
On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese's Last Book

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Abstract

This article reviews Antonio Cassese's last book, *Realizing Utopia*. In doing so, it also reflects on Cassese the man, since the subject of the book – that of idealistic reform tempered by considerations of practicality and realism – can fairly be said to have defined Cassese himself. The article thus not only explores the book that Cassese edited, but also his own views on the nature of change in the international (legal) order, and on the best methods of securing such change. Both in his capacities as a scholar and as a judge Cassese was at times subjected to often withering criticism for breaking with orthodoxy and failing – or refusing – to distinguish between the law as it is and the law as it should be. His own essays in *Realizing Utopia* thus provide us with an excellent opportunity to explore these themes anew.

1 Introduction

I must say that I approached the task of reviewing *Realizing Utopia*, Antonio Cassese's final book,¹ with some trepidation: first, because it runs to more than 700 pages, with almost 50 individual chapters; secondly, because to the great regret of everyone who knew Nino personally, and of our profession as a whole, the book was published only posthumously. It is hard enough to find just the right measure of critique even in a 'normal' book review. It is another level of difficulty entirely to find the proper measure of critique in reviewing a book whose author has passed away so recently, indeed while working on it, and was so well regarded.² The potential for sheer crassness needs little explaining.

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¹ A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), hereinafter *Realizing Utopia*.

² We have unfortunately had more than one such example over the past year, with the passing of A.W. Brian Simpson and the posthumous publication of his *Reflections on The Concept of Law* (2011), itself a critique of H.L.A. Hart's great work.

Mercifully, my concerns proved to be unfounded. While *Realizing Utopia* is very long, and while few will go through it from cover to cover, it is still quite readable. And it is certainly a good book – perhaps not a timeless classic, but still a good book, and more than a fitting tribute to Nino Cassese’s boundless energies.

Indeed, in writing this article it is impossible not to reflect on Cassese the man and just review *Realizing Utopia* as if it were any other edited collection. Doing so is all the more natural since, as will soon become apparent, the subject of the book – that of idealistic reform tempered by considerations of practicality and realism – can fairly be said to have defined Cassese himself. It inevitably requires questioning the proper remit of a lawyer, scholar, or judge – all roles played by Cassese during his professional career – on which people may reasonably (and not so reasonably) disagree. Moreover, Cassese not only edited *Realizing Utopia*, but also wrote its introduction and conclusion and no fewer than six substantive chapters, and co-wrote one more. As Cassese himself put it, this multitude of essays was not the result of his hypertrophic ego or megalomania, but was necessary because a number of the invited contributors dropped out at the last minute.³ And to have done all this while presiding over an international criminal tribunal and suffering from both cancer and the medicine is nothing short of remarkable.

This article will thus not only explore the book that Cassese edited, but also his own views on the nature of change in the international (legal) order, and on the best methods of securing such change. In his capacity as a judge and president of two international criminal tribunals, with his fingers deep in the proverbial pie, Cassese was also in a better place to implement his vision of reform than most of us will ever be, no matter how progressive or productive we may be as scholars. Yet, as we all know, he was at times subjected to often withering criticism for breaking with orthodoxy and failing – or refusing – to distinguish between the law as it is and the law as it should be. Cassese’s own essays in *Realizing Utopia* thus provide us with an excellent opportunity to explore these themes anew.

2 An Overview of *Realizing Utopia*

It is almost trite to say that law sits on a tenuous, unstable balance between continuity and change. As Martti Koskenniemi has shown, *international* law is especially sensitive to this dynamic.⁴ A persuasive legal argument must always be both normative and factual at the same time; not so prescriptive and divorced from reality as to be susceptible to the critique of utopia, and not so servile and subservient to the political order as it stands to be susceptible to the critique of apology. And while the two are in Koskenniemi’s view logically irreconcilable, they are nonetheless reconciled all the time when decisions are made and disputes resolved in a process that is inescapably political and subject to the structural biases of the system and the actors within it. The law, in short, can never be separated from politics.

³ Cassese, ‘Introduction’, in *Realizing Utopia*, *supra* note 1, at xxii.

⁴ See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).

While Cassese himself was hardly a crit, this tension between the factual and the normative, between apology and utopia, undoubtedly inspired his last book. *Realizing Utopia* is based on two assumptions: that the law must somehow reconcile the need for certainty and the need for change, and that the mechanisms for change that the international legal order formally allows are blatantly inadequate, unable to keep up both with social reality and with moral imperatives.⁵ This is a diagnosis that many of us would share, while some would not, but one can certainly see it not only in *Realizing Utopia* but throughout Cassese's scholarly and judicial work. In his own words:

This book – it is plain – is based on an oxymoron: the notion of building a realistic utopia. However, when we speak of utopia, we are consciously taking an approach that is miles away from a traditional conception of utopia. ... [W]e know that the international society will never be free from violence, poverty, and injustice. We do not dream of a peaceful international society based on comity, friendship, and cooperation. We simply intend to suggest in utopian terms new avenues for improving the major deficiencies of the current society of states.⁶

