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Realizing Utopia through the Practice of International Law

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Abstract

This article understands Antonio Cassese's Realizing Utopia *as an invitation to reflect about idealist international law scholarship and its method. In* Realizing Utopia *and* Five Masters of International Law *Cassese proposed critical positivism as the adequate method for the international lawyer to interpret international law and to suggest legal reform in order to bring international law better in line with the values of the international community. While I agree that critical positivism allows the practitioner of international law to pursue his utopian vision when interpreting and applying the law, I argue that legal scholarship that engages in proposals on what the law is or should be needs to go beyond critical positivism. On the one hand, it has to venture into other disciplines, such as moral philosophy, political theory, or economics, to justify its choices. On the other hand, it must take account of other subdisciplines of law, in particular private law and 'law & society' studies, in order to benefit from their insights into the relationship between law, markets, and society. These reflections, to me, do not diminish the value of* Realizing Utopia, *but rather suggest that it should be read as an instance of utopian international law practice.*

Upon reading Antonio Cassese's introduction to *Realizing Utopia*,[1] and even more upon reading the Final Remarks to the wonderful and fascinating collection of interviews that he conducted with *Five Masters of International Law*,[2] one is left with the impression of a man who was not only an idealist, but who personally suffered from the conditions of world society – the great injustices as well as the individual's limited powers and finitude. In the Final Remarks to *Five Masters of International Law* he sets himself apart from the interviewees, five of the most distinguished international lawyers of Cassese's generation. He observes (with some surprise it seems) that for the most part they did not appear to feel as torn about the purpose of their professional

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

2 A. Cassese, *Five Masters of International Law. Conversations with R-J Dupuy, E Jimenez de Arechaga, R Jennings, L Henkin and O Schachter* (2011), reviewed by J. Klabbers at 22 *EJIL* (2011) 1175.

endeavours or as touched by the myriad problems of life as he was.[3] In attempting an explanation he writes:

> For those, like the present writer, who are radically secular, life can be more troublesome. Those who have no belief system think that *homo sapiens*, having reason, has become aware of two things of which all other animals have no consciousness, ie the great complexity and the mysterious nature of our world, and the ineluctable finitude of each individual's life; hence the dread of death. To cope with these two things and achieve relative peace of mind, human beings had to invent splendid tales (including religion) about the creation of the world, about the reason of our existence and about the afterlife. If a secular 'pocket philosophy' is chosen instead, life and work become more haphazard.[4]

It is not just palliatives, like art, that might then gain in significance to make life more bearable. The desire to find peace of mind may also explain the search for meaning in one's profession, the belief in law as a means to realize Utopia.

From this viewpoint *Realizing Utopia* for me first and foremost becomes an invitation to reflect on the practice and method of idealist, normative – a critical legal studies scholar might call it sentimental[5] – international law scholarship. What can we do as international lawyers to make the world better, more just? How can we meet our social and professional responsibility as legal scholars? Can we find solace in utopian scholarship?

In what follows I first address the relationship between international law and Utopia as it appears from the chapters of *Realizing Utopia*, in particular the contributions on international economic law. Like Cassese I will take Utopia as a placeholder for a world society that is more just, in which 'the major deficiencies of the current society of states' are moderated, the basic values embodied in international law better realized than today[6] – a placeholder that allows us to bracket (at least for a while) the question of the subjectivity or objectivity, the particularity or universality of these values and their proper realization. Secondly, I inquire into what appears to be Cassese's favoured method for realist utopian scholarship: critical positivism – a method that probably constitutes the predominant method of normative international law scholarship in Europe today. Thirdly, I propose that international lawyers need to go beyond critical positivism and transcend their disciplinary boundaries if they intend to engage in normative or 'utopian' scholarship. As a consequence they may remain international lawyers as practitioners, but may lose the comfort of belonging to a clearly

[3] Part of the questionnaire that Cassese used in his interviews was a question asking which 'Palliatives' (according to Freud including 'Powerful diversions', 'Substitute Gratifications' and 'Drugs') the interviewee resorted to in order to make life bearable (*ibid.*, at p. xix). In the Final Remarks Cassese observes that 'none of the interviewees felt, or at least voiced out loud, the belief that life is inherently tragic … – a belief that appears to be enhanced in those who look at reality also or primarily through the prism of criminal justice' (at 269).

[4] *Ibid.*, at 268.

[5] Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice', in United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999), at 495.

[6] Cassese, 'Introduction', in Cassese (ed.), *supra* note 1, at p. xxi.

circumscribed discipline of 'international law' as scholars. To clarify this argument I contrast the role and responsibility of the practitioner of international law with those of the international law scholar.

