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## Editorial

### Nino – In His Own Words; In this Issue; The Last Page and Roaming Charges

#### Nino – In His Own Words

I have no intention of listing all of Antonio Cassese's many distinctions and achievements as one of the great international lawyers of his generation. Readers of *EJIL* will be familiar with all of that, and Wikipedia (a decent entry) is just one click away. It is the person behind the public figure who is of interest. One has to be personal. I met Nino for the first time in 1978. I was a young(ish) Assistant at the European University Institute. He was a Professor 'down town' in Florence. Relations between the faculty at the University and the EUI on the top of the hill were frosty. At best an *entente cordiale*. Nino would have none of that. He embraced me and within months of my arrival invited me, first to his home, and then to contribute to a major project he was directing on Parliamentary Control of Foreign Policy. I was asked by him to write the Report on the European Communities. It was a telling moment. The late Christoph Sasse, distinguished professor of EC law from Hamburg, was indignant: 'a role for a Professor, not an Assistant'. Nino had no patience for that stuff either. He really did not know me all that well and was taking a risk. But it was typical of him: reaching out, welcoming, having faith, including the young, foreigners. It galvanized me. It was, too, a lesson for life.

Planting trees together, ploughing fields, building houses, jointly creating something from nothing, all bring people together as little else does. I was privileged to build two houses together with Nino. One was this Journal – *EJIL*. Bruno (Simma) and I had no doubt that it should be Nino we should turn to as our Italian 'partner'. He embraced the project with his typical enthusiasm and commitment. He had more ideas per gallon than all of us put together. The Italians have a wonderful saying: *Nove parlano, Uno fa*. Nine talk, one does! Nino was one of those Ones. Indeed, he did the work of all the other nine put together. And of course it was infectious. Those of you with some experience in these matters know how meetings of journals, institutes and the like proceed. The French idiom '*Il faut*' goes into overtime. One needs to do this, and one needs to do that. A nice way of being creative, engaged and, yet, lazy and uncommitted at the same time. Nino would collect all the '*Il faut*' like the discarded wine bottles at our meetings and then just do them! Whether it was organizing, or writing.

I attach at the end of this Editorial a list of his contributions to *EJIL* over the years – some iconic, all memorable. His imprint on the Journal is still everywhere, years after he left to build yet another house, the *Journal of International Criminal Justice*.

We also established together the Academy of European Law – now in its 23rd year. He took charge of the Human Rights section, I led the EU part. The same enthusiasm was on display there too. Here is a tiny, telling anecdote. At a certain point we had to dismiss an employee of the Academy who simply was not up to the task. Nino just could not do it. He called me, his Co-Director, for a little talk. ‘Joe, you’re an Old Testament type. You have to do it’ . . . I did.

This Editorial, like all our Editorials, will also appear on our Blog – [www.ejiltalk.org](http://www.ejiltalk.org). I invite students, colleagues, friends to contribute Moments of Nino – stories and recollections, which illuminate not his professorial or judicial or diplomatic prowess, but Nino’s human side and his great humanity.

*EJIL* will be publishing in due course a Special Issue in honour of Antonio Cassese in which, in addition to a scholarly symposium the contours of which are still under discussion, several tributes by some friends and colleagues will appear.

In 2003 Nino was invited as a Distinguished Global Fellow to NYU Law School. It is customary to invite senior judges, present or past, domestic and international, to that position. For a week or two they participate in seminars, give lectures and associate with colleagues. One fixture in the calendar is a public interview ‘To Be a Judge on [this or that Court]’. The purpose of the interview is not to discuss fine points of law, nor even to gain insight into the procedure of this or that Court or Tribunal, but primarily to get to know the person behind the judicial robes.

The following is a transcript of the interview I conducted on 4 September 2003 with Nino. It is only very slightly edited. I have not corrected the usual little lexical gremlins which creep into free flowing discussion. I believe that in this unadorned way one can hear the authentic Nino – self-deprecating, earnest, passionate, with a twinkle in his eye, and that wonderful child-like little smile and giggle.

**Professor Joseph Weiler:** Good evening Ladies and Gentlemen, this is the third in our series of encounters with international and constitutional court judges. It’s a great privilege and honour to have with us Professor Antonio Cassese, who was the first President of the Tribunal for the former Yugoslavia.

Tell us first of all a little bit about your background as a child, where were you born, where you went to school, what kind of school you went to – in short, the early Cassese. We want to get a feel for this person sitting next to me.

**Professor Cassese:** I was born in Atripalda (a village of 10,000 inhabitants) in 1937, but my family moved when I was a child to Salerno – which is a small town near Naples – in 1937, and that means that I have a very vivid recollection of the war, because as you know in September 1943 the American troops landed in Salerno, my hometown. And so, therefore I was six, but I remember the war very well, everything – every moment of bombing and the first time I saw my mother crying, and the first time I saw my father terrorized. He escaped and we went away to the countryside just a few days before the landing. But before the landing there had been a lot of bombing (by Americans) of

Salerno. We went to the countryside and we happened to be with some relatives – an uncle of mine who was a member, a Captain, a member of the Italian army. You know that during the armistice in September of 1943, the Italians, actually the Italian army disbanded and most people actually did not know what to do. Some of them took part in the partisan warfare, and my uncle decided to stay, just to be in hiding, and so we were in a small farm when a battalion of Germans went through. We thought we were safe, but they actually went through the farm where we were staying, and they spent the night there. So I remember again. There were a lot of weapons there. My uncle, the Captain, and other people had collected all those weapons, bombs, machine guns, and so on. So we thought we were to be killed by the Germans. Again we escaped in the night, and again I saw my father trembling and terrorized because of this new danger of the Germans. So, a lot of recollections of the war.