A realistic utopia is thus one married to apology. It may be an oxymoron, but it is not fluffy, sprinkled all over with the doves, butterflies, and bunnies of international peace and harmony. It is idealistic yet pragmatic, bold but not too bold; like Goldilocks' porridge, it is *just right*. And it was in pursuit of this utopian yet realistic vision that Cassese as editor commissioned individual authors to write their contributions so that they would reflect on the current state of affairs and pressing problems that arise in a variety of fields, highlight elements of possible change, and suggest how these elements could be developed and brought to bear fruit in the next two or three decades.⁷

Some would, I imagine, criticize the whole project as lacking in both intellectual coherence and usefulness in so openly pursuing an unattainable oxymoron. Others might say that this project is in fact no different from what we as lawyers do every day, since we all straddle the balance between apology and utopia. I am, for what it is worth, quite sympathetic to a project that tries to walk that particular tightrope, speculatively looking at the *ought* far more than at the *is* within temporal parameters which are neither too long nor too short. But at the same time it must be acknowledged that the book as a whole, and each individual contribution within it, by their very candidness become more open to critique as either utopia or apology. It is all too easy to dismiss many of the contributions as mere exercises in wishful thinking that we all know will never, ever, come true, and others as too unimaginative, too tainted with the *realpolitik* of the world as it stands today.

With this in mind, let us look more closely at what *Realizing Utopia* has to offer. The book is divided into five parts and a conclusion, with 48 individual chapters, authored by a stellar cast of contributors. It is obviously impossible to do justice to each individual contribution in an article such as this one, so the reader will forgive me if I do not even try to do so; I will be dealing with Cassese's own chapters in more detail in section 3 of this article. While the number of chapters – and the breadth of issues that

⁵ Cassese, 'Introduction', in *Realizing Utopia*, *supra* note 1, at xviii.

⁶ *Ibid.*, at xxi.

⁷ *Ibid.*

they cover – is staggering, they are generally quite short and readable, amounting to some 15 pages on average. As the editor himself acknowledged,⁸ there is a great variety among the chapters in terms of style, referencing, and so forth. Some are densely footnoted, while many are hardly footnoted at all. Each chapter is however prefaced by a usually excellent editorial summary. By and large, most of the chapters are not breathtakingly novel or original, nor were indeed meant to be so. They are rather works of (speculative) synthesis, based on the authors' prior scholarship and experience, and therein lies their value, even if its exact quantum varies.

The first part of the book looks at whether the world can become a true global community. In doing so, its 11 chapters explore a number of themes. Perhaps the most prominent of these is the continued paramount importance of states and the projection of their power in the global arena. Thus, in his essay Martti Koskenniemi cautions us that projects of realistic utopias always require justification in moral, legal, or economic terms, and must not degenerate into managerial, technocratic systems of rule by academic, technical, or legal experts.⁹ Sovereignty may have undergone important changes in recent decades, mainly through the impact of human rights doctrines and globalization, but also through the growing tendency of internal strife to disrupt the functioning of a number of states. But, as Luigi Condorelli and Cassese remind us in a joint essay, sovereignty is not dead,¹⁰ an assessment concurred with by Jose Alvarez: 'the Westphalian system of nation-states – admittedly a blink of an eye in the scope of human history – remains the system that we have. How states react to global regimes over time remains the single greatest determinant of whether these regimes will succeed or fail, evolve or stagnate'.¹¹

This is a sobering assessment: a realistic yet utopian project, achievable within the next few decades, is ultimately one that must find its appeal to states, persuade them, and co-opt them in its implementation. This sets the stage for some of the more specific, programmatic essays. Thus, in his optimistically entitled essay, 'The United Nations: No Hope for Reform?', Philip Alston proposes a series of possible reforms to the UN system, including for example the abolition of more or less useless UN organs, such as the Trusteeship Council and the Economic and Social Council, ensuring stable financing for core UN activities, making better and smarter use of the resources that

⁸ *Ibid.*, at xxii.

⁹ Koskenniemi, 'Projects of the World Community', in *Realizing Utopia*, *supra* note 1, at 3, 11.

¹⁰ Condorelli and Cassese, 'Is Leviathan Still Holding Sway over International Dealings?', in *Realizing Utopia*, *supra* note 1, at 14.

¹¹ Alvarez, 'State Sovereignty Is Not Withering Away: A Few Lessons for the Future', in *Realizing Utopia*, *supra* note 1, at 26, 37. Similarly, see Bhuta, 'The Role International Actors Other Than States Can Play in the New World Order,' in *Realizing Utopia*, *supra* note 1, at 61, 73: [s]tatism remains a fundamental organizing frame for international law, in as much as the latter remains tied to the realities of a power-political order. It is suggested that the new realities of complex governance, transnational norm creation, NGO participation, and non-state armed groups should be approached in the cautious, formalist method of a practice-oriented positivism. Careful attention should be paid to the *specific* challenges posed by each of set of developments, and how existing, functioning frameworks of norms and procedures can be adapted to address these concerns.'

the UN already has at its disposal, and radically transforming the UN Secretariat.¹² Similarly, in another essay which provides in its very title the apologetic antidote to its utopian proposals,¹³ Bardo Fassbender deals with Security Council reform, suggesting several ways in which the Council's work processes could become more open, and its output less arbitrary and more rule-bound. While affirming the continuing relevance of reciprocity in a decentralized international legal system, Andreas Paulus calls for its ever greater institutionalization, since common interests and concerns require common solutions, and these in turn require institution-building.¹⁴ For her part, Anne Peters analyses the development of international law through the prism of constitutionalism, both defending the usefulness of constitutionalist discourse and subjecting its flaws to criticism.¹⁵

