Introductory Remarks by Professor Hisashi Owada

Leiden, October 14, 2025

Distinguished Rector Bijl of Leiden University,
Distinguished Dean of the Graduate School of Arts and Sciences, University of Tokyo, Professor Terada,
Thank you for your kind words to start this 5th session of the Owada Chair.

I wish to begin my words of introduction by expressing my gratitude to Leiden University for offering me the endowment of the Owada Chair in commemoration of my departure from The Hague as judge of the International Court of Justice, Hague, as well as honorary professor of Leiden University. This offer, which I accepted with gratitude, has later developed into a research project operated jointly by both Leiden and Tokyo universities on the interdisciplinary study of the "Interface between the Normative Framework of International Society (international law) and Its Political Framework (international relations) in the present-day world.

Under this overall theme, the project is conducted on a concrete topic selected each year as pertinent to this overall theme by the organizing committee of the two universities, headed by myself. The participating students, about half a dozen at the graduate level from each side, will engage in discussing the topic from various angles in the form of a joint seminar consisting of debates between students on the subject. It is not expected that they would come to an agreed conclusion resulting from these debates; the whole aim of this exercise is to grasp different angles of complex problems arising in international society and to enhance their level of understanding of the complexities involved.

Coming to the concrete topic of this year, "criminal justice" is a concept originally developed in the context of maintaining the internal legal order of a given society. In this sense, a crime is defined as an act of anti-social and anti-cultural character which injures the established values of society that form the legal order of society at large.

This definition is applicable to any crime in society, whether internal or international, provided that the society in question decides to make the act at issue punishable as injurious to the accepted culture and the normative framework of its legal order.

In modern international society, which for this purpose can be said to be built on the Westphalian Legal Order, however, acts of violence and atrocities inflicted upon individuals at the time of war between sovereign states were not to be regarded as an act injurious to the social values of this newly born legal order consisting of sovereign nations. What emerged in this new legal order instead was, as von Klausewitz, a general of Napoleon and a military strategist, famously opined, was a situation where war was "an extension of diplomacy through different means." Thus the act of killing and injuring human beings in the course of war was inherent in war activities and a "casualty" in its literal sense, rather than an act injurious to the societal value to be condemned by the normative order of society.

It was only towards the latter half of the 19th century that a new, dramatic change in the mindset

of international society as a whole came to emerge. Successive wars that raged on the European Continent, starting with the Crimean War, the Russo-Turkish War, the Franco-Prussian War, and the War for Unification of Italy, all with tremendous human casualties and atrocities, came to give rise to an open outcry in the public opinion of Europe, calling for a more humane treatment of soldiers and vicarious innocent victims of war. This public outcry led to an official movement for the prohibition of certain aspects of *jus ad bellum* and of *jus in bello* as illegal, through the conclusion of multilateral conventions. Just to mention a few, the St. Petersburg Declaration on the Prohibition of Certain Types of Weapons, the Hague Convention on the Opening of War, the Hague Convention on the Rules of Land Warfare, etc., etc.

It is to be noted, however, that these new prescriptions of international law were undertaken by sovereign states exclusively endowed with the capacity to bind themselves by consent in the form of international conventions, and that these prescriptions were thus made to be implemented by them as part of their domestic legal order, i.e., "domestic criminal justice".

Secondly, another problem with the Westphalian Legal Order was its second principle, i.e., the principle of non-interference with the domestic matters of another sovereign state, which had the effect of leaving the issue treatment of its own citizens to the governing sovereign. It was only with the rise in importance of human rights in society that the issue of the treatment of human individual citizens inside the sovereign walls of a state could no longer be said to be a matter within the domestic jurisdiction of the sovereign state. A fierce debate that was fought between more conservative American and Western European states and more progressive newly independent states of Asia and Africa in the United Nations in its early years of the late 1940s, surrounding the applicability/interpretation of Article 2(7) of the U.N. Charter in relation to the admissibility of the debate on the apartheid policy of South Africa demonstrates this point.

Despite these two intrinsic problems inherent in the Westphalian Legal Order as described above, the keenly felt societal need of international society to rectify these defects in the existing system, especially confronted with the human existential tragedy of the NAZI holocaust experience, a new legal framework for "*international* criminal justice" came to be born.

In my personal view, there are at present the following diverse types of achieving the "international criminal justice", depending upon the nature of justice to be sought in a concrete context of the situation.