**JW:** What did your father do?

**Professor Cassese:** My father was a historian who actually wanted to become an academic. But he was very shy and so he decided to work as a director of a public record office in Salerno where all the records are kept of the criminal trials against people who were insurgents in Italy in the 19th century. There had been a lot of cases where farmers had gotten together to fight for land distribution, sort of a socialist fighting, and always of course it ended up in bloodshed. Those sorts of rebellions were crushed and my father was very eager to study the episodes which took place between 1830 and 1850 in Italy, through the records which he could find in the public record office of which he was a director. So he spent all his time writing and working.

**JW:** And your mother?

**Professor Cassese:** My mother was a teacher at the high school. She taught Latin and Greek. She was more present and more affectionate than my father because my father, as I said, was always working and studying. I went to high school in Salerno, this small town in southern Italy. It was a very poor area of Italy, and culturally not very developed. That area and the whole of Italy during fascism had been dominated by the Italian philosopher Benedetto Croce, a leading man whose moral authority was however gradually eroded in the late 1940s by Communist thinkers and philosophers. My father joined the Communist party in 1943 and became a leading scholar among the members of the party. . .

At the age of 17 I decided to follow in the footsteps of my brother Sabino and move to Pisa. Pisa was the only university in Italy to which people could gain admission through a very tough exam competition. Very few were selected and they got special classes, they had a special faculty. I was a student of Pisa University and at the same time a student of the 'Scuola Normale Superiore' set up by Napoleon. The idea was of selecting people in Italy as members of the leading classes. I was lucky enough to be selected, and spent four years as a student doing law.

**JW:** When had you decided you were going to be studying law? Was that also in the footsteps of Sabino?

**Professor Cassese:** Well actually yes and no. I had decided to do literature and philosophy. My brother and my father, but more my brother who is a very tough man, said

‘look, don’t waste your time, you’ll never get any money, there’s no future if you do Italian literature and if you study philosophy there’s no future if you want to get a job’. In southern Italy most people from poor classes would become either priests or members of the military, or members of the police, or, like in my case, they would go to the north or central part of Italy to make a living.

In my case I could not become a priest. Although I was Catholic in origin, pretty soon I decided that I was agnostic; my mother was horrified. She once told me ‘You were an angel, and now you are a devil, because of Pisa, this Pisa institution, there are too many Communists there, and you have become agnostic because of Communism.’

**JW:** And your choice to specialize in International Law, when did that crystallize?

**Professor Cassese:** In Pisa we were lucky enough. At that stage in the 1950s (I attended university from 1954 to 1958), Pisa was the university where the best professors would teach before being appointed in Rome. It’s no longer valid now, but in the 1950s, normally professors started out (once they got their professorship) in small universities, say in Sicily, small peripheral universities. Gradually they would move on to more important universities as a stepping stone to Rome (which was number one) and they went to Pisa. I was so lucky that I got the best professors. One in particular, who was professor of public law, Massimo Severo Giannini - I wanted to be his student. But my brother had already been his protégé because he started two years before me, and so therefore I said I’ll move to a different area. Two branches that I did enjoy studying were Constitutional Law and International Law. Why? Because they were technical areas of law, but with close links to politics and reality. I was always divided between the technical part of law, being a good technician who knows the legal technicalities and can use the scientific tools very well, and on the other hand, law as part of the [general] context. In Italy at that stage, most professors of law had only studied law as an abstract body of ideas and notions. You may know the German tradition, what they call the ‘*Gesetzesjurisprudenz*’, so the jurisprudence based on notions and abstract theories.

**JW:** Who were the influences on you in your formation as an International Lawyer? Who were the great Internationalists with whom you studied or from whom you learned most? Which were the books that were fundamental to how you developed as an International Lawyer?

**Professor Cassese:** Since I could not do Constitutional Law (because the professor of Constitutional law had just moved to his hometown) I opted for International Law. My professor was Giuseppe Sperduti, who was a top technician in the area of International law. He was a member of the European Commission for Human Rights, and a very active member. He taught me that there was a whole area of International Law – Human Rights Law – which is promising and extremely important. However, I was not under his influence because I felt that we were too different.

**JW:** As you were growing up, when you graduated, who were your intellectual influences? Who were the jurists that you read?

**Professor Cassese:** I prepared my exam with Professor Sperduti when I was in my third year by reading a book in German, which I regard as a masterpiece still, Verdross’ *Völkerrecht*.

Verdross was a famous Austrian professor and his book has now been updated. I still think that this is the best textbook in Public International Law. After my exam, my professor said 'why don't you write a book review of the latest edition?' I published that book review. So, this was under the influence of Verdross, who is again a very strange animal in a way. He was somebody who had a very complex personality. He was a pupil and protégé of Hans Kelsen, the formalist. He was a Catholic, very close to natural law doctrines. In his books there was a combination of formalism and natural law theories. There was some ambiguity in this attitude. At one stage he was very close to Nazi politicians. That's why later on, he never became a member to the International Court of Justice. [See the European Tradition of International Law symposium on Verdross in 6 *EJIL* (1995) 32.]