The second part of *Realizing Utopia* consists of three chapters, one of which is by Cassese, and assesses the law-making tools needed to bring about necessary change. In his second essay, Condorelli focuses on customary law.¹⁶ He observes that the contemporary approach to customary international law is subject to three developments: first, greater reliance on *opinio juris* than on actual state practice; secondly, frequent derivation of customary rules from widely ratified treaties; and, thirdly, the emergence of non-derogable norms, those of *jus cogens*. Condorelli also proposes three cures for the dangers of fragmentation: training practitioners in general international law, rather than just in their specialist areas; promoting compliance with *jus cogens*; and enforcing the compliance of the Security Council with the rules of the Charter and *jus cogens*, in areas such as targeted sanctions against individuals, preferably through a centralized mechanism of judicial review, but until such a mechanism is created (if ever) through decentralized, incidental judicial review by courts both international and domestic.

While it is hard to fault Condorelli's assessment of the modern tendencies in applying customary law, his prescriptions are perhaps more open to doubt. Fragmentation of international law is of course not just the possibility of conflicts between norms derived from various parts of the international legal system or the possibility of conflicts in jurisprudence among several international courts – it is also the fragmentation of the profession. And while, like the Jesuits, we want to get our hands on our students when they are young and impressionable and subject them to our particular brand of professional indoctrination, blind fidelity to *general* international law is no better than blind fidelity to international trade law, or investment law, or human rights law, or the law of war. Similarly, while I personally have no purely legal objection to incidental

¹² Alston, 'The United Nations: No Hope for Reform?', in *Realizing Utopia*, *supra* note 1, at 38.

¹³ Fassbender, 'The Security Council: Progress Is Possible but Unlikely,' in *Realizing Utopia*, *supra* note 1, at 52.

¹⁴ Paulus, 'Whether Universal Values Can Prevail over Bilateralism and Reciprocity', in *Realizing Utopia*, *supra* note 1, at 89.

¹⁵ Peters, 'Are We Moving towards Constitutionalization of the World Community?,' in *Realizing Utopia*, *supra* note 1, at 118.

¹⁶ Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law', in *Realizing Utopia*, *supra* note 1, at 147.

judicial review of Security Council decisions,¹⁷ we must also openly acknowledge that exercising such review is not simply a matter of *doing the right thing*, but is also a claim to *power*, and of redistribution of power in the zero-sum international order.

While Condorelli is (for good reasons) concerned with the Security Council as a possible threat to international law, Alan Boyle looks at the Council as a *creator* of international law.¹⁸ He deems it desirable for the Council to essentially legislate on matters of international environmental law, in which more traditional law-making approaches are unlikely to bear fruit. Boyle is, however, aware that the current, unreformed Council suffers from a significant legitimacy deficit, which could potentially undermine any legislative initiative, even assuming the Council members actually support it. He thus proposes the creation of a more inclusive and transparent deliberative process for adopting such legislative Council resolutions which would also involve the General Assembly. And while he acknowledges human rights-related concerns regarding the Council's efforts so far (*viz.* Condorelli), he is afraid that imposing stricter limits on Council action would serve only to emasculate it. As with other chapters your mileage may vary with respect to both the political realism and desirability of Boyle's proposal.

The third part of the book ties in to the second by looking at ways of increasing the effectiveness of international law. Thus, for example, Yuval Shany examines the many advantages of implementing international law through domestic courts,¹⁹ a theme later returned to in the sixth part of *Realizing Utopia*. Pierre-Marie Dupuy argues for a more robust regime of aggravated state responsibility for violations of *jus cogens* and *erga omnes* norms,²⁰ while Paola Gaeta reflects on state immunity as an obstacle to the effective implementation of human rights law before domestic courts.²¹ A number of essays then explore the role of the international judiciary and quasi-judicial bodies.

The fourth part of the book canvasses various substantive areas of international law, outlining proposed avenues for change. For instance, in their chapters Philippe Sands and Christian Tams look at the *jus ad bellum*.²² Sands thus argues that while a number of uncertainties and grey areas remain in the Charter regime on the use of force, it is unlikely that the vital interests of powerful states will so align that these uncertainties could be resolved through legislative effort. Rather, the Charter regime needs operationalizing, not only through international adjudication if that is possible,

¹⁷ See for more Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke J Comp Int'l L* (2009) 69.

¹⁸ Boyle, 'International Lawmaking: Towards a New Role for the Security Council?', in *Realizing Utopia* 172.

¹⁹ Y. Shany, 'Should the Implementation of International Rules by Domestic Courts Be Bolstered?', in *Realizing Utopia*, *supra* note 1, at 200.

²⁰ Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding the Obsolescence of Aggravated Responsibility', in *Realizing Utopia*, *supra* note 1, at 210.

²¹ Gaeta, 'Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?', in *Realizing Utopia*, *supra* note 1, at 227.

