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Homage to Judge Tullio Treves

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It is difficult to imagine that it is now 25 years since I taught at Boalt and first encountered in class a brilliant student for whose subsequent career doubtless innumerable teachers hasten to take credit: Professor David Caron, who I know very much regrets that he cannot be with us tonight.

While I have had the pleasure of coming back to Boalt on several occasions since then, it is a signal privilege to be invited to speak on this particular occasion. I can think of no one whose contributions to international law in general, and to the rule of law at sea in particular, are more worthy of celebration than Tullio Treves.

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[2] of the *Institut de Droit international*[3] and several national societies of international law, including the American Society of International Law.[4]

Professor Treves has a great interest in the law of the sea, is a former Board member of the Law of the Sea Institute,[5] and has continued those ties here at Boalt. He helped organize and edit the proceedings for one of the Institute's most successful meetings, the 26th annual conference in Genoa in 1992.

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.[6] It was

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[1] Professor of Law, School of Law, University of Miami. This talk was presented at an LOSI dinner honoring Judge Treves, Boalt Hall School of Law, UC Berkeley, April 5, 2007.

[2] *See* http://www.idi-iil.org/idiE/navig_members.html#titulaires.

[3] *See* http://www.idi-iil.org/.

[4] *See* http://www.asil.org/.

[5] *See* http://www.law.berkeley.edu/centers/ilr/lawofthesea.html. Also, http://repositories.cdlib.org/losi/.

[6] For a historical description on the drafting evolution of the Law of the Sea Convention, *see* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference.

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[7] within each language as well as across six different languages.

As you might expect, our work together at the Third UN Conference on the Law of the Sea and elsewhere has yielded a stash of war stories that could be the stuff of a reasonably entertaining after dinner talk. In the same vein, it is doubtless possible that I could spice it up with some inside gossip about Tullio Treves. In any event, at least mentioning these possibilities may encourage a certain level of attention as I proceed.

In preparing for my talk, I had the pleasure of reviewing a vast wealth of material that Tullio Treves has written. I wish there were time to share with you all of the subtle and profound insights that I encountered there. The problem is that such an attempt could easily consume all of the available time merely rehearsing the superlative professional biography and bibliography of Tullio Treves.

I decided therefore to pick a discreet aspect of that material that, while very rich, is of sufficiently limited scope to make it a plausible object of my remarks this evening. I refer here to the *known* contributions of Tullio Treves as *judge* of the International Tribunal for the Law of the Sea.[8]

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

The focus is on the contributions of Tullio Treves *as judge*: Professor Treves has continued to write and teach while serving on the Tribunal, but he does 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.

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[7] For a general overview on the Law of the Sea Convention and its related texts, *see* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm. For an English version of the Law of the Sea Convention, *see* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

[8] To have access to the International Tribunal for the Law of the Sea, *see* http://www.itlos.org/.

The only hard data we have available are the opinions that Judge Treves wrote for himself. In this regard, I wish to 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 eleven judgments and provisional measures orders. Judge Treves participated in all of them. Four of the decisions were unanimous. Judge Treves was in the majority in all but one case – although, as one might expect, the appraisal here requires somewhat more nuance to which I will advert presently. Judge Treves wrote one dissenting opinion 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.

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 dialogue and judicial opinions.

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 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 only opinion styled a dissent by Judge Treves is merely a partial dissent on only one issue in the *Camouco* case[9] decided in 2000: the difference

[9] *See* Camouco (No. 5) (Panama v. France), 125 ILR 164 (Int'l Trib. L. of the Sea 2000).

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 joint declaration made in 1999 by Judge Treves and six colleagues in the *Saiga* case[10] 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.

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, 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

[10] *See* M/V SAIGA (No. 2) (Saint Vincent and the Grenadines v. Guinea), 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

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 Law of the Sea Convention 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 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[11] in 2001 and the work of the International Law Commission on diplomatic protection, which began in 1997 and was finally completed last year.[12] 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.[13] He then assumed a

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[11] *See* Grand Prince (No. 8) (Belize v. France), 125 ILR 272 (Int'l Trib. L. of the Sea 2001).

[12] For an English version of the 2006 ILC report on diplomatic protection with commentaries (*Yearbook of the International Law Commission*, 2006, vol. II, Part Two) treated at United Nations General Assembly (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), *see* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

[13] Article 292 of Part XV, Section 2, of UNCLOS (United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 297) states: *"Article 292.-Prompt release of vessels and crews: 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. 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time. 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."*

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."[14]

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[15] 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

[14] *See* Footnote 12, *ut supra*.

[15] *See* Southern Bluefin Tuna (No. 3 and 4) (New Zealand v. Japan; Australia v. Japan), 117 ILR 148 and 119 ILR 508 (Int'l Trib. L. of the Sea 1999).

provisional measures: for instance, in Italian, *misure cautelari,* in Portuguese, *medidas cautelares*, in Spanish, *medidas cautelares* or *medidas precautorias.*"

Judge Treves used his separate opinion in the MOX Plant case[16] in 2001 to 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,[17] expressly invoking comity, suspended proceedings pending a determination of jurisdiction by the European Court of Justice. 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.[18]

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

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[16] *See* The MOX Plant (No. 10) (Ireland v. United Kingdom), XXXXXXXXXXX (Int'l Trib . L. of the Sea 1999).

[17] For an English version of the Law of the Sea Convention, *see* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

[18] For the judgment in the European Court regarding the MOX Plant case, *see* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=MOX+Plant&resmax=100. For other resolutions, *see* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=MOX+Plant&resmax=100.

theme of Judge Treves' separate opinion in 2004 in the Juno Trader case.[19] 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 favour of the detained vessel and crew."

So long as there are judges like Tullio Treves, those who fret and fuss about the dangers of a supposed fragmentation of international law will be proven wrong. Every developed legal system has brought forth 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 truly in his debt.

Thank you, Judge Treves.

[19] *See* The "Juno Trader" (No. 9) (Saint Vincent and the Grenadines v. Guinea-Bissau), 128 ILR 267 (Int'l Trib. L. of the Sea 2004).