Homage to Judge Tullio Treves

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There can be no doubt that the contributions of Tullio Treves to international law in general, and to the rule of law at sea in particular, are worthy of celebration. Professor Treves is an international law scholar of extraordinary distinction. In that capacity he has published many books and articles, including outstanding contributions to the American Journal of International Law. He is a member of the *Institut de Droit international* and several national societies of international law, including the American Society of International Law.

Professor Treves served as chair of the French Language Group of the Drafting Committee of the Third UN Conference on the Law of the Sea. As chair of the English Language Group, it was my great privilege to work with him as we tried to achieve a coherent text of the UN Convention on the Law of the Sea within each language as well as across six different languages. Our work together at the Law of the Sea Conference, in the Law of the Sea Institute, during my service as judge *ad hoc* of the International Tribunal for the Law of the Sea, and on other occasions has yielded a stash of stories that could certainly enlighten and entertain—on the right occasion.

In considering other possible approaches to this essay, I had the pleasure of reviewing a vast wealth of material that Tullio Treves has written. Would that I were able to discuss all of the subtle and profound insights that I encountered there. The problem is that such an attempt could easily consume countless pages

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merely rehearsing the superlative professional biography and bibliography of Tullio Treves.

I decided therefore to pick a discreet aspect of his work that, while very rich, is of sufficiently limited scope to make it a plausible object of this homage. I refer here to the known contributions of Tullio Treves as judge of the International Tribunal for the Law of the Sea.[1]

The operative words here are "as judge" and "known."

The focus is on the contributions of Tullio Treves *as judge*: Professor Treves continued to write and teach while serving on the Tribunal, but he did not purport to speak as judge when not on the bench. To his great credit, he has been punctilious in observing that distinction.

The focus is on the *known* contributions of Judge Treves: While many of us can enjoy speculating on the nature of Judge Treves' contributions, those who are not members of the Tribunal do not know precisely what contribution Judge Treves made to the deliberations and opinions of the tribunal. Those who served on the Tribunal may know, but they cannot say.

The only hard data we have available are the opinions that Judge Treves wrote for himself. In this regard, I might assure Judge Treves that I plan to honor the Continental tradition pursuant to which judges tell us what the law is and law professors tell them what they meant.

Since it was constituted, the International Tribunal for the Law of the Sea has rendered thirteen judgments and provisional measures orders, and its Seabed Disputes Chamber one advisory opinion. Judge Treves participated in all of them.[2] Six of the decisions were unanimous. Judge Treves was in the majority in all but two cases—although, as one might expect, the appraisal here requires somewhat more nuance to which I will advert presently. Judge Treves wrote two dissenting opinions and four separate opinions. All are concise and to the point. He also participated in a brief joint declaration of seven judges in one case and wrote a similarly brief individual declaration in another.

These facts in themselves tell us a good deal about Judge Treves' role on the Tribunal.

First, these facts tell us that Judge Treves has been in the majority almost all of the time. Those who know him would agree that the most plausible inference is that Judge Treves enjoys the respect and confidence of his colleagues.

Second, these facts tell us that although he came to the bench as a distinguished professor of law with extensive diplomatic experience, Judge Treves understands the difference between scholarly discourse and diplomatic dialog and judicial opinions.

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[1] For information regarding the International Tribunal for the Law of the Sea and the text of decisions and opinions cited herein, *see* www.itlos.org.

[2] *See* Appendix A for a chart detailing Judge Treves' role in the Tribunal's decisions.

Third, these facts tell us that Judge Treves is a man of integrity and humility.

Judge Treves has written both dissenting and separate opinions. As we all know, the distinction between dissent and concurrence relates in a formal sense to a distinction in voting on the dispositif or operative provisions of the decision set forth at the end. While the parties to the case and their advocates are doubtless greatly interested in the dispositif, students of the law are often less interested in the formal outcome than in the underlying reasoning. From that perspective, the distinction between a separate opinion and a dissenting opinion is more subtle.

Nowhere is this more apparent than in Judge Treves' opinions.