²² Sands, 'Operationalizing the UN Charter Rules on the Use of Force', at 343, and Tams, 'Prospects for Humanitarian Uses of Force', at 399, both in *Realizing Utopia*, *supra* note 1.

but also – and probably more importantly – through the introduction of international legal rules into domestic political debates on the use of force, as, for example, in the UK with regard to the Iraq or Libya intervention. Other chapters scrutinize areas as diverse as trade, environmental law, development, and the law of armed conflict. Finally, the fifth part of the book looks at international criminal justice, as well as prosecutions and civil litigation before domestic courts, as means of improving international norm compliance.

The reader will by now I hope have gained a flavour of what *Realizing Utopia* has to offer. Again, it is impossible to address in detail each and every essay in this rich book; they all build on their authors' prior work, and raise familiar arguments. To the extent that the reader has not, say, been persuaded of the virtues of global constitutionalism, the reader will not be any more inclined to buy into that grand theme after reading *Realizing Utopia*. This is not to say that the book is not useful. It is valuable, above all, for the open apology/utopia dynamic that it displays; it is valuable for its sheer breadth, particularly in looking at specific areas in which any given reader has little expertise; and I am sure it will prove to be especially valuable for students, by presenting a range of issues in a very approachable way and enabling them to think critically about them. In short, taken as a whole, *Realizing Utopia* is certainly greater than the sum of its parts.

3 Towards Utopia

Having given a broad overview of *Realizing Utopia*, I now wish to turn to Cassese's own essays in the book. It is easy to say what changes we would like to have in the international legal and political system – how to achieve them is a far more difficult matter. So how did Cassese himself hope to attain the oxymoronic realistic utopia?

Let us start with his first essay in the book, pleading for a global community grounded in human rights.²³ Cassese notes that there is a wide gap between the aspirational ideal of the universality of human rights and the lack of such universality in practice, a state of affairs he deems intolerable even if it is one of the 'stark realities of the world'.²⁴ How then does one bridge this gap? He first proposes to distinguish between a core set of human rights – a core he equates with norms of *jus cogens* – and other rights whose application can and perhaps should vary from state to state. This 'two-tier system of human rights values' is in his view not *per se* pernicious, but simply reflects the reality of international society.²⁵ Fighting for the core – a core that will gradually expand – will be easier than fighting for the whole. He then suggests three distinct avenues for this fight. First, as he thinks the establishment of a widely adhered to international court of human rights to be entirely unrealistic, he proposes fact-finding commissions as a more feasible alternative. Secondly, he argues that

²³ Cassese, 'A Plea for a Global Community Grounded in a Core of Human Rights', in *Realizing Utopia*, *supra* note 1, at 136.

²⁴ *Ibid.*, at 138.

²⁵ *Ibid.*, at 140.

‘[i]ndividual criminal liability is more effective than state responsibility for the purpose of both preventing future violations and alleviating the suffering of the victims or their next of kin’, and thus advocates the strengthening of the International Criminal Court and increased reliance on universal jurisdiction and the withholding of amnesties for gross human rights violations.²⁶ Finally, he argues for the mobilization of international civil society, primarily consisting of NGOs, which is capable of pressuring states to do the right thing.

Note how Cassese’s prescriptions are undoubtedly shaped by his own personal experiences, whether as judge and president of two international criminal tribunals or as the chair of the Darfur commission of inquiry. Others might well disagree about the degree of usefulness or credibility of non-judicial fact-finding bodies, or about any deterrent effect of international criminal justice, shrouded as it is in empirical uncertainty, as Cassese himself acknowledges.²⁷ And of course, one man’s completely unrealistic utopia is another man’s apology.²⁸

This brings us neatly to Cassese’s second essay, dealing with *jus cogens*.²⁹ One should recall at this point Ian Brownlie’s quip that *jus cogens* is like a car that has never left the garage; it has never actually been applied in the area – the law of treaties – in which it emerged as a concept, i.e., it has so far not been used to invalidate a conflicting treaty. It has of course made an impact outside the law of treaties, for example by constituting a bar to statehood when it is obtained through the violation of a fundamental norm of international law, for example, the prohibition on the use of force or racial discrimination.³⁰ It has also prominently figured in arguments regarding the law of immunities, if with less success.³¹ Its most important role has of course been symbolic, as a statement that the international community adheres to a set of values from which there should be no departure.

But the garage metaphor nonetheless has much truth in it. So how can one make *jus cogens* more effective – assuming, as Cassese does, that this is indeed a desirable course of action? He first addresses the problem of establishing the existence of a peremptory norm:

I submit that the task of authoritatively determining whether a peremptory norm exists cannot be entrusted to either the UN General Assembly or to any other political body. Nor can pronouncements of individual states or by other members of the international society be tantamount to more than expressions of legal views by such international subjects, expressions

²⁶ *Ibid.*, at 142–143.

²⁷ *Ibid.*, at 142.

²⁸ For proposals to create a world court of human rights see, e.g., Nowak, ‘The Need for a World Court of Human Rights’, 7 *Human Rts L Rev* (2007) 251; Chetail, ‘The Human Rights Council and the Challenges of the United Nations System on Human Rights: Towards a Cultural Revolution?’, in L. Boisson de Chazournes and M. Kohen (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (2010).

²⁹ Cassese, ‘For an Enhanced Role of *Jus Cogens*’, in *Realizing Utopia*, *supra* note 1, at 158.

³⁰ See, e.g., J. Crawford, *The Creation of States in International Law* (2nd edn, 2007), at 96 ff.