1 International Law and Utopia

The point of departure for the book project that became *Realizing Utopia* is the diagnosis Cassese sets out in his introduction: that the international community is in dire need of change.[7] How international law deals with non-state entities, in particular civil society and individuals, the selectivity and double standards in the pursuit of international justice, the lack of compliance and enforcement of international law are, for Cassese, among the deficits of the international community. As far as the globalized economy is concerned Cassese highlights the limits of state sovereignty *vis-à-vis* the global economy on the one hand[8] and the insufficiency of regulatory mechanisms in filling the void left by globalization on the other hand. Cassese further refers to the 'global economic and financial upheavals [that] occur free from any international legal restraint',[9] implying that they can and should be reined in by international cooperation and law.[10] These statements illustrate that the call for change is prompted at the same time by a perceived lack of international law and by international law that is somehow the wrong international law – law that should be changed. Correspondingly the collaborators in the *Realizing Utopia* project were called upon 'to *identify*, for the benefit of politicians and diplomats, areas of international law more in need of radical change, and to suggest new ways and modalities to bring international legal institutions and rules up to date'.[11]

Yet, taking into account the individual contributions to the volume, it appears that some of the authors perceive the relationship between Utopia and international law in a third way, evidencing scepticism that international law can or should function to realize Cassese's Utopia 'gradually [to] transform world society into a really international community endowed with paramount communal values and at least a modicum of community institutions so that public or collective concerns may prevail over private interests'.[12] In a simplifying manner one may thus say that for some authors Utopia needs to be sought outside the purview of international law, that for others international law is obstructing the realization of Utopia, and that a third group of

[7] *Ibid.*, at p. xviii.

[8] For Cassese restrictions on state sovereignty through international law promoting universal values are generally welcome, while other authors in the book like José Alvarez or Nehal Bhuta are more sceptical.

[9] *Ibid.*, at p. xx.

[10] This view is confirmed in the contribution by Condorelli and Cassese, 'Is Leviathan Still Holding Sway over International Dealings', in *ibid.*, at 14, 21.

[11] Cassese, 'Introduction', in Cassese, *supra* note 1, at p. xx.

[12] Among the authors expressing scepticism or critique of the endeavour set out in the introduction are M. Koskenniemi, J. E. Alvarez, N. Bhuta, and J. H. H. Weiler.

authors considers international law – despite its shortcomings in certain areas – to be Utopia.

The first view – that Utopia is outside the purview of international law and international law scholarship – is taken by Joseph Weiler in his chapter on the WTO.[13] The global economy and its legal framework may create inequalities and inequities. Nonetheless international economic law, according to Weiler, is not the appropriate instrument to bring about a better world. It is not the law of the WTO, or more specifically the GATT,[14] that is responsible for persisting inequality between states and underdevelopment. It sets out general principles of non-discrimination and provides the institutional framework for bargains among states concerning liberalization commitments. If states strike unbalanced or unfair bargains this is not trade law's fault – an argument reminiscent of the view that it is not the fault of domestic private law if an individual autonomously agrees to a contract which is detrimental to his own interests.[15] Moreover, Weiler cautions against a constitutionalization of the WTO for it would result in the decoupling of the law from politics – a law that is not value neutral, but itself the outcome of political processes that are, and possibly more so at the international than the national level, characterized by power imbalances.

Martti Koskenniemi, too, takes a critical distance from international lawyers' search for Utopia by way of international law and points to the necessary particularity of utopian conceptions of international law.[16] He stresses the value of critique of existing institutions and their distributional consequences over the proposal of blueprints for new bureaucracies. In a scholarly effort of critique realistic Utopia could figure productively not as a goal in the form of new legal institutions, but rather as a mindset, a twist Koskenniemi already proposed in relation to constitutionalism.[17]

[13] Weiler, 'The WTO. Already the Promised Land?', in Cassese, *supra* note 1, at 418.

[14] Weiler concentrates on the GATT as a legal framework for economic cooperation among states and brackets the TRIPS Agreement in relation to which the argument can more easily made that the law is a cause for social injustices (*ibid.*, at 420).

[15] For a still pertinent critique see Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', 38 *Political Science Q* (1923) 470.

[16] Koskenniemi, 'Projects of World Community', in Cassese, *supra* note 1, at 3. Just how important it is to Koskenniemi not to be intellectually associated with Cassese's law reform project is evidenced by his public intervention concerning the title of his contribution. The text was included in *Realizing Utopia* under the title 'The Subjective Dangers of World Community', whereas Koskenniemi wanted it to be entitled 'Projects of World Community': see Koskenniemi, 'The Perils of Publishing. Living under a False Title', *EJIL Talk!*, 12 Apr. 2012, available at: http://www.ejiltalk.org/author/martti-koskenniemi.

[17] Koskenniemi, 'Constitutionalism as Mindset. Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 9; for his argument that utopian thinking or a heroic commitment to a larger cause that remains unfulfilled is constitutive of international law scholarship and practice as is its flipside cynicism, see Koskenniemi, *supra* note 5. René-Jean Dupuy seemed to have something quite similar in mind when he stated in his interview with A. Cassese, 'Utopia is bad when it is reduced to means. Such as, for example, the belief in a perfect constitution which would suit all countries in all epochs. A utopian end, in contrast, is the aspiration towards an ultimate goal. Of course, it can't be achieved without the appropriate means. But these means can never be definite, they can only be provisional: they are temporary, interim and can be corrected or discarded': see Dupuy in Cassese, *supra* note 2, at 41.

