

International Courts and the Development of International Law

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International Courts and the Development of International Law

Essays in Honour of Tullio Treves



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Preface

Under Article 38 of its Statute, the International Court of Justice can apply judicial decisions only as a “subsidiary means for the determination of rules of law”. However, there are many reasons to believe that international courts and tribunals do play quite an important role in the progressive development of international law. There are a number of decisions which are inevitably recalled as the first step, or a decisive step, in the process of the formation of a new rule of customary international law. Can, in these cases, the judge be considered as a subsidiary of others? Are these cases compatible with the common belief that a judge cannot create law? Is this a peculiarity of international law, which is characterized by the existence of several courts but the lack of a legislator? Do decisions by different courts lead to the consequence of a fragmented international law? This volume aims to provide the reader with an elaboration of various questions linked to the legislative or, depending on the preferences, quasi-legislative role of courts.

In their choices of subjects, the contributors have taken into account both the general aspects of the development of international rules through court decisions and the instances of specific sectors of international law, such as human rights, international crimes, international economic law, environmental law, and the law of the sea. Others have chosen the subject of rules on jurisdiction and the procedure of international courts. The question of the courts’ role, *mutatis mutandis*, in the development of areas of law different from public international law, namely private international law and European Union law, has also been considered.

* * *

The subject of this collection of essays is also linked to the outstanding characteristics of the scholar in honour of whom it is published at the time of his retirement from the University of Milan. Tullio Treves combines an academic background with the experiences of a negotiator of international treaties and a judge of an international tribunal.¹ He has been professor of international law

¹ For more details see the *curriculum vitae* included in this volume.

in the Italian Universities of Sassari, Turin, and Milan and has given and will deliver lectures and courses in many and prestigious academies all around the world, including the Hague Academy of International Law. His bibliography is impressive for the quality and number of works, as well as for the variety of the subjects and languages.² His first diplomatic experience, as a legal expert of the Italian delegation at the Third Conference of codification of international law of the sea (1973–1982), has been followed by several others. In 1996 he was elected judge of the International Tribunal for the Law of Sea where he sat until 2011. He was subsequently also elected by his colleagues as President of the Seabed Disputes Chamber of the Tribunal and largely contributed to the seminal advisory opinion rendered by it in 2011 on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.

It is also because he has a great deal to say on how international law develops that the editors of this collection are certain that Tullio Treves will appreciate the contributions written by friends and colleagues and collected in this volume.

* * *

The two original editors Nerina Boschiero and Tullio Scovazzi, owe a great debt of gratitude to Tullio Treves under the supervision of whom they have begun their legal studies and with whom they have subsequently shared many unforgettable experiences. They have taken the initiative of promoting this collection of essays also as the less young³ among those who have the privilege to consider Tullio Treves as their mentor.

In their task, while having the benefit of reading in advance the contributions and learning a great deal from them, the editors had to address two inevitable questions

The first question was the drawing of the list of contributors. It was evident that it would have been impossible to include all those who were willing to participate for well justified reasons of friendship and collaboration and that a difficult and perhaps questionable choice had to be made. The editors finally decided to invite a number of lawyers who have participated with Tullio Treves in diplomatic negotiations or have been judges at the International Tribunal for the Law of the Sea. They have also included his colleagues at the Department of International Law of the University of Milan and on the board of editors of the *Rivista di Diritto Internazionale Privato e Processuale*. Finally, they have invited some young scholars who have benefited from academic advice and supervision by Tullio Treves during the development of their legal research.

The second question was the dimension of the contributions in order not to exceed what could be contained in one volume. The editors started by prescribing a precise limit of space and continued by strictly enforcing it. Most contributors

² See the bibliography included in this volume.

³ To be precise, Tullio Scovazzi is much older than Nerina Boschiero.

have complied with this imposition and the editors are sincerely grateful to them because they have facilitated their task. Other contributors have not⁴ and the editors are equally grateful to them, because they have understood the deeply rooted Mediterranean culture of the editors, according to which every rule has its exceptions.

