

[...] The Appeals Chamber is empowered to decide at this stage not only on jurisdiction but also on standing. This power does not derive from the Rules, which only deal with cases where an accused has been brought before the Tribunal, a situation that has not yet come to pass. It rather derives from general principles of international criminal law, and from the fundamental principle of judicial economy.⁸⁶

It may be added that to impute an unexpressed right of appeal ran flatly counter to principles of domestic law in a common law system. That may have been a factor in the opinion of Judge Nsereko, a distinguished common lawyer, joining Vice-President Riachi, an equally distinguished civilian, in dissent in the *Ayyash* case (discussed below under rights of victims).⁸⁷ The majority decision—that we should grant leave to appeal against an order as to suppression of victims' names where no explicit right of appeal had been conferred—depended on the principle stated in *El Sayed* and what was seen as the fundamental importance of the issue.

The second issue of principle, which we addressed in *El Sayed*, was whether Mr El Sayed was entitled to see the documents he sought. We considered both international law and Lebanese law and determined that, taking into account his legitimate interest in accessing the claimed documents—their use in a court of law to bring claims against those allegedly responsible for an unlawful detention—he should have such access but subject to any overriding contrary public interests. We relied on two streams of international jurisprudence: the right of access to justice and what has been called the 'right' to information held by a public authority.

As to the first stream, we noted the principle of a right of access to justice, emphasised by President Cassese and supported by major human rights

⁸⁶ Ibid, paras 54–5.

⁸⁷ Below n 106.

instruments as well as jurisprudence from regional human rights courts.⁸⁸ We cited the old equitable bill of discovery reviewed in *Norwich Pharmacal v Customs and Excise Commissioners*⁸⁹ and recently applied in the *Binyam Mohamed* litigation.⁹⁰

As to the second stream, we found that up to 115 countries had legislative provisions recognizing freedom of information, while another 22 had draft laws in progress. We held that the adoption of such an approach is required by the Preamble of the Constitution of Lebanon, which refers explicitly to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, each guaranteeing, as a component of freedom of expression, the right to 'seek, receive and impart information'. We further concluded that the international sea-change is of such dimensions as to demand acceptance that freedom of information has become a general principle of law. In terms of international custom, as evidence of a general practice accepted as law, it met the standard of Article 38(1)(b) of the ICJ Statute. We adopted the following test:

The presumption henceforth should be that information is to be made available unless there is good reason to withhold it.⁹¹

In short, we drew heavily on both civil law and common law in adopting what in retrospect looks very much like the robust approach of both Professeur Weill and Lord Bingham.

We upheld Mr El Sayed's claim as follows:

[to the extent] necessary to avoid a real risk that, if it is declined, the applicant will suffer an injustice that clearly outweighs the opposing interests. Nor should it be granted beyond the extent required for that purpose.⁹²

⁸⁸ *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) paras 40–1.

⁸⁹ *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

⁹⁰ *R (on the application of Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC Admin 2048; [2009] 1 WLR 2579 and 2653; on appeal [2010] EWCA Civ 65 and 158, [2010] 3 WLR 554.

⁹¹ *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) para 49.

⁹² *Ibid*, para 67.

Domestic judges, like the fellow citizens of their State, carry the experience and consequent mind-set of the familiar, which unsurprisingly will differ from that of judges of the other 192 States. Within limits, that contains an advantage when dealing with domestic disputes at home. It is only when sitting in the court of another society that one realises what an effort is required to ensure an appreciation of its differences sufficient to avoid causing unease, offence or injustice. Sitting as an international judge, because of unfamiliarity one tends to be apprehensive about adopting others' notions. But having collected fundamental precepts from a range of very different societies,⁹³ Hans Corell, after a decade as Legal Counsel of the United Nations, concluded:

[...] learned theologians and philosophers would probably have views about this kind of comparison. But to me it was important that the quotations were contributed by my own staff. I maintained that this comparison proves again the point that the Secretary-General often makes, namely that there are very similar thoughts in the religious and philosophical sources that guide people all over the world.⁹⁴

So one must try hard to put aside one's personal parochialism and be open to other, better concepts (and especially, in the case of the STL, those of Lebanon). The Hippocratic oath 'abstain from doing harm', often rendered as 'first do no harm', transfers readily to the task of the judge. Given that judges can and must contribute to the creation of international law, the obligation to do right requires