Most contributions fall, however, into the two other camps as they regard international law and its institutions at once as the obstruction of Utopia and the means of its realization. To return to the subject of economic governance, Emmanuelle Jouannet argues that today's international economic law is an impediment to Utopia. She shares the diagnosis of Third World Approaches to International Law (TWAIL) scholars that international economic law together with the international law of development has perpetuated the dependence of developing nations and must be made, at least in part, responsible for persisting poverty and underdevelopment.[18] While the critical legal analysis frequently stops after the diagnosis, the 'utopian' scholar proceeds to propose a cure. On the particular theme of underdevelopment Cassese states in his introduction that 'the plague of underdevelopment has *not yet* been effectively tackled through reliance on an efficient international institutional mechanism'.[19] For Jouannet, to bring about social and economic justice on a global level the rules of the economic system should be changed and a new and fair New International Economic Order established, mainly through reforms of the International Financial Institutions and the WTO to promote equity and equality of opportunity across countries of differing economic strength. Thus, the cure for international law's obstruction of Utopia is to be legal progress, the development of better norms, of better (and more) institutions that better realize the world community's values.[20]

Frequently the call for 'better' law in the contributions to *Realizing Utopia* is not one for 'new' law, but rather for greater effectiveness or pervasiveness of existing legal values: Law as Utopia. The community values that supposedly are already part of the law are to be infused into all areas of international law. In particular the principle of humanity, human rights, and democracy are identified as the embodiment of utopian values that may serve to improve the whole. Robert Howse, for example, proposes to interpret international monetary law in the light of norms on equity, human rights, and sustainable development.[21] Likewise Nehal Bhuta suggests renewal from within, i.e., reform guided by existing law. He writes:

[18] Jouannet, 'How to Depart from the Existing Dire Condition of Development', in Cassese (ed.), *supra* note 1, at 392. For a TWAIL view see A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); see also S. Pahuja, *Decolonising International Law* (2011) and the recent contributions on the interplay between TWAIL, postcolonial thinking, and development in 45 *Verfassung und Recht in Übersee/ Law and Politics in Africa, Asia, Latin America* (2012) 121.

[19] Cassese, 'Introduction,' in Cassese, *supra* note 1, at p. xx (my emphasis).

[20] Cf. also Francioni, 'Realism, Utopia, and the Future of International Environmental Law', in *ibid.*, at 442 (asking at 455: '[c]an international law develop into a more mature and effective system of environmental governance, similar to the one which has evolved in the field of international economic law and, to a lesser extent, of human rights?'). As I have already pointed out, this progress narrative is not shared by all contributors. Alvarez explicitly takes issue with this view and prefers to regard the evolution of law as a historical dialectic: Alvarez, 'State Sovereignty is not Withering Away. A Few Lessons for the Future', in *ibid.*, at 26; for a critical treatment of the notion of progress in international law see also T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

[21] Howse, 'Fragmentation and Utopia. Towards an Equitable Integration of Finance, Trade, and Sustainable Development', in Cassese, *supra* note 1, at 427.

> [C]oncerns about transparency, accountability, and participation raised by new forms of governance should be addressed in the context of the institution and procedures in which they arise, and by drawing upon the values and forms of legitimacy already embedded in those institutions. Overarching principles drawn from human rights norms can also be used as a means of contesting specific outcomes and failures of transparency and accountability, as well as principles common to a variety of administrative law systems.[22]

Proposals to reform or reinterpret specific international legal regimes by reference to legal principles frequently form part of one of three scholarly projects or strands that are currently competing to reconceptualize international legal theory and doctrine with the aim of offering an account for the legitimation of international law and governance: Global Administrative Law,[23] the project on international public authority originating in the Heidelberg Max Planck Institute,[24] and Constitutionalization – the last being represented by Anne Peters' contribution to *Realizing Utopia*.[25] Apart from their sharing a common aim all three projects still – to a greater or lesser extent – seem to be struggling with defining their respective methodologies,[26] a struggle that is not self-evident in legal scholarship. Without going into detail it seems fair to say that none of the projects would wish to be associated with a natural law approach,[27] but instead would subscribe to one or the other characterization as positivist.[28] Cassese, too, reflected on the method for utopian scholarship and proposed as his preferred variant of positivist scholarship 'critical positivism'.

[22] Bhuta, 'The Role International Actors Other Than States can Play in the New World Order', in *ibid.*, at 61.

[23] See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', NYU Public Law and Legal Theory Working Papers (2005), Paper 17.

[24] A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010); A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking* (2012). For a description of and references to publications of the project see http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/voelkerrecht/ipa.cfm.

[25] Peters, 'Are We Moving Towards Constitutionalization of the World Community?,' in Cassese, *supra* note 1, at 118; see also J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009).

[26] Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23; Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law', in von Bogdandy *et al.*, *supra* note 24, at 3; on the method of international constitutionalization scholarship see the discussion by Klabbers, Peters, and Ulfstein on *EJIL Talk!* and in particular the interventions by Anne Peters at www.ejiltalk.org/the-constitutionalization-of-international-law-a-rejoinder/ and by Jan Klabbers at www.ejiltalk.org/the-genre-of-constituionalization/.

[27] Cf. Allott, 'Language, Method and the Nature of International Law', 45 *British Yrbk Int'l L* (1971) 79 (stating that there is only one problem in international law: what to do about natural law (at 100)).