³¹ See in particular *Jurisdictional Immunities of the State (Germany v. Italy)*, ICJ, Judgment, 3 Feb. 2012, available at: www.icj-cij.org.

which of course may have powerful weight for any international organ pronouncing on the issue. To make such an authoritative determination requires being endowed with judicial powers. It is therefore chiefly for international judicial courts and tribunals to make such a finding. Both inter-state and international criminal courts are empowered to undertake this task. Of course, the persuasive force of their findings and indeed their authority as judicial precedent very much depends on how persuasively they make their findings. Here, as in any other matter, the cogency of the court's reasoning has a decisive bearing on its likelihood to be taken up by other courts and tribunals.³²

Thus, *politics* cannot be entrusted with establishing the existence of *jus cogens*. That is a task for courts (and, mind you, not just the ICJ); they are the ones who must say what the law is, very much *à la Marbury v. Madison*.³³ While the persuasiveness of judicial reasoning is crucial, the primary audience that needs persuading is *other* international courts and tribunals. And how are courts to approach this task, i.e., what are the criteria they should rely on in establishing *jus cogens*? Cassese rightly argues that a prior logical step in ascertaining whether a particular norm has achieved peremptory status is to see whether it has become customary; only a norm of customary international law can be one of *jus cogens*. This logic holds even if the two steps are frequently elided in practice.³⁴ With Article 53 VCLT providing that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted', to evince such acceptance, in Cassese's view:

Such 'acceptance' does not necessarily involve actual conduct, or a positive assertion; it may involve an express or tacit manifestation of will, which can take the form of a statement or declaration, or acquiescence in statements by other international legal subjects or in recommendations or declarations by intergovernmental organizations or in decisions by judicial bodies. No consistent practice of states and other international legal subjects (*usus*) is necessary.³⁵

And because states and other relevant subjects rarely comment on the peremptory status of any given norm, one should see whether that norm is congruous with the universal values that underpin the international community, for example, through declarations of collective bodies such as the General Assembly, and whether that norm is as prominent or important for the community as other rules of *jus cogens*, for example, the prohibitions on genocide and slavery. Most importantly, however, 'one should see whether there exist judicial decisions rendered by either international or national *courts*: normally judges are in a better position than states, international organizations, and other international legal subjects to assess whether a general rule or principle has acquired the rank and force of *jus cogens*'.³⁶

This is a manifesto for judge-made law (or, more crudely, judicial activism) if ever there was one. While Cassese never explicitly says that the mere fact of judicial

³² Cassese, 'For an Enhanced Role of *Jus Cogens*', in *Realizing Utopia*, *supra* note 1, at 158, 164.

³³ 5 US (1 Cranch) 137 (1803).

³⁴ Cassese, 'For an Enhanced Role of *Jus Cogens*', in *Realizing Utopia*, *supra* note 1, at 158, 164–165.

³⁵ *Ibid.*, at 165–166.

³⁶ *Ibid.*, at 166.

pronouncement is enough to make *jus cogens* – that would, after all, be a tad too utopian – this is what his somewhat circular chain of reasoning (or better, chain of authority) implies. States cannot be trusted; courts can. And courts should above all look at what other courts have said on the matter at hand. It is enough for states to merely acquiesce in what the courts say, and if nothing else because of bureaucratic inertia this is what they will tend to do anyway.

Even though in his chapter focusing on *jus cogens* Cassese explicitly leaves aside the logically prior question of establishing custom,³⁷ we can see the same methodology at work when applied to custom in two decisions of the Appeals Chamber of the Special Tribunal for Lebanon (STL) over which he presided. In the first of these, dealing ostensibly with the very technical matter of access by a potential suspect to documents in the case file, the Appeals Chamber made a number of pronouncements of general importance on the exercise of inherent jurisdiction by international tribunals – in other words, their use of powers that their founding instruments do not explicitly give them. The Appeals Chamber held that international tribunals can indeed exercise such inherent powers, pursuant to a rule of customary international law:

The extensive practice of international courts and tribunals to make use of their inherent powers and the lack of any objection by States, non-state actors or other interested parties evince the existence of a general rule of international law granting such inherent jurisdiction. The combination of a string of decisions in this field, coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved.³⁸

Note how, even though *nominally* the Appeals Chamber is looking for practice and *opinio juris*, in fact custom now equals what tribunals say is custom plus lack of objection by anyone else, just like with Cassese's acquiescence argument for the formation of *jus cogens*. Note also how the Appeals Chamber does not refer to *state* practice and *opinio juris*, but to practice pure and simple, as well as to the 'lack of any objection by States, non-state actors or other interested parties' and the 'acquiescence of all the international subjects concerned'. Right or wrong, this is hardly an orthodox account of the formation of custom and its *formal* source of authority. And it has significant practical consequences for state behaviour, in that states would need to be ever vigilant and protest against the formation of alleged customary rules even if they do not directly concern them at the time, and even if other states do not assert that the particular rule exists.

The STL Appeals Chamber confirmed this approach in its equivalent of the seminal *Tadic* interlocutory decision on jurisdiction,³⁹ also famously presided over by Cassese,⁴⁰

³⁷ *Ibid.*, at 164.