⁹³ H Corell, 'Commentary to 'Shari'a and the Modern State' and 'Narrating Law', in A Emon, M Ellis & B Glahn (eds), *Islamic Law and International Human Rights Law* (2012) 82, 87–8: 'And why beholdest thou the mote that is in thy brother's eye, but considerst not the beam that is in thine own eye?' Holy Bible, Matthew 7:3; 'Not the faults of others, nor what others have done or left undone, but one's own deeds, done and left undone, should one consider.' 50th Stanza from the Dhammapada (The Path of Wisdom); 'Believers, let not a group of you mock another. Perhaps they are better than you. ...Let not one of you find faults in another nor let anyone of you defame another.' Holy Qur'an, Chapter 49:11 (Al-Hujarat); 'You see in others what you actually see in yourself.' The Guru Dronacharya in Mahabharata; 'I went in search of a bad person; I found none as I, seeing myself, found me the worst.' Kabir, Saint Poet of North India; 'I wonder whether there is any one in this generation who accepts reproof, for if one says to him: Remove the mote from between your eyes, he would answer: Remove the beam from between your eyes!' Talmud: Baraita: Rashi (1050–1115 ce) quoting Rabbi Tarfon; 'It is easy to see the faults of others, but not so easy to see one's own faults.' Gautama Buddha (563–483 BCE); 'The first half of the night, think of your own faults, the second half, the faults of others when you are asleep.' Chinese proverb.

⁹⁴ Ibid, 88.

an international judge to try to do better and look for the best result that can be achieved.

I have tried in interpretation to employ the notion of a periscope that lifts one's vision beyond the confines of our own particular experience in an effort to determine what is right, for an adjudication that will:

- protect the rights of the accused and otherwise comply with the 'highest standards of international criminal law' which we are charged to maintain (Articles 16 and 28);
- maintain and promote confidence in our work and the rule of law by adhering to settled principle. The ever accelerating process of globalization, dissolving former impediments to cross-border dealing, requires international judges as far as possible to accept and contribute to the existing common fabric of law, in our case that of Lebanon, rather than causing the chaos of unnecessary change;
- recognise we are dealing with Lebanese issues. I have emphasised the role of the Constitution, statutes, judge-made law, values and traditions of Lebanon;
- meet the criteria of transparency and expedition required of an international tribunal created by the Security Council, with its leading members appointed by the UN Secretary-General;
- conform with our statutory obligation of expedition, and satisfy fair-minded critics that we are spending to best and principled advantage the contributions to our budget borne as to 49% by Lebanon and 51% by nearly 30 volunteer States' taxpayers; and
- avoid injustice in the practical way employed by Cicero, Grotius and modern adjudicators in the civil law and the common law alike.⁹⁵

Looking back at the decisions, while forming no explicit part of any judgment, it may also be that as well as the law of Lebanon, Article 28 of the Statute of the Tribunal, which requires us in matters of evidence and procedure to make

⁹⁵ See Hans-Georg Gadamer's notion of 'fusion of horizons' in *Wahrheit und Methode (Truth and Method)* (1960). This hermeneutical idea stressed that real understanding required a certain openness to transcend the interpreters' standpoints and achieve a fusion of horizons with the other.

rules conforming with ‘the highest standards of international criminal law’, could unconsciously by analogy have flavoured our approach to issues of substantive law and its interpretation. It seems to me a valuable expression by the Security Council of what the judicial task entails, and it supports the ‘highest standard of practical necessity’ test proposed earlier for substantive as well as adjectival law-making.

3.2.2 *Non liquet*

In the case of *Ayyash*, the Appeals Chamber was asked by the Pre-Trial Judge under Rule 68(G) to construe the concept of ‘terrorism’ employed in the Lebanese criminal legislation which Article 2 of the Statute of the Tribunal requires us to apply. To assist interpretation of the domestic law on which our decision turned, we examined the hotly debated issue of whether there exists any concept of ‘terrorism’ in international law.⁹⁶ William Schultz has recently argued that:

The world has not even been able to agree on a common definition of terrorism, much less an international treaty against it.⁹⁷

At an early stage of the case, while assisted by argument from the Head of Defence but before the appointment of counsel to represent the four accused who are being tried *in absentia*, we were satisfied, in interpreting our obligations, that the *non liquet* principle derived from the civil law prevented us from simply saying the question was too difficult.⁹⁸ We concluded that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (*dolus*) of the underlying crime; (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act; and (iv) that the terrorist act be transnational.⁹⁹

As a common lawyer aware of the role played by *non liquet* in international law discourse, I was content to employ the civil term which avoided the injustice

⁹⁶ B Saul, *Defining Terrorism in International Law* (2008) 270.