[28] See, however, Alexander Somek's critique of GAL: Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *EJIL* (2009) 985 (making the argument that GAL is infused with a natural law component (at 990)).

2 Critical Positivism as the Method of Utopian International Law Scholarship

Cassese was a great admirer of Bernard Röling,[29]of his sweeping critique of international law and his call for its renewal to promote peace and social justice.[30] Nonetheless in *Realizing Utopia* Cassese distinguished his project from Röling's call on international lawyers to expound 'the natural law of the atomic age'. Cassese preferred a more positivist method.[31] Yet, perhaps Cassese's implied juxtaposition results from an overstatement, as it is probably wrong to call Röling – who maintained a clear separation between law and morality – a proponent of natural law. For Röling the 'natural law' to be envisaged by international lawyers was to serve as 'inspiration and a guiding principle to achieve a change in positive international law'[32] which he considered inadequate to meet the challenges of social inequalities and security threats of his age. In 'International Law in an Expanded World' Röling sided with the following expectation that Roscoe Pound had directed at the international lawyer:

> [W]e may demand of him a legal philosophy that shall take account of the social psychology, the economy, the sociology as well as the law and politics of today, that shall enable international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition.[33]

By contrast Cassese considered his own approach to be more realistic, oriented towards incremental reform of international law and institutions and guided by international law's own terms. In his introduction to *Realizing Utopia* he indicates the method that in his view matches this endeavour: the international legal scholar as judicious reformer shall engage in critical positivism.[34] Cassese expounds further on the method of critical positivism in *Five Masters*.[35] The critical positivist, according to Cassese, engages in an investigation of legal rules that is conscious of the ideological and socioeconomic context of their creation. The lawyer thus understands the primary philosophy underlying the rules. When the lawyer encounters indeterminacy[36] in reconstructing the content of a norm or the powers of an institution, the critical

[29] Cassese, 'B.V.A. Röling. A Personal Recollection and Appraisal', 8 *J Int'l Crim Justice* (2010) 1141; Cassese's interviews in *Five Masters,* which included the question 'Did you ever meet Röling?', also testify to his admiration for the Dutch scholar.

[30] B.V.A. Röling, *International Law in an Expanded World* (1960); Röling, 'Are Grotius' Ideas Obsolete in an Expanded World?', in H. Bull, B. Kingsbury, and A. Roberts (eds), *Hugo Grotius and International Relations* (1990), at 298.

[31] Cassese, 'Introduction', in Cassese, *supra* note 1, at pp. xxi, xxii (with reference to Röling, *supra* note 30).

[32] *Ibid.*

[33] Pound, 'Philosophical Theory and International Law', in *Bibliotheca Visseriana* (1923) 71, cited in Röling, *International Law, supra* note 30, at 1, 2.

[34] Cassese, 'Introduction', in Cassese, *supra* note 1, at p. xvii.

[35] Cassese, *supra* note 2, at 255 ff, where Cassese reflects on the professional self-understandings of Louis Henkin and Oskar Schachter.

[36] Cassese with reference to H.L.A. Hart uses the term 'penumbral situations': Cassese, *supra* note 2, at 259.

positivist draws on general principles that express universal values[37] of the world community, such as the pursuit of peace, human rights, self-determination, the rule of law, or democracy. These values at times may, however, conflict with each other. In this case the critical positivist has to make a choice and 'will necessarily have to rely upon his or her personal ideological or political leanings. What matters, however, is that he or she should make it explicit and clear that the choice between two conflicting values is grounded in a personal slant or bias, and not in any "objective" legal precedence of one value over the other'.[38] Once the positivist scholar has determined the content of the legal rule or institution Cassese invites her critically to appraise the law in the light of the general values of international law and to suggest legal alternatives.[39]

Locating critical positivism on a spectrum of methods of normative international law scholarship,[40] one may place it in a middle position between natural law approaches to international law – for which validity depends on the grounding in moral principles[41] – as well as the policy-oriented approach to international law of the New Haven School[42] on the one side and doctrinal constructivism on the other side of the spectrum.[43] Compared with the moralist or policy-oriented approaches critical positivism arguably places stronger emphasis on the existing international law and institutions and looks for orientation primarily in values that it seeks to find within the international legal order;[44] contrary to doctrinal constructivism[45] which aims at a

[37] In *Five Masters* Cassese clarifies by reference to Schachter's take on positivism the meaning he gives to values: '[h]e [a positivist lawyer] is free to trace rules or principles all the way back to the original policies or objectives which spawned them (these policies or objectives I [i.e. Cassese] would call "values")': *ibid.*, at 258.

[38] *Ibid.*, at 259.

[39] *Ibid.*; for a further recent exposition of the positivist method in international law scholarship see Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts. A Positivist View', 93 *AJIL* (1999) 302. In their account of 'enlightened positivism' the emphasis lies on the determination of sources of international law. Both Cassese and Simma and Paulus depart from Oppenheim's positivism (Oppenheim, 'The Science of International Law. Its Task and Method', 2 *AJIL* (1908) 313) in that they explicitly take account of the law's sociopolitical context and favour greater flexibility with respect to the concept of sources of international law.