Later on I met quite a few famous scholars; in Geneva I met Paul Guggenheim and Fitzmaurice. Great men, but actually none of them had that much influence. They were all excellent scholars, top flight. However the only man, who was the great sort of love of my life, was a Dutch professor, Bert Röling. He was not a great scholar. In 1946, he was appointed by the Dutch government as a member of the 11-member Tokyo tribunal, at the age of 39. He had started off as a criminal judge and a professor of criminal law. Then he went to Tokyo, and spent two and a half years in Tokyo. He came back to the Netherlands and moved to International Law because he thought International law was more exciting than Criminal Law. When I met him in 1973, he was already a famous professor of law. As I said he never developed a fully-fledged theory of International Law, though his major works are as profound as books by Roberto Ago and Fitzmaurice, to mention a few. However, he was the only man who had a vision. Let me give you an example: his dissenting opinion in the Tokyo Trial. He wrote a wonderful booklet which came out in 1960, 'International Law in an Expanded World'. To my mind this was really a turning point in legal literature. This book was written 10 years after the famous book in German by Carl Schmitt. In my mind his book published in 1960 was more important. Why? Because International Law was put into an historical perspective. This had already been done by Carl Schmitt, but in a different way. Röling thought that International Law had developed from the Peace of Westphalia in 1648, in three different stages. The first stage was the 'Christian states'. Then the 'Civilized states'. Why? This first stage lasted up to 1856, when the Ottoman Empire was admitted to the charmed circle of the European states, Europe being the centre of the world. The European states decided to admit Turkey into this charmed circle. Why? As a Turkish diplomat put it, 'We are now considered to be equal to the Europeans in social butchery, because we made wars and we showed that we are good butchers in war, as good as the Europeans.' So Christian states, European states, gave admission to a Muslim country, the Ottoman Empire, only because of this reason. Then, according to Röling, you have a third stage, starting after the Second World War with the UN Charter, the 'Peace Loving countries'. The new standard and yardstick for admission into the world community is to pursue the idea of peace.

**JW:** But the subject of our interview is you not the world . . .

**Professor Cassese:** No, but I'm not very interesting. [laughter] What I found fascinating about this booklet, for the first time he looked at International Law from the view point of what he used to call the 'underdogs', the have-nots, the developing countries. He decided we need a new design of the international community geared to the promotion of the developing countries. He spoke for the first time, a Dutchman, a European, talking to the people of developing countries. It's no coincidence that Georges Abi-Saab – who

is the leading scholar on developing countries – felt that this book is really the most significant. He told me ‘I agree with you that this is a wonderful book that opened the minds of many people. Let us look at International Law as it applies not only to current legal standards, let us look at International law because we want to change International Law and create what Bert Röling used to call the “natural law of the nuclear age”’.

**JW:** Did that approach, the periodization, the three stages, etc, the International and expanding law, influence your own *International Law in a Divided World*. Was it like writing the successor to Röling?

**Professor Cassese:** Yes indeed.

**JW:** Was he alive when you did that?

**Professor Cassese:** Yes, whilst I was writing. He died in 1985. Actually he committed suicide because he had cancer and was suffering too much. He decided to take some poison, but he died in a very dignified manner, and was a great man. He influenced me through this new vision of International Law, which is as I said not International Law seen from the viewpoint of Europe and Americans, no longer the Eurocentric view of International Law, but International Law for the have-nots. He taught me so many things. I remember once I gave a paper, and he was there. The paper was on ‘The Principles of International Law’ and my paper was on humanitarian law and the famous principle of prohibiting weapons causing unnecessary or superfluous suffering. I worked a lot on state practice. I went through all state practices. At the end it was decided that this principle had never been applied and it was pointless to discuss this principle prohibiting unnecessary suffering because states had never applied this principle, and they don’t care. They only pay lip service. My argument was that principles are extremely important, because one day a principle can pave the road, one day a court, a scholar, a judge may rely upon the principle and flesh out the principle. Now in reflection I think that general principles in International Law can be regarded as the six characters in search of an author [to borrow from Pirandello, the Italian playwright]. I think these principles are looking for a court. And one day a court may jump in and say ‘oh look this is a wonderful principle’. Actually one such court was a Tokyo district court which in the *Shimoda* case applied that principle of unnecessary suffering, saying that the use of atomic weapons in Hiroshima and Nagasaki was against that principle. When we were discussing humanitarian law Bert said to me ‘Stop thinking that soldiers must be regarded as heroes. Soldiers are human beings. You have to understand that they prefer to kill somebody else than be killed.’ And so this human realistic view of military people not as heroes, but people who fight and want to live their lives, is profoundly human. So this great man would teach so many things because of his vision. He is a unique international scholar. He was the great influence of my life.

**JW:** How in your formation did your linguistic ability develop? You were reading in German, and Italian, and French, and English, when did this happen?

**Professor Cassese:** At University. In Pisa we were told – because we were students of law and philosophy – we were told by the boss, ‘look here you don’t do politics, you stop talking politics, and you forget politics, and you learn German, because German is a key language for all of you. Whatever your discipline, you have to learn German.’ So we had to learn German and it was very hard.

**JW:** And French and English?

**Professor Cassese:** Not so important, no they didn't care. **[laughter]** For somebody who is studying philosophy and Greek literature, and the humanities, German is important. Actually, I found later that German is crucial for those who study criminal law. I also studied French and English at University.

**JW:** So now let's fast forward, and before we get to your period on the Tribunal, you had an experience as the President of the Torture Committee established by the Council of Europe. Very briefly, tell us just a little bit about that experience.

**Professor Cassese:** The Convention was a very short convention, setting up a committee against torture and inhuman degrading treatment. It was a committee consisting of lawyers, medical doctors, specialists in prisons, and so on, who would inspect the various establishments of contracting states.

**JW:** And the contracting states were the states of Council of Europe?

**Professor Cassese:** Yes, now about 44 states, all members of the Council of Europe have joined this convention. Before there were about 20–25 member states, including Turkey.

**JW:** And you would announce one day to a state, 'we are here, we are going to carry out an inspection'. There was no preparation? Would you go to a police station, to a prison?