⁹⁷ A Mazrui & W Schulz, ‘Who is Afraid of Human Rights?’, in A Williams (ed), *The Brilliant Art of Peace: Lectures from the Kofi Annan Series* (2012) 50.

⁹⁸ *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 23; see also *R v Gul* [2012] 1 WLR 3432, para 33ff.

⁹⁹ *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 85.

of declining to deal with the issue. Nor do I doubt that my civil law colleagues were of a similar opinion.

3.2.3 *Jus cogens*

In the Appeals Chamber's decision in *Ayyash*, we held that the principle of legality (*nullum crimen sine lege*) inherent in the law of Lebanon, whereby individuals may not be punished if their conduct had not been previously criminalised by law, has been so extensively proclaimed in international human rights treaties with regard to domestic legal systems and so frequently upheld by international criminal courts with regard to international prosecution of crimes, that it is warranted to hold that it has the status of a peremptory norm (*jus cogens*), imposing its observance both within domestic legal orders and at the international level.¹⁰⁰ We drew on the statutes of international criminal tribunals and some eight decisions, one dissenting, which emphasised the importance of that norm.¹⁰¹ More generally, it is derived from a fundamental principle of fairness. If generally accepted, it will prove a valuable addition to the jurisprudence.

¹⁰⁰Ibid, para 76.

¹⁰¹The *nullum crimen* principle has been laid down in the international criminal tribunals' statutes (see: *Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Res 808*, UN Doc S/25704, 3 May 1993, para 34; Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art 22; *Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc SI2000/915, 4 October 2000, para 12) and in the relevant case law (see: *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) paras 139, 141, 143; *Prosecutor v Jelisić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-10-T, 14 December 1999) para 61; *Prosecutor v Delalić (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) para 170; *Prosecutor v Erdemović (Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) para 11; *Prosecutor v Krstić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) para 580; *Prosecutor v Vasiljević (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-32, 29 November 2002) paras 193, 196, 201; *Prosecutor v Hadzihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-83-AR72, 16 July 2003) paras 32–6; *Prosecutor v Galić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) paras 90, 93, 98, 132; *Prosecutor v Akayesu (Trial Judgment)* (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998) para 605.

Jus cogens has the appearance of a civil law principle. Judge Rafael Nieto-Navia notes in this context that Wolff, Vattel and Grotius spoke of *jus naturale necessarium* and moral necessity to which I have earlier alluded.¹⁰² But *jus cogens* has been developed more recently into a tenet of modern international law. For myself, the recognition of the principle of legality as *jus cogens* is well familiar to the common law—and indeed integral to the rule of law as stated by John Finnis:

A legal system exemplifies the Rule of Law to the extent [...] that [...] its rules [...] are promulgated, [...] clear, and [...] are sufficiently stable to allow people to be guided by their knowledge of the content of the rules.¹⁰³

The recognition of the principle of legality as *jus cogens* appeared to be appropriate, both to myself and my civil law colleagues who are trained to emphasise the principle of legality.

3.2.4 *Teleological interpretation*

Historically, courts have applied the principles *in dubio mitius* and *favor rei* as required by the presumption of innocence. In proper contexts they retain their force. The latter precept resolved a dilemma posed by the difference between Article 2 of the Statute which requires us to apply the criminal law of Lebanon and Article 3 which in the case of issues over parties permits us to use principles of international criminal law. How should we direct the Pre-Trial Judge to approach the question? We found the answer in the maxim *favor rei* which authorised us to give to the accused an election as to which better favoured him, holding that if the principle of teleological interpretation did not prove helpful:

[...] one should use the interpretation which is more favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as “in favour of the accused”). This principle [is] a corollary of the overarching

¹⁰²R Nieto-Navia, ‘International Peremptory Norms (Jus Cogens) and International Humanitarian Law’, in Lal Chand Voh (ed), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 595, 599–602.

¹⁰³J Finnis, *Natural Law and Natural Rights* (1980) 270.

principle of fair trial and in particular of the presumption of innocence.¹⁰⁴

Another facet is that:

[...] the principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that—when applied to the interpretation of treaties and other international rules addressing themselves to States—calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice [...] Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.¹⁰⁵

As a Chamber then composed of four civil law judges and one common lawyer,¹⁰⁶ when settling the Rules of Procedure and Evidence, we had benefited from debating with our other colleagues in plenary a variety of issues of principle.¹⁰⁷ The Appeals Chamber decision contained over a dozen citations of Latin precepts, derived either from the Roman Law or from subsequent practice, which

¹⁰⁴*Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 32.