[40] By the term 'normative scholarship' I refer to scholarship that intends to answer questions of how international law norms should be interpreted and applied or changed.

[41] An important proponent of the natural law approach to international law in Europe was Alfred Verdross; see Simma, 'The Contribution of A. Verdross to the Theory of International Law', 6 *EJIL* (1995) 33.

[42] McDougal and Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', 53 *AJIL* (1959) 1; for a recent exposition of the New Haven School's method see Wiessner and Willard, 'Policy-Oriented Jurisprudence', 44 *German Yrbk Int'l L* (2001) 96.

[43] Von Bogdandy, 'The Past and Promise of Doctrinal Constructivism. A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe', 7 *Int'l J Constitutional L* (2009) 364; cf. also Allott, *supra* note 27, at 104 ff (on the finding of patterns through selection, arrangement, and interpretation as method of international law) and Klabbers, 'The Genre of Constitutionalization', *Ejil Talk!*, 10 Aug. 2010, available at: www.ejiltalk.org/the-genre-of-constituionalization/ (describing his, Anne Peters', and Geir Ulfstein's constitutionalization scholarship as conceptualism).

[44] For Cassese's understanding of the term 'value' see *supra* note 37.

[45] I consider doctrinal constructivism to be a method of normative scholarship since systematization of the law and formulation of key concepts assist and direct the practitioner in identifying and interpreting the law in concrete situations.

systematic exposition of the law, the formulation of structures and principles, critical positivism openly engages in teleological interpretation and allows room for non-legal considerations to inform interpretation and construction of the law. While believing in the prescriptive force of law, critical positivism, as expounded by Cassese, acknowledges the role of politics in legal interpretation and a resultant responsibility of the lawyer to be explicit about his value preferences.[46]

In the remainder of this article I shall attempt the argument that critical positivism allows the practitioner of international law within certain limits to further her Utopia, that the international law scholar, however, who engages in normative scholarship has to do more than is demanded by critical positivism to meet his scholarly responsibility. The argument rests on the claim that, as scholars of international law, we follow a different rationality than we do as legal practitioners, and that consequently we have a different responsibility, a responsibility not to give in to our ideological or political leanings too easily.

3 The Roles and Responsibilities of the Utopian International Lawyer

International lawyers frequently perform more than one role. International law scholars not only teach and conduct research; often they also give legal opinions to private or public institutions, hold public offices as judges or in expert commissions, and sometimes they intervene in politics.[47] Even though the lines between the roles – in particular between scholarship and practice – are inevitably blurred, different roles entail different responsibilities reflected in the ways we argue with and about the law.[48]

As *activists* or politicians we might think ourselves freest from constraints – be they in the form of conventional rules of argument or existing law. We may give our opinions on Utopia, on international law and how it should be changed. It is upon others to judge our opinions by the force of our arguments. By contrast, if we exercise our expertise as *practitioners* of international law – as judges, experts, or legal counsel – and either have to decide a case on the basis of law or give an opinion on what the law allows or forbids in a given situation, we have to stick to certain rules of the game, to observe rules of jurisdiction, of procedure, and of interpretation. Nevertheless, it is my argument that these rules of the game, in particular rules on procedure, allow

[46] For an explication of the hidden politics of Lassa Oppenheim's international law positivism see Kingsbury, 'Legal Positivism as Normative Politics. International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL* (2002) 401.

[47] The biographical information included in the list of contributors to *Realizing Utopia* serves as an illustration of the manifold roles that international lawyers are performing: Cassese, *supra* note 1, at p. xiii ff.

[48] For an (in part empirical) enquiry into the roles and (perceived) responsibilities of international lawyers see Peters, 'Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht', 45 *Berichte der deutschen Gesellschaft für Völkerrecht* (2012) 105; see also Koskenniemi, *supra* note 5 (differentiating between the international lawyer as judge, adviser, activist, and academic).

the practitioner considerable leeway to promote her Utopia by way of critical positivism, but – contrary to what Cassese proposed – without having to lay open her politics. Finally, the utopian international lawyer as *scholar* in my view has the greatest responsibility to reflect on his Utopia – with the consequence that if the international lawyer intends to engage in normative *scholarship* he may not be able to do so without transcending the discipline of international law.

4 The Utopian International Lawyer as Practitioner

Positivists and realists alike agree that neither procedural rules nor the applicable substantive law predetermine the legal decisions of judges or opinions of legal counsel and experts in the sense that there is always but one correct answer to a legal question. To the extent that indeterminacy is perceived to exist, the critical positivist will attempt to reduce it by reference to legal values. This part of Cassese's exposition of critical positivism, namely the interpretation of law in light of values inherent in international law, brings it into the proximity of Ronald Dworkin for whom legal principles provide correct answers to all legal questions. Dworkin's theory is based, however, on the view that the institutional history of the law allows for the identification of practical reason in a society that can determine legal interpretation.[49] In international law this institutional history is scarce and Cassese's reference to conflicting values suggests that it may not allow for a coherent reconstruction of the law in light of commonly acknowledged principles. As a consequence it may not be possible to reduce indeterminacy by reference to legal principles alone. A decision on a legal question may require that the judge look beyond law and legal practice. While Dworkin would suggest that she refers to moral philosophy, Cassese sees room for the lawyer to inject her political preferences, her utopian ideas, into the legal decision.