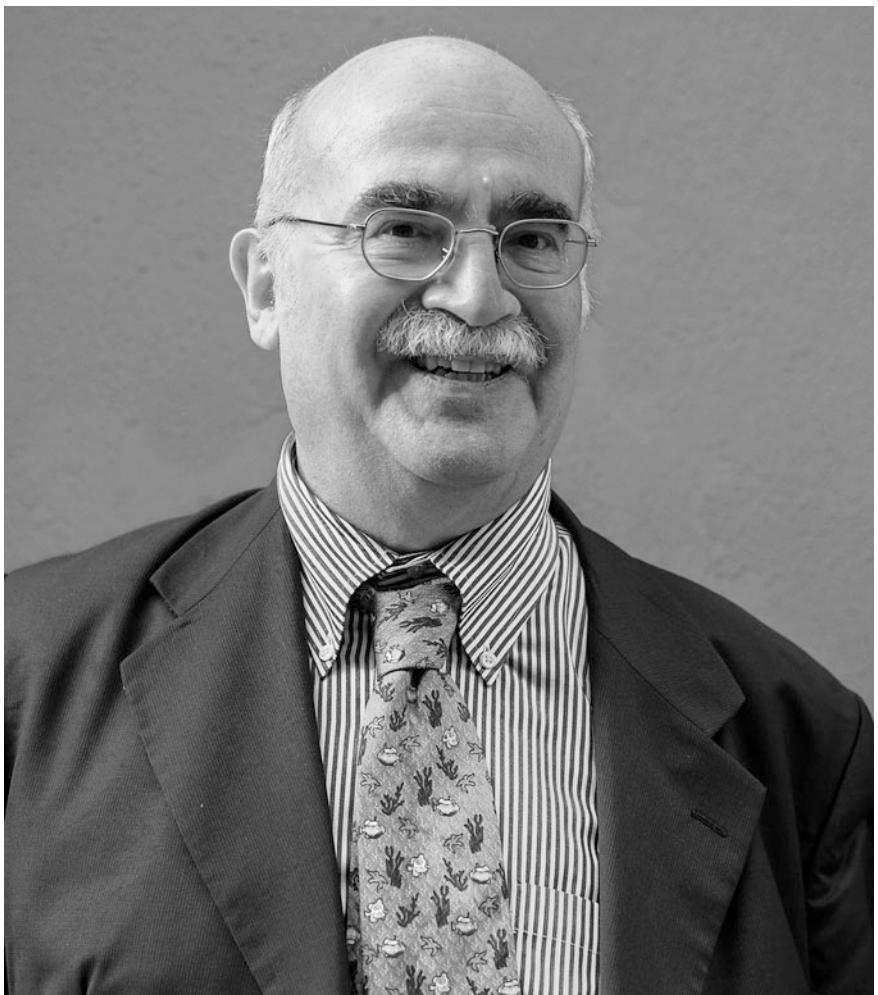
* * *

The editors wish to thank all those people who in one way or another have helped to bring this collection of essays to its conclusion. In particular the editors are indebted to Chiara Ragni and Cesare Pitea, who with a lot of competence and goodwill took much of the burden of the editorial effort on their shoulders and were finally appointed editors, together with the two original ones. They are also grateful to Angelica Bonfanti, Benedetta Cappiello, Chiara Sisler, Elena Fasoli, Francesca Romanin Jacur, Giorgia Sosio De Rosa, Giulia Bigi, Luigi Crema, Maria Chiara Noto, Michele Potest, Sabrina Urbinati, Seline Trevisanut, and Stefano Brugnatelli who acted as 'stylists' in ensuring that each paper was written in a uniform style as for abbreviations, quotations, and other details. Special thanks are due to Peter Morris who supervised most of the papers written by non-English native language contributors, to Seline Trevisanut, who did a similar work for texts in French, as well as to Philip van Tongeren and Marjolijn Bastiaans who provided the highly professional publishing services of T.M.C. Aser Press. It is also appropriate to thank the Universities of Brescia, Cagliari, Milan, Milano-Bicocca, Parma, and Trento which financed the publication of this book. Above all the editors wish to express their gratitude to the group of friends, colleagues and followers of Tullio Treves who generously contributed their intellectual resources and valuable time to make possible the completion of this collective effort.

Milan, June 2012

Nerina Boschiero
Tullio Scovazzi

⁴ Regrettably one of the editors is among them.



Tullio Treves: A Biographical Note

Tullio Treves was born in Tucumán, Argentina, on 20 September 1942. His father, Renato Treves, an eminent philosopher and sociologist of law, and his mother, Fiammetta Lattes, had fled to Argentina to escape the anti-semitic laws of Fascist Italy.

He studied in the Italian school system from elementary school until he graduated at Milan University Faculty of Law in 1964. He then started a scholarly and academic career under Professor Mario Giuliano who taught Private International Law and later International Law at the University of Milan's Faculty of Law. He held the position of Assistant to Professor Giuliano after 1967; from 1969 onwards he gave courses as *chargé de cours* at the Universities of Pavia and Sassari. In 1972, he became a full professor (*straordinario*, tenured as *ordinario in 1975*) teaching at the University of Sassari's Faculty of Law from 1972 to 1974 (as dean in 1973–1974) and at the University of Turin's Faculty of Political Sciences from 1974 to 1980. From 1980 until his retirement in 2012 he taught at the University of Milan's Faculty of Law. In Milan he gave courses on Private International Law, General International Law, and he inaugurated the teaching, which he continued for many years, of Advanced International Law, promoting an interactive method focusing on specific subjects and international case law. In Milan he also gave informal seminars on new developments on international law involving his pupils, young colleagues, and graduate students.