¹⁰⁵*Ibid*, para 29.

¹⁰⁶Antonio Cassese, President, from Italy; Judges Riachi, Vice-President, and Judge Chamseddine from Lebanon, and Judge Björnberg from Sweden.

¹⁰⁷All except two being civil lawyers: the Pre-Trial Judge, Judge Fransen from Belgium, and the members of the Trial Chamber: Judge Swart from The Netherlands, and Judge Braidy and Judge Akoum from Lebanon. The common lawyers were Judge Morrison QC from England and Judge Nosworthy from Jamaica. Subsequent appointments have been Judge Roth of Switzerland, Judge Nsereko from Uganda, Judge Hrdličková from the Czech Republic and Judge Lettieri from Italy.

express principles to which both civil and common lawyers have fallen heir.¹⁰⁸ Whether it would have been so easy for me to find the answer in their expression by a particular civil law domestic system I do not know. Unfamiliarity with other systems could risk doubt and delay, perhaps for my colleagues as well as me. But having available the Latin maxims with which all of us were familiar, and which underlay the law of Lebanon, provided a *lingua franca* that allowed a confident common answer. As one of the ‘periscope’ factors, this adoption of settled civil law principle was wholly acceptable to a common lawyer.

In my own case the shift from domestic to international judging has brought out both the desirability of synthesis of legal principle to meet the problems of rapidly increasing global activity and, in that process, the benefit of Roman Law principles as contributing a sort of common ground for civil law and common law which helps to transcend difference.

3.2.5 *Estoppel*

In *El Sayed*, the Prosecutor had stated in writing that three documents were among those which should be made available to Mr El Sayed.¹⁰⁹ Over a year later, before Mr El Sayed had been shown the documents, the Prosecutor changed his mind and sought to withhold them, despite an order of the Pre-Trial Judge that he should receive them. On appeal from that decision, counsel for Mr El Sayed held that principles of estoppel barred the Prosecutor from changing his mind.

We examined the international jurisprudence on estoppel, both common law and civil law.¹¹⁰ Although the term ‘*estoupail*’ had derived from old French and been brought to England by the Normans,¹¹¹ it was not until 2005 that estoppels became a concept of French law.¹¹² After considering comparative jurisprudence we noted:

¹⁰⁸H Broom, *A Selection of Legal Maxims, Classified and Illustrated* (1939); *Adages du Droit Français* (1999).

¹⁰⁹*In the Matter of El Sayed (Decision on Appeal By the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2013/01, 28 March 2013).

¹¹⁰The decision is not, I think, inconsistent with the later decision of the UK Supreme Court in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] 3 WLR 299.

¹¹¹*McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, para 10–11 (Lord Denning MR).

¹¹²*Golshani v Gouvernement de la République islamique d’Iran*, Cour de Cassation [French Court of Cassation], 01-15.912, 6 July 2005 (2005) Bull civ n° 302, 252; G Cuniberti, ‘Enhancing Judicial Reputation through Legal Transplants – Estoppel Travels to France’ (2012) 60 *AJCL* 383, 385.

[t]he doctrine of estoppel is legally complex, viewed differently by different legal systems, and its precise application depends on a number of factors [...] [T]here is no evidence that Mr El Sayed acted in some manner on the basis of the Prosecutor's initial position. [...] No principle was cited to us and [...] we are not aware of one, which in the absence of such evidence would prevent the Prosecutor from reviewing his initial decision [...] Estoppel by deed aside, the authorities we have examined require either subsequent conduct or other acts of reliance by the party invoking the estoppels or unconscionability.¹¹³

Essentially because of settled international custom, we dismissed the appeal. So the analysis began with old French, followed it to England, then checked comparative authority including French law before reaching the conclusion.

3.2.6 Trial in absentia

While trial *in absentia* was employed at Nuremberg, it had not been used since by any international criminal tribunal. It is barely known to the common law, save in exceptional cases where an indicted accused absconds, and is not employed in many civil law jurisdictions. But following the law of both Lebanon and France and the guidance of the European Court of Human Rights, the authors of the STL Statute provided for it in the general terms of Article 22 with its guarantee of retrial for anyone tried *in absentia*. Further provision was made in Rule 106. A decision of the Trial Chamber authorizing trial *in absentia* of each of the four accused in the Prosecutor's first indictment was challenged on appeal to the Appeals Chamber. We dismissed the appeal, holding:

[...] Article 22 of the Statute and Rule 106 of the Rules, interpreted in light of the international human rights standards, require that *in absentia* trials are possible only where (i) reasonable efforts have been taken to notify the accused personally; (ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against them; and that (iii) it does so with such degree of specificity that the accused's absence means they

¹¹³ *In the Matter of El Sayed (Decision on Appeal By the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2013/01, 28 March 2013) paras 19–21.

must have elected not to attend the hearing and therefore have waived their right to be present.¹¹⁴

Our decision, which pays much respect to the crucial fact findings of the Trial Chamber, sought to meld the experience and wisdom of the Lebanese judges experienced in conducting trials *in absentia*, the experience of other jurisdictions including the European Court of Human Rights, and our common concern to meet the double criteria of utter fairness to the accused and protection of the other interests engaged, of both victims and the community. As a result of this exercise, I have become a convert, in the most serious cases, to trial *in absentia* with the accused protected by an absolute right of retrial. Victims and the community are spared the frustration of the file gathering dust in some archive where there is reason to believe the accused is deliberately avoiding trial. It presents, in my view, a clear example of how the common law may learn from civil law procedures.

3.2.7 *Rights of victims*

I mention finally *Ayyash*,¹¹⁵ in which the Legal Representative of Victims appealed against a decision of the Pre-Trial Judge holding that ‘victims participating in the proceedings (VPPs)’, a term of art for victims given such status, could not receive the protection of an order for permanent suppression of their identity. The case raised important issues of first impression as to the status of victims and VPPs; the role they play in proceedings; and the effect of an anonymity order on the absolute right of fair trial guaranteed to the accused.

We held that despite the immense importance of victims, whose protection is the very reason both for the establishment of the STL and indeed of international criminal law (and as earlier noted was a major factor in the majority’s decision to give leave to appeal), the accused’s right to fair trial precluded permanent anonymity for a victim who wished to play an active part by becoming a VPP. The judgments reveal a common concern of both civil law and common law judges to identify each of the values in play and to find a result that, while ensuring the accused’s absolute entitlement to fair trial, acknowledged also the dignity and importance of the victims.

¹¹⁴ *Prosecutor v Ayyash (Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/PT/AC/AR126.1, 1 November 2012) para 31.

¹¹⁵ *Prosecutor v Ayyash (Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge’s Decision on Protective Measures)* (Special Tribunal for Lebanon, Case No STL-11-01/PT/AC/AR126.3, 10 April 2013).

4 Conclusion

The foregoing themes may be summarised:

1. Interpretation can embrace law making.
2. Such law-making should meet the test of the 'highest standard of practical necessity'.
3. Interpretation in international law operates across the civil law/common law divide, with each contributing to a just and effective result.
4. The periscope metaphor describes the obligation of international judges to reach above the domestic predilections of their domestic law experience to find an optimum result.
5. In the STL, there is a process of personal development of civil lawyers and common lawyers learning from one another, as they pursue a common obligation to deliver justice according to the substantive criminal law of Lebanon and the highest standards of international law of procedure and evidence.

We have seen a wide variety of issues raised for determination and have experienced a confluence of invaluable responses made to them. In each instance we have been greatly helped by the wide range of experience of the judges in each Chamber, including a background in the law of Lebanon, other civil law, common law and international law.

It would be presumptuous to suggest that our decisions have of themselves effected any change or even clarification of international law. That will depend on future events, and whether and to what extent the mainstream of international custom will find them sustainable. The proliferation of tribunals called on to adjudicate on issues of international law is ever-increasing, presenting many problems including that of choice of forum.¹¹⁶ There is a compelling need to facilitate access to the International Court of Justice, as recently proposed by both Antonio Cassese and James Crawford SC,¹¹⁷ which would have provided a

¹¹⁶ C McLachlan, *Lis Pendens in International Litigation* (2009).

¹¹⁷ A Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady', in A Cassese (ed), *Realising Utopia: The Future of International Law* (2012) 239; J Crawford, 'International Legal Outlook for Governments Today' (Lecture delivered at the Hague Institute for Global Justice, 22 May 2013).

convenient forum for our case about the jurisdiction of its sibling the Security Council, and to make other reforms which would help systematise the constant burgeoning of international law. However, its development will be accelerated by the continual process of mutual education of litigants, scholars, lawyers, and judges which modern communications increasingly permit. The pattern is evidenced by the experience of the Special Tribunal for Lebanon, whose judges, legal officers and counsel draw on whichever of the accessible legal options will work the best justice consistently with settled principle.