Cassese does not stop there, however, but calls upon the critical positivist to indicate to what extent his decision is not guided by the law – to indicate when 'the choice between two conflicting values is grounded in a personal slant or bias, and not in any "objective" legal precedence of one value over the other'.[50] In my view this call for intellectual honesty is misguided when directed to legal interpretation by the practitioner of international law for two reasons. First, what appears to be an indeterminacy of the law from an external perspective of legal theory may not appear as such to the judge who is called upon to decide a legal question or a legal expert who has to deliver an opinion on whether a certain activity is demanded or prohibited by law. The practitioner may rather by a mixture of doctrine, precedent, *Vorverständnis*,[51] institutional bias,[52] and societal normativities[53] feel constrained to adopt a certain decision.

[49] R. Dworkin, *Taking Rights Seriously* (1984).

[50] See *supra* note 38.

[51] H.G. Gadamer, *Wahrheit und Methode* (1960); J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1972).

[52] M. Koskenniemi, *From Apology to Utopia* (reissue 2007), Epilogue.

[53] Teubner, 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter', in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in the Law* (2006), at 41 (considering judge-made law as sensorium for societal normativities (at 60)).

Secondly, and more importantly, to explicate reasons external to the law – such as policy considerations – on which a legal decision is based may impede the pacifying function of law and legal procedures. If we consider not truth or correctness as the ultimate objective of the legal process that results in a legal decision, but what the German sociologist Helmut Schelsky called juridical rationality (*juridische Rationalität*), then it might actually be harmful to refer to extra-legal considerations in order to substantiate a legal decision. Schlesky identified as the essence of juridical rationality 'not that which is "true," but that which is "'certain" in the reciprocal actions in a social context, that which one can count on in others, because oneself is doing it as that which is "right"'.[54] While truth may require ongoing reasoning to allow for the processing of new information and revision of decisions recognized as false, certainty requires decisions. The necessity of deciding legal questions and the impossibility of referring to indeterminacy as a reason not to take a decision is an important feature of effective dispute settlement and other legal procedures. The more the reasoning of a judgment acknowledges indeterminacy of the law and refers to policy considerations in order to overcome this indeterminacy, the more it opens itself up to criticism on the basis of policy and standards of rightness which may endanger its pacifying function.

Legal certainty is, however, not sufficient for law to pacify societal relations. To ensure that a legal decision not only provides legal certainty, but at the same time can be accepted as rational or legitimate[55] then becomes the purview of legal procedures and not the individual ethical behaviour of the jurist.[56] Juridical rationality does not emerge from an individual's mind but in an institutional process structured by procedural law. Institutional safeguards and procedures, such as participatory rights, the requirement of collegial decision-making or the admissibility of dissenting opinions, rules on evidence and rights to appeal ensure that the decision at the same time serves the objective of certainty and can be regarded as legitimate.[57]

5 The Utopian International Lawyer as Scholar

While the practitioner of international law contributes to the production of juridical rationality within a given institutional arrangement and legal procedure, the scholar is held to different standards of rationality – standards of (intersubjective) truth and

[54] H. Schelsky, *Die Soziologen und das Recht. Abhandlungen und Vorträge zur Soziologie von Recht, Institution und Planung* (1980), at 35 (my translation); cf. Allott, *supra* note 27 (stressing the mythical nature of law which may serve important pacifying functions).

[55] Even though Schelsky takes up Luhmann's ideas on legitimation through procedure (*Legitimation durch Verfahren* (1969)), he refers to rationality (as a narrower concept than legitimacy) that is established through legal procedures: *supra* note 54, at 48, 49.

[56] *Ibid.*, at 46 ff; N. Luhmann, *Legitimation durch Verfahren* (1969).

[57] For a discourse theoretical justification of procedural requirements to ensure certainty and legitimacy see J. Habermas, *Faktizität und Geltung* (4th edn, 1994), at 287 ff; cf also Bogdandy and Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *EJIL* (2012) 7.

rightness.[58] Whereas the *practitioner* meets her professional responsibility by justifying her decision in legal terms, by reference to legal rules, principles, precedent, and doctrine, legal *scholars* may be called upon to probe further and inquire more deeply into the paradoxical self-referentiality that is unavoidable, given the necessity for the practitioner to make decisions based on law.[59] This, however, is not the endeavour of Cassese's critical positivism that engages in pronouncements about what international law should be, how international law should be interpreted so as to realize Utopia. Indeed, such normative (and at the same time realistic) scholarship is frequently regarded as a moral duty by international law scholars. Thus, Anne Peters in her contribution to *Realizing Utopia* postulates that '[f]ormulating both criticism and alternatives to the law as it stands is an intellectual obligation of legal scholars, not "only" a political and hence potentially unscholarly activity'.[60]

Given the commitment to this kind of normative scholarship the question may be raised whether critical positivism provides the utopian international law scholar with a suitable method. In my view it does not – my critique being twofold. First, it is a critique of the ideological nature of critical positivism which – even though it calls upon the scholar to lay open her political preferences – depends on them remaining concealed. Secondly, it is a critique of critical positivism's disciplinary limitations holding that on the one hand they hinder the contestability of the scholarly propositions and on the other hand they result in the neglect of knowledge that may be crucial to the international lawyer's utopian project.