**Professor Cassese:** We would go to the capital first, as soon as we were elected as the members of this committee. I was elected by the Council of Europe and the groups elected me as President. We decided that we needed a lot of training, especially because of our different individual training. So we learned a lot from the International Committee of the Red Cross. We went to Geneva, and people from Geneva came to Strasbourg and taught us how to go to the prison. And they are extremely competent and knowledgeable in how to inspect a prison and talk to a detainee without any person attending you. So we learned the ropes, and we decided you can't go straight to the UK and start visiting police stations and prisons without warning the authorities, if only 24 hours before going there. We normally went through the Home Office and Foreign Ministry and would have very quick talks with the top people and then start visits without announcing where we would go.

**JW:** Tell us a little bit about actual experiences. Which countries did you visit? What was memorable for you?

**Professor Cassese:** Turkey of course. I was President of the Committee only for four years and then I dropped out after four years because it was too exhausting. This is one of many defects. I lack detachment. I get so involved, psychologically and physically involved, that I spend all my time there. Turkey was very crucial, and for this reason we went to Turkey on four occasions. Each year we decided to go there. By contrast, during my period we went only once to the Ukraine, once to France, once to Spain, and I went to Cyprus and Greece.

**JW:** It's remarkable that Turkey accepted the convention, and accepted the discipline, and accepted that you would go to visit them.

**Professor Cassese:** Yes, but the rule was that this Convention was accepted by all these countries because of the political pressure by the Council of Europe. Also, because there was a clear clause in the Convention that had been suggested by the Swiss, in particular a Swiss millionaire Gautier, a very good man whose dream had been to set up such a Convention, so we realized his dream. The idea was that you go there and you follow the ICRC methods, namely you don't disclose the results of your visit. You go there, you talk, you spend two or three or four weeks, a month visiting all the worst places in the country, and then you go back to Strasbourg to draft a detailed report with all your criticisms and suggestions. This report would be confidential and sent to the authorities, and this report would remain confidential. So, this was the basic idea. That is why all the states accepted. But then, we were rather astute and lucky. The first country we visited was the UK, and during the visit in the UK, we found a lot of rather awful things, particularly in prisons. Those prisons we visited were horrifying, really dreadful. We made very nasty and critical comments. You make comments on the spot. At the end of the visit you go to visit the top ministers and say, 'Hey look, we have just visited this place, and the most horrible things we have seen are those ones, and we make these suggestions, but we will go back to Strasbourg and issue a detailed report, running 100 to 150 pages.' But in the UK, I told my colleagues, why don't we try to be naïve and astute at the same time, ask the Minister of Foreign Affairs and Home Affairs to set an example. 'When we send the report, why don't you set an example and you make it public?' When they saw that we had been critical, they said 'We can make it public on condition that we also make public our critical comments on your report.' I said I agreed, and the report was made public. After that it was very easy for us to go to other countries and say 'Look you can't be less democratic, and open, and transparent than the British.' And it worked very well, except for Turkey. Turkey for six years had refused to make our reports public, and as a result, we issued our own weapon. We had this rule of confidentiality and the other weapon was that when the state fails to cooperate or implement the recommendations of the Torture Committee, then you may go public and publish a short statement. We made two public statements on Turkey in my four-year period. We also disclosed, without mentioning the particular names of places where we had found torture, horrible cases of torture. Of course the Turkish government was taken aback. But in a matter of six or seven years eventually it accepted the idea of going public. So now all countries have accepted the idea of giving up the confidentiality rule, except for Russia. For the time being, I think Russia is the only country.

**JW:** Let's now get to the Tribunal for the former Yugoslavia. Tell us first about the appointment process. How come you got to be appointed? How did it work in Italy?

**Professor Cassese:** I had just quit the Torture Committee, so one day the Minister of Justice, who happened to be a very good Professor of Criminal Law and former President of the Italian Constitutional Court, phoned me. I was of course extremely flattered to get a phone call from the Minister of Justice. He didn't go through the various secretaries, but simply said 'Hello Nino, how are you?' And he said, 'look I must appoint someone to replace you in the Torture Committee and I would like to know how much you got there because there is a man whom I would like to appoint to get rid of him, because he's a pain in the neck, so how many thousand dollars did you get?' And I said 'not one penny. Actually we didn't get any salary. So therefore tell him that he will not get any salary. You do this because you believe in fighting for human rights'. And he said,



‘Well I’m so sorry, anyway, I will try to convince him. By the way, since you are free now, and you are going back to academia, and you are a Professor, would you be prepared to accept to become a Judge on the International Criminal Court for the Former Yugoslavia?’ I said, ‘Yes and I can accept being nominated by you, but of course I don’t stand any chance of being elected by the General Assembly.’ The judges are elected by the UN General Assembly after a screening process. So governments nominate judges and then the Security Council makes a screening to see whether they have the right proportions – common law countries, civil law countries, people with international experience, former judges. There were 50 people, and then the Security Council reduced this number to 25.

**JW:** Were there politics in that process or was there some sort of professional air? Were countries lobbying at all?

**Professor Cassese:** Maybe I am being naïve. I thought because I saw this secret list of people who had been nominated and how they had been selected by the Security Council, and actually I think they went for quality and political distribution. And for the first time they nominated four carefully selected people from Muslim countries, and none of them was a Muslim. One from Malaysia who was not Muslim, one from Nigeria who was a Protestant, from Pakistan he was a Farsi, and Abi-Saab from Egypt was a Coptic. So it was very strange. Probably it was made on purpose to avoid having someone who could be accused of siding with Muslims against the Croats who are Catholics or the Serbs who are Orthodox.

**JW:** So it went well for you in the General Assembly?

**Professor Cassese:** In the General Assembly, yes, only because there was an excellent ambassador who was a specialist in lobbying, Ambassador Fulci. He had tremendous power because he lobbied all the small islands. He had a lot of close links with most ambassadors so he was extremely powerful. So it was because of his diplomatic capacity that I got a lot of votes.