The first opinion styled a dissent by Judge Treves is merely a partial dissent on only one issue in the *Camouco* case[3] decided in 2000: the difference between Judge Treves and the majority was largely a matter of degree on the question of the amount of bond that would be reasonable. Judge Treves characteristically engaged in an exacting examination of the relevant facts as well as the potential penalties under the law of the detaining state.

The second dissent came a decade later in a provisional measures order in the *Louisa* case[4] issued in late 2010. Although Judge Treves first noted that he agrees with the result of the Tribunal's decision not to grant provisional relief, he went on to disagree with the Tribunal on the admissibility of the application. Judge Treves found three grounds for inadmissibility; the majority instead reserved those issues for proceedings on the merits. Judge Treves explained that the Tribunal should not hear the case because the Applicant, Saint Vincent and the Grenadines, had not met the requirements of the Convention, from which the Tribunal derives jurisdiction. This dissent is consistent with Judge Treves' separate opinions, discussed below, in which he carefully analyzes the role of the Tribunal and the Convention in the broader context of international law.

The joint declaration made in 1999 by Judge Treves and six colleagues in the *Saiga* case[5] explained their negative votes, not as to the merits, but on the question of whether costs should have been awarded to the victorious applicant. But the disagreement was not trivial: the brief declaration makes clear that the question of reimbursement for litigation costs is not unrelated to the merits in a case in which compensation is awarded in respect of serious personal injury and property damage.

The individual declaration by Judge Treves in the *Hoshinmaru*[6] case of 2007 came among three other individual declarations and one separate opinion. The other Judges' separate writings discuss the operative portion of the Tribunal's decision. Judge Treves' declaration was written to clarify the placement and

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[3] *See* ITLOS: "Camouco" (Panama v. France), Judgment (7 February 2000).

[4] *See* ITLOS: M/V "Louisa" (Saint Vincent and the Grenadines v. Spain), Order (23 December 2010).

[5] *See* ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999).

[6] *See* ITLOS: "Hoshinmaru" (Japan v. Russia), Judgment (6 August 2007).

purpose of language used in the opinion about a secondary disagreement between the parties that the Tribunal declined to decide specifically. This declaration demonstrates Judge Treves' precision with words and mindfulness of the impact of the Tribunal's decisions.

His remaining opinions are called separate opinions by Judge Treves. They share some interesting characteristics. They are disciplined by a distinctive style: They are concise. The opinion of the tribunal is the formal object of the separate opinion. The formal purpose of the separate opinion is to explain more fully the actual or potential implications of the tribunal's conclusions on one point or a very few particular points.

In referring to this style as distinctive, I of course run the risk that Professor Treves will demur and harrumph, not so *soto voce*, that this is what separate opinions are supposed to be. Indeed. Professor Treves may well be right in some Platonic sense. And he doubtless has both the extraordinary ability to conceive of the form coherently, and the admirable discipline to adhere to it. My lame reply to his imagined harrumph is haplessly empirical: most separate opinions that I have read do not seem to fit this mold. For that matter, they do not seem to fit any mold at all.

It can of course be noted that all of Judge Treves' separate opinions were written in the context of urgent proceedings regarding provisional measures or prompt release of vessels and crews. Accordingly, it can be argued that there was not enough time for Judge Treves to run on endlessly. The response to this argument is of course a classic: everyone who has tried knows that it is harder and takes more work to be concise and to the point.

None of this of course explains: Why the separate opinions? If a distinctive Treves style is the vessel, is there a distinctive Treves jurisprudence that informs the content? What can we say about the points that Judge Treves may have been unable to persuade his colleagues to include in the majority opinion, and that he felt nevertheless required articulation from the bench?

In my view, the common thread of the separate opinions is that they reflect a deep interest in the coherence of the relationship between the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter Law of the Sea Convention)[7] and its dispute settlement procedures with substantive and institutional developments in international law outside the Convention. While Judge Treves' accomplishments as an expert not merely in the law of the sea but in international law as a whole are doubtless an indispensable predicate for approaching these questions with the level of sophistication evident in his opinions, they do not in themselves account for the insightful connections that he identifies. Rather I would proffer the hypothesis that Tullio Treves believes

[7] Entered into force on 16 November 1994.

that the ultimate vocation of the judge is the coherent management of the legal system itself.