In his scholarly writing Tullio Treves started with private international law, publishing books on exchange controls in the conflict of laws (1967) and on jurisdiction in international criminal law (1973) and he wrote numerous articles and notes stimulated by his participation in the *Rivista di diritto internazionale privato e processuale*. In these writings, while following the technical methodology of the Italian approach to private international law, he also devoted a great deal of attention to comparative law and to the connections between private and public international law, as well as to the political implications of cases and doctrinal trends.

His interests soon moved toward public international law. He published a long essay on the topical issue of the continuity of treaties and new independent States

in 1969, and, stimulated by his involvement in the Italian Delegation to the Preparatory Committee to the Third UN Conference on the Law of the Sea, and to the Conference itself, he started writing on the law of the sea, dispute settlement, international environmental law, and general questions of international law. He continued and still continues to focus on these issues. Among the books published, the following should be mentioned: *Diritto Internazionale. Problemi fondamentali* (2005), the 1991 Hague lectures (in French) on State practice and the codification of the Law of the Sea, the book (in Italian) on International disputes, new trends and new tribunals (1999), and the 2006 Castellòn General Course in English on International Law: Achievements and Challenges, in which he sets out his personal views on customary law and international law-making, the fragmentation of international law, the settlement of disputes, and other general topics.

He conceived and directed with enthusiasm collective research endeavours on topical issues which actively involved young researchers in scholarly and organizational tasks, affording them the opportunity to interact with recognized international scholars. Among them are those whose results appear, or are to appear in book form, on Civil Society and International Courts and Tribunals, on Non-Compliance Mechanisms and the Effectiveness of International Environmental Law, and on Common Concerns and the Protection of International Investment.

Tullio Treves has been involved in international activities since the early 1970s. First, as a member of the Italian Delegation to the Third UN Conference on the Law of the Sea (1973–1992), where he chaired the French Language Group of the Drafting Committee, and at other conferences. Between 1984 and 1992, he was the Legal Adviser to the Permanent Mission of Italy at the United Nations in New York. In this capacity he chaired various working groups of the Sixth Committee and was a member of the Italian delegation to the Security Council. In 1996, he was elected as a Judge of the International Tribunal for the Law of the Sea, a position which, after having been re-elected in 2002, he left in 2012. At the Tribunal he was twice President of the Seabed Disputes Chamber, including the proceedings for the delivery, on 1 February 2011, of an Advisory Opinion upon the request of the Council of the International Seabed Authority. He chaired the Tribunal's Committee of the Whole for the drafting of the Rules of the Tribunal. Apart from his involvement in the International Tribunal for the Law of the Sea, Tullio Treves is an active participant in international litigation: counsel for France in the Arbitration with Canada on the delimitation of maritime zones in the area of Saint-Pierre-et-Miquelon; counsel for Finland in the Great Belt case before the International Court of Justice; counsel for Peru in the Peru v. Chile maritime dispute before the ICJ; an arbitrator in the Bangladesh v. India maritime delimitation case. A consultant to various Governments, International Organizations and private entities; and Chairman of an Arbitration Tribunal for the Cairo Regional Centre for International Commercial Arbitration.

He has given courses and lectured at many distinguished learning institutions, including the Universities of Paris I and II, the Institute for Advanced Legal Studies of Geneva, the Hague Academy of International Law, the Castellon

Bancaja Euromediterranean Courses of International Law (1997 and in 2007 the general course), the Rhodes Academy for Maritime Law and Policy (every year since its inception in 1995), the Instituto Ortega y Gasset in Madrid, the University of California at Berkeley School of Law, the Cursos de Invierno de derecho internacional (Belo Horizonte, Brazil, 2010), the UNITAR and later UN Courses on International Law (The Hague, Quito, Yaoundé); the UN Regional Courses on International Law (Addis Abeba 2011 and 2012), and the OAS Courses on International Law (Rio de Janeiro, 2012).

A Member of the “Curatorium” of the Hague Academy of International Law since 2010, he taught at the Academy in 1991, and at the external sessions in Cairo in 2000 and Abu Dhabi in 2010. He is invited to deliver the General Course in 2015.

He is a member of numerous learned societies, including the *Institut de droit international* (since 1999); the *Società italiana di diritto internazionale* (as member of the Board 1998–2003); the *American Society of International law*, *Société française de droit international*; the *Law of the Sea Institute* (a member of the Board 1984–1990); the *European Council for Environmental Law* (as president since 2006); and the *Monetary Law Committee* of the International Law Association.

He is editor of the *Rivista di diritto internazionale privato e processuale*, a co-editor of the *Italian Yearbook of International Law*, the editor of *Comunicazioni e studi*, a member of the Boards of the *Max-Planck Encyclopedia of Public International Law*, *The Law and Practice of International Courts and Tribunals*, *the Ocean Development and International Law Journal*, *Il diritto marittimo*, *Rivista di diritto della navigazione*, *Revue belge de droit international*, *Revista Española de derecho internacional*, as well as being a correspondent for Italy of the *Journal du droit international*.

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