**JW:** So now you go to The Hague and you get elected as President. How did that happen?

**Professor Cassese:** There were 11 in The Hague and of course we met on the 16th of November 1993 in a horrible hotel, a sort of gloomy and pompous hotel. When we met we had a nice chat and then we realized we had nothing. No facilities, no court room, no building, no money, nothing, no budget, no secretaries, no law clerks. And they told us we would meet in the building of the International Court of Justice, and there were three secretaries with three-month contracts, so most judges got scared. And I remember when I met the then Foreign Minister Pieter Kooijmans, who is now a judge on the ICJ [1997–2006], and whom I had known for many years because we were both experts in torture, **[laughter]** I mean fighting against torture. So Pieter Kooijmans and I had met many times in official capacities. He told me ‘Nino, the two people who can be elected President are Sir Ninian Stephen [a most distinguished judge from Australia, who was really number one I think] and you.’ But Sir Stephen said he was not interested because he said, ‘I would like to suggest that we should go home and wait for the General Assembly to adopt a budget. What is our purpose of being here?’ And I said ‘No, we are here and we must fight and set up a real tribunal, and show that we can do something serious.’ So therefore some people felt it was better to have some

sort of fighter instead of a more distinguished judge of great standing. He had been the Governor of Australia for many years. A great man, but probably they needed someone who could work very hard, and probably that's why I was selected. After a few days all of them went back home. And I remember, just to give you an example, that when we were sworn in on the 17th of November in 1993, there was a formal ceremony with the UN Legal Counsel and the Secretary General, we were to wear some robes, and there were no robes, and we borrowed the robes of the Dutch Bar Association, and the French Judge, who was very pompous, he came to see me and said 'It is outrageous, for the first time in my life that I don a gown that is neither French nor International. I am disgusted.' He was really upset. And I said in French the equivalent of 'beggars can't be choosers.' Simply like that, we have no gowns, no robes.

**JW:** And you are already sitting, and presumably by now you have your international gowns?

**Professor Cassese:** No not yet, not until 1995. We had meetings on the colour and so on, whether the collar should be red or black. It was a lot of fun. [laughter]

**JW:** I remember when you were appointed, you might have forgotten it, but I was then at Harvard. And you wrote to me and said, 'Look there are three or four legal issues I really need some research done quickly, have you got some bright students?' It is often said that in the area of international criminal law, you either have lawyers with criminal law experience but very vague ideas about international law, or vice versa. But few or no people with a good grasp of both. . . . What was your experience at the time?

**Professor Cassese:** Well most people had criminal law experience. The Chinese judge was a judge, Judge Li, who had been legal advisor to the Foreign Ministry in Beijing, who had no judicial experience. Georges Abi-Saab and I myself had no judicial experience. The new French judge Claude Jorda had actually been a Chief Prosecutor in Bordeaux and then in Paris. He was a socialist and an excellent prosecutor, since the rightists had taken over, they wanted to get rid of him, and he told me he said, 'I have been a Chief Prosecutor in Paris, it's a very powerful position, with a lot of political implications, and they want to get rid of me, and they want to offer me to come over to The Hague.' And I said 'Of course I would be delighted if you could come' because I knew he was a top man.

**JW:** Did you feel disadvantaged because you did not have criminal law experience?

**Professor Cassese:** Yes of course, because I had to learn. I had already started as soon as I had been elected in September. I had begun studying, reading books and so on. Our advantage, I felt, was that we had this international dimension, international experience. The excellent judge from Pakistan, who had always been a Pakistani judge, he would always move around with his Pakistani codes of criminal procedure. On any topic we were discussing he would say 'In Pakistan, we are doing this and that. I would suggest that we take up this rule applicable in the Pakistani law.' But this was not a Pakistani tribunal, this was an International Tribunal. So in a way, we lacked judicial experience. We were naïve, we had no competence whatsoever. Judicial experience of course is crucial. On the other hand, we were not in any way parochial. We did not have that sort of narrow-minded approach typical of somebody who has always been a judge in his own country. Probably the only one who had this international dimension was Sir Ninian Stephen because of his tremendous international experience. Therefore

there was a combination of judicial experience, not so much as a criminal judge, but as a member of the High Court. When I phoned you to ask for help, I thought one of my first tasks should be to prepare a lot of background material, manuals on notions of criminal law, international criminal law, and international humanitarian law. I remember one of your best students prepared an excellent memo on Command Responsibility, with all the documents. So we got a 35-page memo with all the relevant cases, Trial in Absentia, whether or not it was possible for us to think of trials in absentia, the difference between international and internal armed conflicts. I thought that each of us should be so modest as to accept to prepare, to start doing homework. I don't know how many judges actually read those papers, very few of them.

**JW:** That we will not tell my former student. . .[laughter]

**Professor Cassese:** And also, I insisted that we people from civil law countries – there were five of us from civil law countries, five to six from common law countries – we would like to come to the UK or the US and watch trials. Actually we went to London, we came to New York, we went to Washington. There was Abi-Saab, the Egyptian, a Frenchman; and I, the Italian. We spent quite a few weeks in New York, London, and Washington just watching trials, to see how common law jury trials worked.

**JW:** So now in those early years, it seemed as if it could have been a frustrating experience for you because you, if anything, were getting the small fry, the Lieutenant Kellys, the Sergeant Joes, and the real big reputed war criminals were not being touched. Can you capture for us that early period?