(1) The Hague Conventions model
(2) The Genocide Convention model
(3) The ICTY/ICTR model
(4) Racial Discrimination Convention model
(5) Torture Convention (*aut dedere aut judicare*) model
(6) I.C.C. model
(7) Mixed Tribunal (Cambodia) and other hybrid models

As I said earlier, the Westphalian Legal Order of 17th-century Europe, which has formed the essential legal framework of modern international society, was based on the twin principles, i.e., (a) the principle of sovereign equality of the state members of this society and (b) the principle of non-interference into the domestic matters of these sovereign states. What this meant in practice

was that (a) no wrongs done by one state against another such as the use of force by one state against another would not be regarded as an injury of justice prevailing in the society of sovereign nations for the purposes of applying sanctions of society against an ant-social and anti-normative act within the society, and that (b)the principle of non-interference into the domestic matters dictates international society to refrain from poking its nose into outrageous infringements within a sovereign states of human rights of its citizens.

These are the points that I have wanted to raise by way of an introduction to the problems involved as *an agent provocateur of the debates* that we are expecting to follow. As I am not going to go further into this matter; if I did so, I would be going beyond what has been assigned to me as an introducer to the major speech, and therefore I should be going to stop here.

Before closing, however, I wish to raise two additional points, not for my own role as "*an ageant provocateur*", but rather as "*a devil's advocate.*" I have decided to add these points, not because this is necessarily what I believe, but because I believe that they may fall outside the scope of the present topic and thus may not be touched upon by the Principal Speaker of the present Session, but that these are points worth reflecting upon putting yourself in the position of a devil's advocate as part of larger problems surrounding "international criminal justice".

(1) Assuming that there has been major development in the act of genocide as an atrocious act which goes against the interests of international society clearly, as demonstrated in the Nazi atrocities in the Holocaust and the addition of different crimes, not only against humanity, but also crimes against peace. All these things have created a situation where it is desirable to have international criminal processes even expanding the scope of jurisdiction of the body, either domestically or by creating an international tribunal with its own jurisdiction, which by itself, is extra-territorial. Assuming that is the case, is it absolutely necessary to create in order to maintain the validity and the usefulness of international criminal justice?

I am sure you think the answer is, of course, yes. What you have to think about this problem in the wider context of a broader international reality, particularly in the context of the interface between international law as normative framework of society and international game play as a political framework of the activities of states in international society. Then, the problem, of course, would become much more complicated. Whether one likes it or not, under the Westphalian Legal Order, which is the legal reality, sovereign states are binding themselves by content (*pacta sunt srvanda*) and believe that they are not bond, *a contrario*, by what they have not agreed to. This is why the U.S.A. and Russia are so violently raising objections to the arrest warrant issued by the ICC prosecutors against American military authorities and President Putin. I'm not suggesting that one is a better process than the other. It is a difficult problem. I have no final answer myself, but I just put it out there in the form of a devil's advocacy.

(2) The second point I wish to ask you is, we have always been assuming that, with the development that I have described historically, legally, and sociologically, how the concept of international criminal justice has come to develop. But what is the purpose of this expansion of the concept. This is because basically, and I agree with that, international criminal justice is needed in order to create a situation where no perpetrators should get free with impunity. That is against your moral conviction and that is against the interest of the stability of international society as such. That I accept also, but my point, again, as a devil's advocate, is that there are other

examples like the Truth Commission approach or the Cambodian approach of creating mixed tribunals. These examples are meant not to pursue the objective of international community or international society in order to create a situation where no culprit could be getting away with impunity, but rather to create, to focus on social development of the society in question.

Again, here, I am not really talking about society, referring to international society as such, but rather more about the local community. For example, in the case of South Africa; South Africa decided to adopt not the international criminal justice approach, but to create a society which would be viable and that is more important for a country which was born as a result of the abolition of apartheid. So, they decided not to proceed to the pursuit of criminal justice but to the establishment of a more harmonious, viable society.

Now, again, I repeat what I said; I'm just putting these things out as devil's advocate and I'm not saying that one is better than the other. This is a complicated process and I hope you understand the complexities involved in the whole issue. I am convinced you are going to learn more from our distinguished speaker who is going to follow me to understand the difficulties of the International Criminal Court, which focuses more on the importance of the principle that no perpetrator should get away with impunity. How do you do it in the context of the interface between the normative framework of international law and the political framework of international relations?

In concluding this short introduction of mine about the scope of the topic of Session V, let me express my sense of tremendous relief for having successfully steered through my manuscript without losing sight of my text in the middle of my presentation as I have done in the past two occasions, as the French would predict "*jamais deux fois sans trois*", and I look forward to the debates that will develop among you on this intractable topic.

Thank you for your kind attention, thank you.