According to Cassese the critical positivist interprets and critiques the law as well as proposes reforms by reference to legal values and principles. Ideological leanings,[61] for Cassese, should enter the picture only when the general principles do not afford a clear answer. However, general principles, like the principle of humanity which has recently taken centre stage in international law debates, seldom (or never) afford any clear answers[62] and are referred to in order to support largely contradictory normative projects – as is evidenced, for example, by current debates concerning the responsibility to protect. International law scholars who attempt to answer questions such as when governments have a duty to intervene militarily in situations of humanitarian crisis merely by reference to legal principles risk engaging in what Philip Allott calls a

[58] On this point I disagree with Anne Peters who argues that the academic enjoys a 'fool's freedom' due to the lack of institutional authority of her scholarly opinions: Peters, *supra* note 48, at 142 ff.

[59] For such inquiries see Allott, *supra* note 27; Wiethölter, 'Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung. Fragen eines lesenden Recht-Fertigungslehrers', 3 *Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft* (1988) 1; Teubner, *supra* note 53.

[60] Peters, *supra* note 25, at 135.

[61] Like Cassese I use the term 'ideology' here synonymously with 'political tradition'. For a more differentiated treatment of the term and the role of ideology critique in international law scholarship see Marks, 'Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter', 12 *EJIL* (2001) 109.

[62] In the context of international law see Milan Kuhli and Klaus Günther's discussion of the ICTY's decision in *Kupreškić et al.* (Case No. IT-95-16-T, Trial Chamber, Judgment of 14 Jan. 2000) and whether the court here engaged in a discourse of norm identification or norm justification (implying law-making): Kuhli and Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals', 12 *German LJ* (2011) 1261.

'method of controlled intellectual confusion' in order to present a certain interpretation as prescribed by law.[63]

Cassese certainly concedes that legal values and principles may not always suffice to justify a legal proposition. In such a case the scholar should make his politics transparent.[64] Even if not made explicit, the 'ideological leanings' of international law scholars frequently are not difficult to discern – even though it is usually the normative projects of others that are labelled ideological while one's own are justified in terms of international law values. Emanuelle Jouannet, for example, in her contribution to *Realizing Utopia* condemns the 'neo-liberal pro-market paradigm' as an ideology embracing economic efficiency, while being socially unfair and therefore in contradiction with international law values;[65] Michael Reisman, by contrast, favours economic globalization (which may be associated with the neo-liberal paradigm criticized by Jouannet) 'for its promise of enhanced production and the efficient use of the resources of our planet'[66] over the 'pseudo-socialist rethoric'[67] of New International Economic Order politics (for which Jouannet seems to have sympathy).

Is anything gained, then, if ideological leanings are made even more transparent? Surely the reflection and self-questioning that need to precede the disclosure of ideological leanings would benefit any intellectual endeavour. I hold the view, however, that it is the responsibility of the normative scholar not only to disclose ideological leanings, but to go a step further and support her preferences by reference to other disciplines, be they moral philosophy, economics, or social theory.[68] Such borrowings from other disciplines may not change the particularity of each normative proposal. However, the provision of further arguments for our normative propositions from economics or moral philosophy or social theory will broaden the base for principled contestation. They serve to push back the point at which we will have to agree to disagree for the reason of our diverging politics. The attempt to lay open the values and social theory instructing their policy suggestions was one great advantage of the New Haven School.[69] Through their explication on the basis of social theory of the process of interpretation and construction of the law the proponents of the New Haven School made this process more transparent and thus amenable to a scientific debate on its advantages and disadvantages. Unfortunately, however, critique of the New

[63] Allott, *supra* note 27, at 98.

[64] *Supra* note 38; see also Peters, *supra* note 48, at 127.

[65] Jouannet, *supra* note 18, at 406 ff.

[66] Reisman, 'The Future of International Investment Law and Arbitration', in Cassese, *supra* note 1, at 275, 285.

[67] *Ibid.*, at 277.

[68] Cf. Koskenniemi, 'Projects of World Community', *supra* note 16, at 11; for an argument that Simma's enlightened positivism would gain from taking account of philosophical debates on global justice see Ratner, 'From Enlightened Positivism to Cosmopolitan Justice, Obstacles and Opportunities', in U. Fastenrath *et al.*, *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011) 155; see also Pound and Röling, *supra* note 33.

[69] *Supra* note 42; for a similar appreciation of the New Haven School 'for their methodologically explicit style including clarity as concerns policy considerations', see Allott, *supra* note 27, at 119.