**Professor Cassese:** I think the prosecutor adopted a pyramid approach. Namely you start because you have more intelligence about the small fry and then you climb up the pyramid and then you target the leaders. At that stage, I think it was probably very difficult to right away target Milošević or Tudjman. Eagleburger, when he was still Secretary of State, he had made a public statement saying we have evidence that Milošević, Tudjman, Karadžić have committed crimes against humanity and war crimes. However I don't know to what extent it was possible to start compiling evidence about those people. So we started out with Tadić, who was a minor defendant, and had been apprehended in Germany. And the Germans from the outset were extremely cooperative. They decided immediately to hand over Tadić. We got Tadić, and Tadić was very useful because we moved on from Tadić to Karadžić and Mladić. And the Chief Prosecutor brought indictments in July of 1995 against Karadžić and Mladić. And this was crucial because it was really a turning point. Later on, other prosecutors went on. It was a question of evidence. I had quite a few discussions, and had rightly been accused by Richard Goldstone as overstepping my authority as judge, and he's right. At the outset we thought we were to discuss generally, not cases; the judge could not discuss the case with the prosecutor. But probably the prosecutor can informally discuss the main policy of the tribunal. At that stage we discussed the various problems, and all the judges pushed a lot for the prosecutor to indict the major people. But we were aware. And I think this was a good argument put forward by Richard Goldstone, that of course for the victims, what victims say of rape, and killing of civilians and so on; it does not matter whether the defendant, the rapist, the murderer, is a leader, a general, or the political leader of the country. They want to see, this man may be a small fry. So for them, for the victims, it is crucial to make no distinction between the leader and the minor defendants.

**JW:** What was the most important case that you sat on?

**Professor Cassese:** Probably *Tadić*. Because I pushed so much and we exploited the *Tadić* case to draw as much as possible from a minor defendant to launch new ideas, and be creative. Actually, *Tadić* offered us the opportunity to pronounce on the legality of the Tribunal, whether the Tribunal had been set up in conformity with the law, the question of whether it would be appropriate to make a distinction between war crimes committed in internal or civil war and international conflict, and also the question of the extent to which a civil war may turn into an international war. Let me give you an example; *Tadić* was a Bosnian Serb who killed quite a few Bosnian Muslims. So therefore everything happened within a time frame, with Bosnia as a government. So clearly it was an internal armed conflict. At one stage in 1999, we had to decide whether *Tadić* had been acting as a de-facto state official acting on behalf of Milošević, turning therefore the internal conflict into an international one. I think two important positions are *Tadić* in 1995, where for the first time we got rid of this unacceptable distinction between internal and international as far as war crimes are concerned. And in 1999 we decided on what condition somebody acting within an internal armed conflict may in reality act on behalf of a foreign country. That's why we took up *Nicaragua* and criticized the ICJ in *Nicaragua*. To be honest, I'm very proud of what we did with *Tadić* in 1995. I remember when the case was brought before the Court of Appeal, and there was a very distinguished defence counsel. They said 'you can't apply some rules because these alleged crimes have been committed within an internal armed conflict, and you can't apply Article II of your statute which deals with breaches of the Geneva Convention's manual, because these pertained to an international armed conflict.' So we were stuck. So we said that we have no jurisdiction because this is an internal armed conflict, we can't apply rules which only apply to international armed conflict or shall we move forward and be creative? At that point I said to my colleagues, should we stick to the traditional concept that war crimes can only be committed in international armed conflict? This to me is crazy! A rape is a rape; a murder is a murder, whether it is committed within the framework of an international armed conflict, a war proper, or a civil war. The doctrine that had been upheld by everybody, including the International Committee of the Red Cross, was that if you kill civilians, you rape women, you murder wounded POWs in an internal armed conflict – this is not a war crime. It is simply a violation, a violation of Article 3 common to the four Geneva Conventions. The consequence is that the soldier acting on behalf of the central authority, who rapes women belonging to the civilian population of the insurgents, will never be punished. Whereas if the rape or murder is committed by the insurgent or rebel, he will be punished because he has taken up arms against the central authority. And he has no incentive to comply with humanitarian law. But because he knows that in any case he will be punished for taking arms against the central authority, he goes and kills and rapes and will be punished after the war. So I said 'why don't we jettison this stupid distinction?' My colleagues said 'yes we agree with what you are saying, it's very nice, but how can you create this criminal offence? Nino, if you can show that there is some custom in international law supporting your views, we will go along with it. But try to find some sort of evidence.' So I took six months, and set up a team. One of the best members of our team was an American girl, Betsy Andersen, who is now working somewhere in New York. And she helped me go through state practice and we came up with a lot of evidence. . . well some evidence. [laughter] I was delighted when I discovered cases

where the Americans had complained because of what Saddam Hussein did against the Kurds in Northern Iraq and the use of chemical weapons. I thought this was an internal armed conflict, something which happened within a state, and foreign countries including the United States are saying Iraqi authorities had breached International Law. That means that this is evidence and that you may one day be brought to trial. This is a very compelling piece of evidence; that some states consider that a breach of international humanitarian law within a state and civil war may amount to a war crime. Of course we also looked at the laws applicable within former Yugoslavia. The International Committee of the Red Cross used to tell us to take Yugoslavia as an example of humanitarian thrust. They were the best ones in legislating humanitarian law. So we picked up some pieces of legislation and said: if people from Bosnia and Herzegovina who have allegedly committed crimes, they are expected to know their own legislation, which was so forward looking, really one of the best ones in the world because of the broad sweeping scope. In a way, they should be expected to be aware that, say, a Bosnian Serb raping a Bosnian Muslim woman in an internal conflict, does something that cannot be condoned, which may be regarded as a criminal offence.

**JW:** Last week when you visited my seminar, you were speaking of something similar and said 'Well it was illegal but legitimate.' Maybe it helped in this case when you stretched the law that you don't have a sense of committing a real foul injustice towards somebody. What was your hardest moment on the court? Hardest with your legal conscience, your hardest moment as a lawyer?