³⁸ Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, STL Appeals Chamber, Case No. CH/AC/2010/02, 10 No. 2010, at para. 47, available at: www.icty.org.

³⁹ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 Oct. 1995, available at: www.icj-cij.org.

⁴⁰ Interlocutory Decision on Applicable Law, STL Appeals Chamber, Case No. STL-11-01/1, 16 Feb. 2011.

ruling that customary international law now recognizes a distinct crime of terrorism in peacetime. In other words, the Chamber held not only that a customary rule exists *between states* that they need to suppress terrorist crimes, but that a customary rule applicable *to individuals* has evolved,⁴¹ directly creating a true international crime, and did so despite the inability of states to agree on a comprehensive definition of terrorism, despite the fact that both the prosecution and the defence in the case concurred that no such definition existed, and despite the fact that this was not a question it needed to reach since it was anyway bound to apply Lebanese domestic criminal law, rather than customary international law. The Chamber based its finding *inter alia* on its assessment of convergent national judgments, stating that:

Even if the view were taken that those national judgments do not advert, not even implicitly, to a customary international rule nor explicitly note that they reflect an international obligation of the State nor express a feeling of international legal obligation ... one should assume as a starting point the *presumption* of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule.⁴²

The STL's position on the definition of terrorism is of course one that Cassese advocated for some time extra-curially,⁴³ for which he attracted no small amount of criticism,⁴⁴ as did the STL decision itself.⁴⁵

The expansive approach for establishing *jus cogens* that Cassese proposes in *Realizing Utopia* is thus entirely consistent with his demonstrated judicial philosophy, if perhaps a bit more explicit. And he follows this approach through by arguing for the direct effect of *jus cogens* in municipal legal systems, spearheaded this time by domestic rather than international courts.⁴⁶ Finally, international disputes regarding possible violations of *jus cogens* should be subject to the compulsory jurisdiction of the ICJ. In such cases, 'we are not faced with a dispute over an "ordinary" legal provision or rule of international law; rather, we are faced with a controversy over fundamental values of the whole world society. It follows that states should not be allowed to rely on their sovereign prerogatives and refuse to submit to the ICJ. They must be prepared to go to court.'⁴⁷

In his third essay, Cassese sets out his views on advances that need to be made in the relationship between international and domestic law.⁴⁸ He essentially argues for

⁴¹ *Ibid.*, at para. 105.

⁴² *Ibid.*, at para. 101 (relying on the work of Max Sorensen).

⁴³ See, e.g., A. Cassese, *International Criminal Law* (2nd edn, 2008), at 162 ff.

⁴⁴ See, e.g., R. Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure* (2nd edn, 2010), at 338 ff.

⁴⁵ See, e.g., Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', 24 *Leiden J Int'l L* (2011) 655.

⁴⁶ Cassese, 'For an Enhanced Role of *Jus Cogens*,' in *Realizing Utopia*, *supra* note 1, at 158, 167–168.

⁴⁷ *Ibid.*, at 170.

⁴⁸ Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?', in *Realizing Utopia*, *supra* note 1, at 187.

monism, albeit one whose introduction would be gradual, with four basic prescriptions. First, treaties which require implementation in domestic law should be subject to compulsory international adjudication, so that an international court would always be able to determine whether a given state has complied with its obligation to implement the treaty in its domestic order. Secondly, a monitoring body should be set up to determine whether the state has complied with the court's ruling. Thirdly, states should adopt constitutional provisions to the effect that a piece of domestic legislation that conflicts with international law would be invalidated. Finally, in possible cases of such conflict both domestic courts and individuals should be able to refer the issue to an international court for authoritative determination. Cassese is obviously aware just how radical – and politically unlikely – this set of proposals is, and suggests that they can really be implemented only at the regional level. Indeed, the proposals are based mainly on the experience of European integration, and one could fairly say that it is only such integration that can make Cassese's proposals politically viable.

Cassese's fourth essay is focused on reforming the International Court of Justice.⁴⁹ He acknowledges the successes the Court has had, particularly in recent decades, as it has become more appealing to states, resulting in more cases being brought before it. But the Court still has shortcomings. As Cassese colourfully puts it:

The Court is indeed like a prepossessing lady, who has been little courted for many years in spite of her indisputable youthful charm and now, at old age, all of a sudden has found herself much sought after and indeed insistently wooed, although at present her beauty is somewhat dimmed by many wrinkles and a few liver spots. At present, she does not need any make-up nor a fanciful, fashionable dress full of frills. She has already proved to have much vitality. She only needs some peptone in her arteries and greater grit. It is high time to rejuvenate the old lady and to bring out her best, to make her attractiveness more arresting than before. This becomes all the more relevant as other suitors increasingly grace the world stage.⁵⁰

And what is this 'peptone' that the Court needs to be injected into its arteries? What Cassese has in mind is the remodelling of the ICJ from what originated as a standing arbitral tribunal to a true court of law of the new global community. He would dispense with judges *ad hoc*, allow for a more liberal approach to third party intervention and the involvement of *amici curiae*, open the contentious jurisdiction of the Court to international organizations, and open the advisory jurisdiction to other international subjects, for example, the ICRC; advisory opinions should in fact be formally binding, while national courts should be allowed to refer cases to the ICJ.⁵¹

To the extent that these proposals require the ICJ Statute to be amended, they obviously run into the wall of the UN Charter amendment procedure. Cassese would also reform the internal working practices of the Court, and here reform would be at least somewhat more feasible. Some of his proposals are not particularly helpful, for example, his argument that the Court should work more frequently in smaller

⁴⁹ Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady', in *Realizing Utopia*, *supra* note 1, at 239.

