Introduction: The Contribution of Courts and Tribunals to the Development of International Law

Maurizio Arcari, Enrico Milano and Attila Tanzi

1 The Occasion

On 14 February 2014 a meeting of a group of international law scholars was held in Naples at the headquarters of the Publisher, Editoriale Scientifica, to celebrate the second anniversary of the book series, The Search for Law in the International Community (“La ricerca del diritto nella comunità internazionale”), co-directed by the authors of the present introductory note. The idea was to convene the members of the scientific board (all reputed academics from Italian and other European and South American Universities), and other scholars, in an informal and friendly environment that would be conducive to a substantive exchange of views on a subject germane to the title of the book series. To that end, the choice of the topic of the contribution of courts and tribunals – both international and domestic – to the assessment and development of international law was generally considered appropriate by most of the members of the scientific board. The engagement of the participants in the discussions proved so deep, meaningful and well-articulated that it appeared only natural to ensure a written follow-up to that meeting. The papers gathered in this Special Issue represent the outcome of such an effort. We are grateful to Eduardo Valencia-Ospina, Pierre Bodeau-Livinec and the Board of Editors of The Law and Practice of International Courts and Tribunals for kindly hosting their publication.

The purpose of this effort is not just to celebrate an editorial event by collecting a number of papers each of which describes, in rather incidental fashion, the role and functioning of selected judicial bodies specialising in particular areas of international law. The main idea that has inspired the present guest editors is the assumption that, if international law is a complex and multifaceted legal order, its overall coherence, as well as its advancement, are best tested by the attitude of the international judicial bodies called to assess, interpret and apply international rules and principles.
The present venture does not aim to be comprehensive. In fact, the wish of its proponents was that of merely providing a contribution to a widely articulated and long-standing debate amongst scholars and practitioners – and that we believe will remain topical for long – in order to prompt that debate further along. On that score, the present authors are pleased that the subject matter of the present Special Issue will soon be discussed anew, and on a much wider scale, within the framework of the annual symposium of the European Society of International Law (ESIL) taking place this year in Oslo.

2 The Issue at Stake

One hardly needs to recall how, at the beginning of the present century, “fragmentation” was the main “mantra” in the scholarly debate, as well as in the legal diplomacy, about the international law process. It may be argued that one of the factors that has ignited such a debate was the so-called proliferation of international courts and tribunals. After more than a decade since the inception of such a debate, the concerns about the risks of fragmentation of international law are far from over. At the same time, one may note a substantial shift in the attitude of international legal scholars towards the role of courts and tribunals, the latter being increasingly presented as promotors of “systemic integration” within international law, while “judicial dialogue” and “legal certainty” have become the keywords in this debate. Against this background, one may wonder whether the past critical attitude towards judicial pluralism, assumed to be a threat to the coherence of the international legal order, was simply exaggerated, or whether it is the current more optimistic approach to the matter that is overestimating the beneficial impact of judicial dialogue in the international legal order.

Paradoxically, looking at some of the outstanding cases of contemporary international case law, one could find room for justifying both of the above

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2 See generally the contributions gathered in O. K. Fouchald, A. Nollkaemper (eds.), The Practice of International and National Courts and the (De-)Fragmentation of International Law (2012).
3 See in this respect the introduction by Louis Balmond to the book M. Arcari, L. Balmond (eds.), Judicial Dialogue in the International Legal Order. Between Pluralism and Legal Certainty (2014), 3–6, that is, not by accident, the most recent volume appearing in the aforementioned book collection.