One example involves the interesting parallels between the separate opinion of Judge Treves in the *Grand Prince* case[8] in 2001 and the work of the International Law Commission on diplomatic protection, which began in 1997 and was finally completed in 2006.[9] In his separate opinion in 2001, Judge Treves described the prompt release procedure under Article 292 of the Law of the Sea Convention as a form of diplomatic protection.[10] He then assumed a requirement of continuous nationality between the time of the breach of obligation with respect to the vessel and the time of the application for its release under Article 292, making clear that it is the breach of the duty of prompt release on reasonable bond, rather than the detention itself, that is the relevant triggering event under that article. Judge Treves then went on to consider the consequences of a lapse in registration of the ship in Belize in that case, stating, "The impression one gathers is that the only concern of the shipowner was to be authorized to submit to the Tribunal an application on behalf of Belize, while its mind was already set on registering the vessel in Brazil." Accordingly, Judge Treves concurred in the Tribunal's dismissal of the case *proprio motu* on the grounds that Belize was not the flag state. His analysis not only reflects the difficult issues surrounding the general question of continuous nationality examined by the International Law Commission, but in effect adumbrates the Commission's solution to the problem of manipulation of nationality for purposes of diplomatic protection. The 2006 Report of the ILC contains the following comment on the final articles on diplomatic protection forwarded to the UN General Assembly (p. 40): "[I]f the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated."[11]

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[8] *See* ITLOS: Grand Prince (Belize v. France), Judgment (20 April 2001).

[9] For the text of the 2006 ILC report on diplomatic protection submitted to the United Nations General Assembly see Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

[10] Article 292 provides in pertinent part: "1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree."; "2. The application for release may be made only by or on behalf of the flag State of the vessel."

[11] *See* note 9, *supra*.

Another example concerns the relationship between the Law of the Sea Convention's dispute settlement procedures and the increasing attention being paid to the question of a precautionary approach to environmental issues, including fisheries management. In his separate opinion in the *Southern Bluefin Tuna* case[12] in 1999, Judge Treves attempted to avoid the larger issue of whether the precautionary approach is mandated by international law, and instead argued that it is inherent in the very idea of provisional measures, especially as applied in situations where there may be incremental increases in risk. He stated,

> In my opinion, in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law. The precautionary approach can be seen as a logical consequence of the need to ensure that, when the arbitral tribunal decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to me inherent in the very notion of provisional measures. It is not by chance that in some languages the very concept of "caution" can be found in the terms used to designate provisional measures: for instance, in Italian, *misure cautelari,* in Portuguese, *medidas cautelares*, in Spanish, *medidas cautelares* or *medidas precautorias.*

In his separate opinion in the *MOX Plant* case[13] in 2001, Judge Treves set forth a coherent understanding of the relationship between the binding third-party dispute settlement procedures of the Law of the Sea Convention and those of other treaties where the legal obligations overlap. In so doing, he accepted the majority's view that similar legal obligations arising under different treaties are severable for dispute settlement purposes, so that the plaintiff has a choice of forum. What he added however is that this may give rise to a situation of lis pendens if two tribunals are seised of similar questions. He presciently predicted that in such a situation "considerations of economy of legal activity and of comity between courts and tribunals" would arise. That of course is precisely what subsequently happened in that very case when the arbitral tribunal constituted under Annex VII of the Law of the Sea Convention, expressly invoking comity, suspended proceedings pending a determination of jurisdiction by the European Court of Justice.[14] The ECJ subsequently decided that Ireland had breached its obligations under European law by initiating proceedings against the United Kingdom under the dispute settlement provisions of the Law of the Sea Convention.[15]

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[12] *See* ITLOS: Southern Bluefin Tuna (New Zealand v. Japanand Australia v. Japan), Order (27 August 1999).