⁵⁰ *Ibid.*, at 240–241.

⁵¹ *Ibid.*, at 242–246.

chambers.⁵² Now, obviously, if his earlier proposals succeeded and the Court was inundated with new cases, division into chambers would be the only way to proceed. So far, however, it is *states* that have shown considerable reluctance to use the specialized chambers already provided for by the Court; they *want* their cases to be heard by the plenary Court. Some of his other proposals are eminently sensible, like dispensing with the practice of judges not asking questions of counsel until the end of the first round of oral argument with no expectation that questions will be answered on the spot, thus reducing oral argument to a soporific reading exercise, in essence a third round of written pleadings in front of what is normally a very bored bench.⁵³ This is of course not a new idea, and change may come sooner rather than later.

Cassese expands on the theme of the judicialization of the international order in his fifth essay,⁵⁴ calling for a vast expansion in institutional fact-finding and independent monitoring of state compliance with multilateral treaties:

Monitoring should be expanded and strengthened. It should be expanded to all multilateral treaties. To this end it would be necessary to establish within the UN structure a committee of experts entrusted with overseeing the implementation of all multilateral treaties to be made in [the] future ... Furthermore, it should be agreed that all treaties providing for a supervisory mechanism (such as the UN Covenants on Human Rights, the Convention Against Torture, and other conventions) should rule out the power of contracting states to accept the jurisdiction of the supervisory body only partially. States would thus be prevented from excluding from their acceptance the power of the monitoring body to receive 'communications' from individuals. Monitoring should be strengthened in at least four areas: armed conflicts, use of nuclear energy, human rights, and environment.⁵⁵

Similarly, international organizations, chiefly the UN, should resort far more frequently and on a systematic basis to various types of institutional fact-finding, even without the consent of the state or states concerned.⁵⁶ Cassese is again drawing here on his own experience with the Commission of Inquiry on Darfur, arguing that such commissions, established under a collective mandate and consisting of independent experts, are the next best thing to centralized or compulsory adjudication.⁵⁷

Cassese's final essay is a bit more particular, arguing for the extension of combatant status to fighters belonging to stable and organized armed groups in non-international armed conflict.⁵⁸ I will thus leave it aside for my present purposes, but it bears noting that the essay springs from Cassese's long-standing interest in bringing non-state actors within the fold of international law.

⁵² *Ibid.*, at 246.

⁵³ *Ibid.*, at 247–248.

⁵⁴ Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding', in *Realizing Utopia*, *supra* note 1, at 295.

⁵⁵ *Ibid.*, at 300.

⁵⁶ *Ibid.*, at 302.

⁵⁷ *Ibid.*, at 303.

⁵⁸ Cassese, 'Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane', in *Realizing Utopia*, *supra* note 1, at 519.

4 Reflecting on Cassese's Utopia

In reflecting on *Realizing Utopia*, I think it is important to recognize openly how almost all of the essays in the book, and particularly Cassese's, proceed from the assumption that *more* international law, and *better* international law, would prove to be a good thing for the world at large. This is an assumption that most of us, being good international lawyers invested in the project, would be likely to share. But this is all it is, an assumption, stemming from our own particular worldview, and there are and will be people who quite reasonably disagree with it. For them, the utopia offered by international law – and by *Realizing Utopia* – is at worst dangerous, at best not one worth having.

For those of us who do buy into the project, the book's intended audience, the many specific little utopias that the book offers certainly look appealing. Would it not be very nice, after all, if most international disputes were subject to compulsory adjudication, if complementary monitoring and fact-finding mechanisms helped to secure compliance, and if a *jus cogens*/human rights-oriented international law permeated domestic legal orders?

Cassese's prescriptions for achieving this utopia are of course more interesting – and more contestable – than the utopia itself. A wish list is one thing; realizing it is another. And Cassese's methods of realizing utopia are telling. First, there is the fluidity of the doctrine of sources of international law, resulting in its increased malleability; secondly, activist scholarship coupled with activist judging, which exploits this malleability, for example with regard to the emergence of new custom or *jus cogens*. States cannot be *trusted* with making a better international law, and a better world; they must be *pushed* into it, pushed by international courts, domestic courts, other independent or expert institutions, and by the civil society. It is perhaps only a slight exaggeration to say that states are the enemy, the problem that needs fixing.

Some would challenge this activist agenda as a matter of principle, as disrupting the fundamental line between the law as it is and the law as it should be, between the role of the legislator and role of the judge. That at least is not my concern. Nor do I wish to take the cynical route of saying that while activism may be normatively desirable, it also needs to be *disguised* if it is to be successful, couched in a more orthodox terminology and conceptual framework – in other words, that one can bring about change only if one is not open about it, certainly not as open about it as *Realizing Utopia*. Rather, my concern is that, first, Cassese appears to be insufficiently sensitive to the dangers of relying on supposedly independent experts, i.e. *us*, as solutions to otherwise intractable problems, since this tends to disguise the political or moral nature of the decisions being made and of power and authority changing hands;⁵⁹ and, secondly and relatedly, that he puts too much faith in courts and judges.