**Professor Cassese:** Not as a lawyer, but as a human being, the hardest moment was on the 16th or 17th of July when we were in The Hague, and we learned of the Srebrenica massacre. And I told myself 'My God, we are utterly pointless.' I mean what was the meaning of us sitting there in The Hague; they didn't care about us, what was our effect? I had been preaching about the important role of the ICTY, not only to put a stop to atrocities, but to deter future atrocities. But none of it had an effect because they had massacred 7500 people.

**JW:** Wasn't this the case where the UN failed to intervene and stop the massacre?

**Professor Cassese:** Yes. The Dutch battalion was reluctant; the major powers did not act swiftly. This was really an excruciatingly sad moment. Really you could cry. And I thought 'I'm getting a salary? For what? For nothing! Because I am not being effective. And more so because I had been told a few months before by the French Ambassador, he told me that some Serb generals had met with some French generals, and because of the Tribunal they were getting cold feet, and they say to themselves, let us be careful because if one day we commit crimes we will end up in The Hague. This is what I had been told in 1994. But gradually they realized that we were not effective, which is why they became bold and committed horrible crimes. So this was really a very low point. I even said to myself that well probably we should pack up and go home.

**JW:** What was your most glorious, triumphant, or happy experience as President?

**Professor Cassese:** I had some good satisfactions. On the 10th of September in 1995, a Sunday, I got a phone call. I was all alone at the Tribunal working, because, you know at The Hague you have nothing to do. **[laughter]** So I was working and I got the phone

call and someone with a heavy Russian accent asked if I could put him through to the President. And I said it's me. And he said he was phoning on behalf of the Russian Ambassador and he would like to see you. And he came ten minutes later and he said he just got a short cable from Moscow, and the short cables are the most important, and the cable gave instructions to come and see you and to ask you to annul the arrest warrants issued against Karadžić and Mladić. He was a very good ambassador, very clever, and I said of course this could only be done by a Judge, a judge who is confirmed at the request of the chief prosecutor, and he would never do so, and I would be strongly against it as well. So therefore I told him there is no hope, but if he wished me to get in touch with Richard Goldstone, let us phone him. And of course Richard agreed with me, and I asked him to have a word with the Russian Ambassador, and he gave a nice explanation. And at 2:15 he said goodbye and I said 'I'm so sorry because you are nice, but my reply can't change.' And he said, 'No no, I'm very happy. In Moscow they'll realize they got, in a matter of two hours, a response from me on a Sunday, it's high efficiency.' **[laughter]** Actually because of these warrants, we prevented Karadžić and Mladić from attending first the Geneva conference and then Dayton. That was a huge satisfaction, that you in a way prevent people from attending. It was a tiny victory, but a symbolic victory.

**JW:** We're almost at the end of our time. Could you tell us, looking back to the totality of your life, where do you place this experience for you? How important was it for you? A reflection of what it meant to you, that period as the President of the Tribunal?

**Professor Cassese:** Well to me it was personally a great experience; first to be on the Torture Committee, and then to be on the Tribunal. For an academic who spent a lot of time working and studying human rights and humanitarian law, it was of tremendous importance to see how this model of law is applied, either in various countries at prisons, detention camps, asylum seekers camps, and so on, and how humanitarian law is applied in a criminal court, and to what extent you could be creative and improve upon the existing body of law. It was a very important experience. Of course I made a lot of mistakes.

**JW:** What was the biggest mistake you made?

**Professor Cassese:** Oh I don't know, there were many. . . **[laughter]**

**JW:** One if you could, you would now change?

**Professor Cassese:** I would recite to my colleagues a short story, by Bertolt Brecht, about this strange little man called Mr. Keuner and one story which was to me important. One day this small man meets someone else, and this other person asks, 'you look terribly busy, what are you doing?' 'I am preparing my next mistakes.' **[laughter]** Actually, I told my friends they were most welcome to attack me, because I know every day I make mistakes. One crucial mistake I made was in Florence in July 1996 at a conference. There were about 45 foreign ministers, and I decided to go to the limit of my authority as President. The President, I, was not only a judge, the President may be a judge when he sits in a court as the presiding judge of the appeal chamber, but he has a lot of diplomatic and political tasks to fulfil. There I said 'I'm fed up of the misbehavior of major powers, they don't do anything about Karadžić and Mladić.' I prepared a statement on the need to arrest Karadžić and Mladić, and I said also you need to issue sanctions against those who

have been accused by the chief prosecutor of committing some horrible crimes. I even suggested a few sanctions, and I remember a few minutes after I started talking there was a deadly silence. And then at the end I saw the presiding foreign minister was the Italian minister. He was pale and he said, 'Well as a result of what you said, we have to reconsider our position.' But he was really angry. And the Ambassador from Bosnia and Herzegovina came to see me and he said, 'The Americans are furious with you because you have overstepped your authority by suggesting to politicians what to do. That's not your job. You can't tell the Italians, the Americans, and the French to take some sort of actions.' On the other hand, I thought this was my moral duty, to make use of my judicial authority and as President of the Tribunal. So, at the end of the day I had mixed feelings. I was to some extent proud of what I had done, but I was also aware that this backfired. This probably was my major mistake.