Haven School for the most part does not take up the methodological challenge, but – ironically – contents itself with accusing McDougal and co. of being overly ideological.[70]

There is a further reason why international law scholars cannot be contented with 'just doing law':[71] in situations of legal pluralism it will be necessary to venture into other disciplines such as anthropology or religion not only to make reasoned statements about what the law should be, but already to discern what the law is.[72]

Finally, normative international law scholarship needs to transcend boundaries *within* the legal discipline. Taking notice of other *legal* disciplines may render the utopian international lawyer more self-conscious as regards the instrumentality of law, the power of governments to shape the law, and the power of law to direct behaviour or influence communications of different societal systems. The project of *Realizing Utopia* attests to the strong belief of international lawyers in the possibility of engaging in social engineering through law. A clear example is the contribution by Condorelli and Cassese. After acknowledging 'gaps' in state law as regards the regulation of globalized markets they proclaim, 'This does not mean that "governance" is not possible. One may certainly talk in this connection about a crisis of the state, in the sense that the sphere of national governance has proved inadequate to achieve it. But the same cannot be said of international law and cooperation mechanisms between countries.'[73] Private lawyers and 'law & society' scholars who have been engaging with the relationship between state and society, state and market, market and society, and the respective functions of law for a long time are less confident.[74] They have produced a wealth of legal knowledge that is only slowly being (re)accessed by international

[70] An exception is Saberi, 'Love it or Hate it, but for the Right Reasons. Pragmatism and the New Haven School's International Law of Human Dignity', 35 *Boston College Int'l & Comp L Rev* (2012) 59.

[71] Cf. Simma and Paulus who defend their positivist method with the argument that '[t]here is no specific competence of the lawyer beyond the law itself': *supra* note 39, at 306.

[72] Zumbansen, 'Transnational Legal Pluralism', 10 *Transnational Legal Theory* (2010) 141; see also on the current German debate on the legality of circumcision as an issue of legal pluralism Paz, 'The Cologne Circumcision Judgment. A Blow Against Legal Pluralism', *Verfassungsblog*, 24 July 2012, available at: http://verfassungsblog.de/cologne-circumcision-judgment-blow-liberal-legal-pluralism/ and Kemmerer, 'Naked Law, Lost Traditions. A Comment on Reut Paz and Legal Pluralism', *Verfassungsblog*, 18 Aug. 2012, available at: http://verfassungsblog.de/naked-law-lost-traditions-comment-reut-paz-legal-pluralism/; in *Realizing Utopia* the difficulty of distinguishing between law and non-law is acknowledged by Nehal Bhuta, *supra* note 22, at 68.

[73] *Supra* note 10, at 21.

[74] See, e.g., Galanter and Trubek, 'Scholars in Self-Estrangement. Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin L Rev* (1974) 1062 as well as the debate between Erhard Blankenburg and Gunther Teubner in the early 1980s: Teubner, 'Das regulatorische Trilemma. Zur Diskussion um post-instrumentale Rechtsmodelle', in 13 *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* (1984) 109 and Blankenburg, 'The Poverty of Evolutionism. A Critique of Teubner's Case for "Reflexive Law"', 18 *Law & Society Rev* (1984) 273; and from the more recent literature Zumbansen, *supra* note 72; Zumbansen, 'Law's Knowledge and Law's Effectiveness', 10 *German LJ* (2010) 417; P. Zumbansen and G.-P. Calliess, *Rough Consensus and Running Code. A Theory of Transnational Private Law* (2010); P. Zumbansen and G.-P. Calliess (eds), *Law, Economics and Evolutionary Theory* (2010); C. Joerges and J. Falke, *Karl Polanyi, Globalization and the Potential of Law in Transnational Markets* (2011); G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (2012).

lawyers who in Europe frequently have a public law background.[75] Taking this knowledge into account might dampen our idealism as regards (international) law as an instrument for realizing Utopia.

If we do all this venturing across disciplinary borders that I have been alluding to, we might indeed lose our own disciplinarity as international lawyers. Concomitantly we run the risk of losing international law as our common language – a common language that does provide some comfort in the ever more diversifying world. However, even if we need to become 'transnational lawyers'[76] in scholarship we can remain international lawyers in practice where we act within institutions and procedures of international law and need to decide on the basis of international law only. Thus, at last I concede to Antonio Cassese's wisdom and interpret his project to mean that if as international lawyers we want to participate and find consolation in the utopian project of international law we need to do this not as scholars but as practitioners.

[75] Recently collaborations between international public and private lawyers seem to have increased, an example being the *ESIL–ASIL–EJIL–HiiL* Joint Workshop on Global Public Goods and the Plurality of Legal Orders, European University Institute, 24 October 2011.

[76] Transnational lawyers in the sense that we not only look at a broader spectrum of legal norms, but employ transnational law as a method, as is suggested by Peer Zumbansen: Zumbansen, 'Transnational Law, Evolving', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (2nd edn, 2012), at 898; see also Catà Backer, 'Transnational Law as Field or Method', *Law at the End of the Day*, 1 Jan. 2012, available at: http://lcbackerblog.blogspot.de/2012/01/transnational-law-as-field-or-method.html. The designation of a department of law at the Vrije Universiteit Amsterdam that includes international public law as "Department of Transnational Legal Sudies" may be seen as illustrative of a recent trend of international lawyers to reinvent themselves as transnational lawyers: see http://www.rechten.vu.nl/en/about-the-faculty/faculty/faculty/transnational-legal-studies/index.asp.