I say this while noting that even if his essays in *Realizing Utopia* do not explicitly address these concerns, Cassese the judge, in real life, did take them to heart. That Cassese was by any definition an activist, but still one who exercised some measure

⁵⁹ As indeed Koskeniemi cautions us in his essay, *supra* note 9.

of restraint. While he pushed, he also certainly knew when to push and when to stop, showing much political savvy. The way to change was in seizing the right moment, in the right way. At the level of internal judicial politics, Cassese never went at it alone; he understood that the authority of a judicial pronouncement depended on the authority of the court on which he sat as a collective enterprise. He thus managed to persuade his colleagues in both the ICTY and the STL and take them on board with regard to his most ambitious projects. While *Tadic*, for instance, was undoubtedly a Cassese decision, it was not *just* his decision; he did not simply write reams of separate opinions setting out his own particular worldview.

Of course, some of Cassese's projects will prove to have been more successful than others. I, for one, doubt that the STL's terrorism *Tadic* will prove to be as influential as the original *Tadic*, but I may well be wrong. But that brings us to the more difficult question of *how* courts can be successful as the agents of change, the vehicles of a realistic utopia. While I would agree that having a unanimous court say that terrorism has a general definition in international law, or that customary international law incriminated war crimes in internal armed conflicts, is in and of itself an achievement, I would caution against overstating just how big an achievement that is. *Tadic*, for instance, was neither the first nor the last time that an international court declared the existence of a customary rule which was not *really* supported by enough state practice and *opinio juris*, but was later accepted as declaratory of custom and as black-letter law.⁶⁰ Nor was *Tadic* so influential merely because of its moral appeal. Rather, it is because other actors in the system *acted upon Tadic*, perhaps because they were persuaded by it, or at least because they were willing to be pushed by it, that made it the canonical reference that it is today. In other words, *Tadic precipitated* the change in the law, but *Tadic* was not the change itself. More important was the fact that those with real power in the system – states – embraced a decision by what was then an upstart international tribunal and brought it to fruition beyond the confines of that tribunal, for example in the drafting of the Rome Statute of the ICC.⁶¹

This should not be taken as downplaying the significance of *Tadic*. Without it there would have been no change in the law, or the change would have come much later. But though it may have been a *necessary* condition for change, it was not a *sufficient* one. It is only natural for lawyers to look to courts for solutions to what they perceive as legal problems, and such a turn to courts is all the more natural to international lawyers, operating in a system in which access to adjudication is so obviously lacking and is so strongly desired. But this must not obscure the fact that the road to a centralized legal system based on compulsory adjudication is a very long one, most probably one much longer than the 20 to 30 year timeframe of *Realizing Utopia*. To take the example of one of the world's most developed municipal systems, it took more than

⁶⁰ See also Jennings, 'The Judiciary, International and National, and the Development of International Law', 45 *ICLQ* (1996) 1, at 8.

⁶¹ See for more Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (2010), at 58; Cryer *et al.*, *supra* note 44, at 275–279.

100 years from one US president openly scoffing at the powerlessness of the Supreme Court to implement its rulings⁶² to another president sending in the army to enforce the Supreme Court's decision integrating racially segregated schools.⁶³ A culture of compliance can be formed only in a process of accretion, and being too bold before the right time can actually disrupt rather than enhance this process.

My point is simply this: so long as states remain the dominant units of the international order and so long as states retain the bulk of political power, as *Realizing Utopia* acknowledges they will for the foreseeable future, methods of inducing change in the law that require the mere *acquiescence* of states in rules laid down by wise, independent, and morally uncompromised experts or judges are not likely to produce changes that will be meaningful. There are limits beyond which the constant pushing and prodding by activist-minded judges will prove to be counterproductive for the cause that they seek to achieve. Seizing the right moment to push, persuade, and successfully induce change is undoubtedly a question of a peculiar political acumen and awareness, one that few possess but Cassese had in abundance.⁶⁴ And that acumen was inevitably more on display in his judicial work than in his essays.

Now taking a last look at *Realizing Utopia*, does it make any proposals that are both bold and realistic, whose adoption within the next 20 or 30 years one could predict with a degree of certainty? No, but that is in the nature of things; law as a discipline is not very amenable to science fiction as a genre. The right moment for seizing the knife's edge between apology and utopia can with certainty really be observed only *ex post facto*. But the reader should not be discouraged; if Cassese edited a book like this one at the start, rather than at the untimely end of his long career, would it have predicted *Tadic*? Perhaps. But would any other major developments of modern international law have looked any less utopian? I doubt it. What I do not doubt is that *Realizing Utopia* is a book worth reading.

⁶² *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832), about which President Andrew Jackson is traditionally, if not entirely accurately, quoted as saying '[Chief Justice] John Marshall has made his decision; now let him enforce it!'

⁶³ *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

⁶⁴ Just how much such acumen he had can be seen from his candid and extensive published interviews with Joseph Weiler, 'Nino – In His Own Words', 22 *EJIL* (2011) 931 and H.V. Stuart and M. Simmons, *The Prosecutor and the Judge* (2009), at 47, particularly on matters like the early days of the ICTY.