

Case-Law and the Development of International Law

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Contributions by International Courts and Tribunals

Edited by

Patrícia Galvão Teles and Manuel Almeida Ribeiro



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Note from the Editors

This edited volume is based on the proceedings of the second regional conference of the International Law Association (ILA) that the Portuguese Society of International Law, its Portuguese Branch, has organized. The conference took place in the School of Law of the University of Minho, in Braga, on 18–19 September 2019, under the theme “The Contribution of the Case-Law of International Courts and Tribunals to the Development of International Law”.

The first conference organized by the Portuguese Branch of the ILA had taken place in Lisbon in 2014 with the title “Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective.” In its aftermath, a book was also published by Brill-Nijhoff, with the edited contributions of the presenters in the conference.¹

The theme of the 2019 conference was a suitable follow-up to that of the previous event and one of increasing importance in view of the current state of play regarding the development of international law.

After the Second World War, the international order of the second half of the xx century, although in a context of a “divided world” – to use an expression coined by Antonio Cassese –, witnessed a golden age regarding the development of general international law, with the construction of an extended set of regimes, from international human rights law, to humanitarian law and the law of the sea, to mention just a few examples.

The end of the Cold War brought with it the hope that the new framework of international relations would allow further developments. So far, these hopes have not been confirmed and there are few reasons to believe that this will change in the near future.

This does not mean, of course, that international law froze. On the contrary, bilateral treaties have been concluded in many fields, as well as in treaties in regional frameworks. However, multilateral conventions with universal reach have less and less managed to find a favourable environment to develop. It is common, nowadays, to speak about States’ “lack of appetite” for new multilateral conventions. In the last two decades, the Draft Articles prepared by the International Law Commission, including on the important topic of State Responsibility, have not been adopted as conventions in the framework of the United Nations. In particular, since 2015, with the Paris Agreement on Climate

¹ D. Moura Vicente (ed.), *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective* (Brill Nijhoff, 2016).

Change, very few or none have been the major universal treaties concluded or in perspective of being so in the near future.

In this context, the role of international courts and tribunals has had an enhanced relevance, and will continue to do so, in the building and the development of the legal foundations of the international legal order, such as for the identification of international customary law and regarding the interpretation of treaties.

International courts and tribunals, including the International Court of Justice and the International Tribunal for the Law of the Sea, have been busier than ever in the past decades. States have placed renovated trust in judicial instances to settle their disputes and such instances have also taken the opportunity in the cases they are seized of, in contentious and at times in advisory proceedings, to further contribute to the development of international law.

This book looks, thus, through different lenses, to the recent contribution of the case-law of international courts and tribunals to the development of international law. It starts by looking at how such case-law has contributed to the development of the methodology of international law and to the development of procedural rules.

It then examines recent contributions from three major players in the international judicial arena: the International Court of Justice, the International Tribunal for the Law of the Sea and the mechanisms for Investor-State Dispute Settlement.

Although the majority of the permanent members of the Security Council do not accept the compulsory jurisdiction of the International Court of Justice, its jurisprudence has been, in the same way as the one of its predecessor, the Permanent Court of International Justice, one way of building widely accepted paths regarding the development of international law.

The International Tribunal for the Law of the Sea, a more recent institution in the international order, is a means for the resolution of disputes concerning the common use of the sea, a space not yet fully explored that our planet still offers to all humankind, in the hope that it will contribute to the peaceful profit of its benefits by all nations.

Bilateral investment treaties have allowed for an increasing flow of foreign investment, indispensable for a fairer spread of the benefits of globalization. But this has also led to an increasing number of investor-State disputes, involving a multiplicity of actors, and the search for the best model for the mechanisms to resolve such disputes.

It is our sincere hope that the contributions of the distinguished participants in the conference, some of which are made available to the international legal community in this edited volume, will be of added value to the ongoing

debates on the important matter of the role of international courts and tribunals in the development of international law.

We thank all the participants who attended the conference in Braga in September of 2019 and, in particular, the authors who have contributed to this book. It is with great pride that this book contains a mix of contributions from established scholars and practitioners and promising new voices from diverse regions of the world, ensuring also gender balance with regard to the contributors.

The editors are also very grateful to Brill-Nijhoff for supporting this publication and to António Varela Cid, who has greatly assisted in the editing of the book.

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Lisbon, April 2021

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