**JW:** I have a feeling that you don't regret it all that much. **[laughter]** The purpose of these sessions is not to go deeply into some fine legal point, but to get to know the person behind the name, to 'de-reify' as some theory-prone colleagues of mine would say, the notion of the judge, and to really see the flesh and blood. We've seen a great deal of that today. On behalf of all of you, I would like to thank Judge Cassese for a wonderful hour and a half. Thank you very much. **[applause]**

## Annex: Publications of Antonio Cassese in the European Journal of International Law

The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 18 *EJIL* (2007) 649 <http://www.ejil.org/pdfs/18/4/233.pdf>

When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case, 13 *EJIL* (2002) 853 <http://www.ejil.org/pdfs/13/4/1564.pdf>

Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 12 *EJIL* (2001) 993 <http://www.ejil.org/pdfs/12/5/1558.pdf>

The Martens Clause: Half a Loaf or Simply Pie in the Sky?, 11 *EJIL* (2000) 187 <http://www.ejil.org/pdfs/11/1/511.pdf>

A Follow-up: Forcible Humanitarian Countermeasures and *opinio necessitates*, 10 *EJIL* (1999) 791 <http://www.ejil.org/pdfs/10/4/610.pdf>

The Statute of the International Criminal Court: Some Preliminary Reflections, 10 *EJIL* (1999) 144 <http://www.ejil.org/pdfs/10/1/570.pdf>

*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 *EJIL* (1999) 23 <http://www.ejil.org/pdfs/10/1/575.pdf>

On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 *EJIL* (1998) 2 <http://www.ejil.org/pdfs/9/1/1477.pdf>

The Israel-PLO Agreement and Self-Determination, 4 *EJIL* (1993) 564 <http://www.ejil.org/pdfs/4/1/1219.pdf>

Ian Brownlie, *Treaties and Indigenous Peoples* (book review), 4 *EJIL* (1993) 129 <http://www.ejil.org/pdfs/4/1/1187.pdf>

James Crawford, *The Rights of Peoples* (book review), 4 *EJIL* (1993) 132 <http://www.ejil.org/pdfs/4/1/1190.pdf>

Realism v. Artificial Theoretical Constructs: Remarks on Anzilotti's Theory of War, 3 *EJIL* (1992) 149 <http://www.ejil.org/pdfs/3/1/1172.pdf>

Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?, 2 *EJIL* (1991) 141 <http://ejil.oxfordjournals.org/content/2/1/141.full.pdf+html>

Remarks on Scelle's Theory of "Role Splitting" (*dédoulement fonctionnel*) in International Law, 1 *EJIL* (1990) 210 <http://www.ejil.org/pdfs/1/1/1126.pdf>

## In this Issue

We begin this issue with four articles. Jaye Ellis explores comparative law's contribution to the identification of general principles as a source of international law through a renewed understanding of the interplay between municipal legal systems and international law. Thilo Rensmann analyses the ways in which two Munich Alumni, Ernst Rabel and Karl Loewenstein, have influenced the evolution of international human rights law. The importance of scholarship is also illustrated by Anastasios Gourgourinis in his article as he suggests some tools which aim to overcome the fragmentation of international law: the general/particular international law and the primary/secondary norms dichotomies which, in his view, constitute the unitary elements of the international legal system. Lastly, Daphne Richemond-Barak tackles another kind of fragmentation: the decentralized regulatory framework of the private security and military industry, and seeks to demonstrate the potential of Global Administrative Law methodology in understanding and contending with the growth of the private security and military industry.

In our occasional series, *Critical Review of International Jurisprudence*, Sonia Morano-Foadi and Stelios Andreadakis reflect on the potential of the EU Charter of Fundamental Rights and the EU's accession to the European Convention of Human Rights to achieve a more harmonious and convergent human rights system in Europe, based on a careful study of the divergent approaches of the ECJ and the ECtHR in the specific area of expulsion/deportation of third country nationals from the European territory.

In our rubric *Critical Review of International Governance*, Abigail Deshman sets out to identify the questions raised and the answers provided by a rare case of horizontal review between international organizations: the Parliamentary Assembly of the Council of Europe's criticisms of the transparency and accountability of the World Health Organization during the H1N1 pandemic.

Two *EJIL: Debates!* this time. The first, between Roda Mushkat and Kevin Tan, revolves around an analysis of the process leading to the signing of a path-breaking agreement between China and the United Kingdom regarding the future of Hong Kong, offering insights on the development of governance systems that regulate complex interaction between states. In the second debate, Bas Schotel, responding to the article by Sarah Nouwen and Wouter Werner published in 21:4 *EJIL* (2010), focuses



on the use or abuse of law by the International Criminal Court in recent cases through its portrayal of parties to a conflict as an 'enemy of mankind'.

*Impressions*, our book review rubric which invites distinguished scholars to reflect on a book that strongly influenced their intellectual development, continues in this issue with a contribution by Philip Allott. In precisely the spirit of *Impressions*, Allott starts his reflections with the statement: 'A book can change a mind, but only if that mind is ready to be changed.' He then goes on to illustrate this point by recounting the long-lasting impression Plato's *Republic* made on him.

## Roaming Charges and the Last Page

The experiment continues. This issue's Last Page features a poem by Jonathan Shaw, On Reading Horace Odes 3.2 with Rusty Latin. For the most part we have had very positive reactions to both the Last Page poems, and to Roaming Charges. I would be worried if the reactions were universally favourable. Blandness we do not like at *EJIL*. As far as the Last Page is concerned, I make another plea – Poets of the World (of international law) Unite! Send us your poems; encourage others to do so.

Roaming Charges still perplexes some: Nice photos, but how exactly does it relate to International Law? To *EJIL*? First, give yourself some time. As the series continues, the picture will begin to emerge. We deal in *EJIL* with the world we live in. Often with its worst and most violent pathologies; often with its most promising signs of hope for a better world. But, inevitably, since our vehicle is scholarship, we reify this world. Roaming Charges is designed not just to offer a moment of aesthetic relief, but to remind us of the ultimate subject of our scholarly reflections: we will be alternating between photos of places – the world we live in – and photos of people – who we are, the human condition. We eschew the direct programmatic photograph: people shot up; the ravages of pollution and all other manner of photo journalism. As we roam around the world we aim for images which charge us – please and challenge, even irritate at the same time – photos which have some ambiguity, are edgy and relate in an indirect way, both to the current circumstance but also to the permanent and enduring. We would welcome photo submissions from our readers too!

JHHW

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