[13] *See* ITLOS: MOX Plant (Ireland v. United Kingdom), Order (3 December 2001).

[14] PCA/UNCLOS Arbitral Tribunal: MOX Plant (Ireland v. United Kingdom), Order no. 3 (24 June 2003).

[15] ECJ: Commission of the European Communities v. Ireland, C-459/03, Judgment (30 May 2006).

The relationship between the prompt release remedy under Article 292 of the Law of the Sea Convention and international human rights law is the great theme of Judge Treves' separate opinion in 2004 in the *Juno Trader* case.[16] He wrote,

> [L]ack of due process, when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, [or] in lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements.

He added that the same reasoning may apply when lack of due process arises from efforts to quickly conclude domestic proceedings "without seriously affording a possibility to consider arguments in favor of the detained vessel and crew."

The Tribunal's Seabed Disputes Chamber rendered its first advisory opinion during Judge Treves' presidency of the chamber.[17] The opinion represents a major synthesis of the provisions of the Law of the Sea Convention regarding the role of the sponsoring state in deep seabed mining with the international law of state responsibility. It is a significant contribution to our understanding of both. While it is of course difficult to attribute any part of the unanimous opinion to the contributions of any particular judge, it is clear that the opinion bears the earmarks of Judge Treves' abiding interest in the role of the Convention within the larger corpus of international law and his profound understanding of both.

So long as there are judges like Tullio Treves, those who fret and fuss about the dangers of a supposed fragmentation of international law and proliferation of international tribunals will be proven wrong. Municipal legal systems have brought forth great judges capable of understanding and managing substantive complexity and procedural diversity. As its maturation increases its own substantive complexity and procedural diversity, the international legal system will do no less. Tullio Treves proves it.

For this, we are all in his debt.

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[16] *See* ITLOS: Juno Trader (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment (18 December 2004).

[17] *See* ITLOS: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011).

Appendix A: Participation of Judge Treves in ITLOS Decisions

No.	Case	Date	Type	Nature	Treves in majority	Treves opinion
1	SAIGA	4 Dec. 1997	J	Prompt release	Yes	
2	SAIGA	11 Mar. 1998	O	Prov. meas.	Yes (U)	
2	SAIGA	1 July 1999	J	Merits	Yes[18]	J Dec[19]
3/4	Southern Bluefin Tuna	27 Aug. 1999	O	Prov. meas. pending constitution of arb. trib.	Yes	S
5	Camouco	7 Feb. 2000	J	Prompt release	No[20]	D
6	Monte Confurco	18 Dec. 2000	J	Prompt release	Yes	
8	Grand Prince	20 Apr. 2001	J	Prompt release	Yes	S
10	MOX plant	3 Dec. 2001	O	Prov. meas. pending constitution of arb. trib.	Yes (U)	S
11	Volga	23 Dec.2002	J	Prompt release	Yes	
12	Land reclamation	8 Oct. 2003	O	Prov. meas. pending constitution of arb. trib.	Yes (U)	
13	Juno trader	18 Dec. 2004	J	Prompt release	Yes (U)	S
14	Hoshinmaru	6 Aug. 2007	J	Prompt release	Yes (U)	Dec
15	Tomimaru	6 Aug. 2007	J	Prompt release	Yes	
17	Responsibilities of sponsoring States	1 Feb. 2011	A	Advisory opinion	Yes (U)	
18	Louisa	23 Dec. 2010	O	Prov. meas.	No	D

A advisory opinion, *Arb. trib.* arbitral tribunal to which dispute has been submitted under Part XV, Sec. 2, of the LOS Convention, *D* dissenting opinion, *Dec* declaration, *J* judgment, *j Dec* joint declaration, *O* order, *Prov. meas.* provisional measures, *S* separate opinion (concurrence), *U* Unanimous vote on all of the dispositif

[18] Except on question of costs.

[19] Seven judges participated in the declaration.

[20] Votes "no" on amount of bond.