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Realizing Utopia as a Scholarly Endeavour

Anne Peters*

Abstract

*The article defends 'critical' or 'ideational' positivism and explains why and how it can be conducted successfully as legal scholarship. In order to accumulate replicable intersubjective knowledge, legal scholarship should focus less on concrete applications of law, but needs to generate theories in the sense of models that express the patterns of data in the field under observation as parsimoniously and concisely as possible, and thereby reduce complexity. The article then discusses how scholarly contribution to law reform can be explained doctrinally and how it can be justified in normative terms. International legal scholars cannot and should not 'make' international law in the same sense as governments, because they largely lack the legitimizing factors of representativity, participation, publicity, and accountability. The authority of scholars is not an institutional, procedural, or social one, but purely an epistemic one. Legal academic activity is inescapably political. Scholars should find a middle ground between the unrealistic postulate of value-freedom (*Wertfreiheit*) and unbounded evaluation. International legal practice supports international legal scholarship, notably by providing a 'reality check'. Scholarship can inversely support practice by pursuing a* via media *between infertile alienation from and fetishism with practice. To do so successfully, applied legal research must be complemented by foundational research. Secondly, doctrinal analysis should be complemented by empirical, ethical, and theoretical research. And, thirdly, the typical indeterminacy and dynamics of international law suggest the complementing of positive analysis by normative analysis, because purely positive analysis engenders a false security. The article concludes that the programme of a 'realistic', as opposed to an 'illusionary utopia' is the province of legal scholars.*

1 Introduction

'*On resiste à l'invasion des armées; on ne résiste pas à l'invasion des idées*'.[1] With this reference to Victor Hugo in his conclusion to *Realizing Utopia*,[2] Antonio Cassese reveals

* Professor Dr. iur., LL.M. (Harvard), Director of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. Fellow (2012/13) at the Wissenschaftskolleg, Berlin. Email: anne.peters@mpil.de.

1 V. Hugo, *Histoire d'un crime: Déposition d'un témoin* (1887, 2009), at 639.

2 A. Cassese, *Realizing Utopia: The Future of International Law* (2012), at 683.

his, in modern IR terms, 'ideational' approach, and appears as a man who believed in the transformative power of ideas. Cassese himself propagated what he called a 'critical positivism'.[3] Isabel Feichtner, in her thoughtful piece, criticizes this approach and ultimately denies its quality as scholarship.[4] In this article, I want to defend 'critical' or 'ideational' positivism and explain why and how it can be conducted successfully as legal scholarship or even as legal 'science', to use Hans Kelsen's Germanicism.

2 Cassese's 'Critical Positivism' and its Pitfalls

'Critical positivism' in Cassese's sense is a method of investigating rules and institutions with 'a proper contextualisation, both socio-politically and ideologically'.[5] The critical positivist 'should be careful not to project one's own ideologies and social bias into proposals for change'.[6] But the interpreter may and should 'draw upon general principles consecrating universal values upheld in the world community' to engage in teleological interpretation of the rules at hand.[7] Such principles should of course also inform proposals for law reform. At the same time, Cassese realized that such general principles would not furnish a solution to the problem at hand. When those 'universal values turn out to be in conflict … the interpreter will necessarily have to rely upon his or her ideological or political leanings'.[8]

Isabel Feichtner raises two points of critique: first, that even 'critical' positivism has an 'ideological nature', i.e., that it depends on 'political preferences' 'remaining concealed', instead of laying them open, as demanded by Cassese; secondly, Feichtner deplores the 'disciplinary' limitations of the type of scholarship Cassese pursued. In her eyes, 'critical positivism' is too 'legal' in the sense that it fails to absorb methods, insights, and arguments from other disciplines. An international lawyer should not only 'disclose ideological leanings, but … go a step further and support her preferences by reference to other disciplines be they moral philosophy, economics or social theory'. Feichtner identifies a dilemma: she holds it – for the reasons stated above – indispensable to absorb insights and arguments from other disciplines to 'broaden the base for principled contestation'. In other words, interdisciplinarity is necessary to maintain the quality of scholarly work. But, on the other hand, it is exactly this interdisciplinarity (and the integration of other legal disciplines, such as private or criminal law, into our writings) which 'might dampen our idealism as concerns (international) law as an instrument to realize Utopia'. *Lawyers, if they want to be true scholars, can therefore not be idealists*. This leads Feichtner to the inevitable conclusion: '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*'. In a nutshell, Isabel

[3] A. Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (2011), at 258.

[4] Feichtner, 'Realizing Utopia through the Practice of International Law', 23 *EJIL* (2012) 1143.

[5] Cassese, *supra* note 3, at 258.

[6] Cassese, *supra* note 2, at 683.

[7] Cassese, *supra* note 3, at 259.

[8] *Ibid.*, at 259.

Feichnter's claim is that Antonio Cassese's type of activity does not and cannot *satisfy the criteria of scholarship*.

3 What is 'Scholarly' about Academics' Dealing with International Law?

This critique of Cassese's (and others') attempt to reconcile scholarly 'method' with a 'normative' and 'idealist' approach has added a fresh perspective to the longstanding debates about the scholarly (or 'scientific') character of legal academics' working with the law. Does this really deserve the label 'scholarship' (or even 'science')? Much of the confusion reigning here goes back to the Aristotelian notion of 'science'. For Aristotle, science was possible only in relation to necessary and universal subject matters.[9] This arose from his demand for strict equivalence between knowledge and the subject of knowledge. From the Aristotelian perspective, law belonged to the realm of human experience, which related to transient, perishable things. Practical wisdom (φρόνησις), or prudence (*prudentia*), which recognizes the contingent realities of practice, was therefore no science (επιστήμη).[10] Accordingly, jurisprudence was merely a 'wise knowledge of law'.

This is not the place to repeat the general debate whether legal scholarship is 'really' επιστήμη (science or scholarship), a debate which is burdened with sterile definitional issues.[11] Instead I simply wish to ask whether and how (international) legal scholarship achieves what successful sciences are generally supposed to achieve, namely the *accumulation of replicable intersubjective knowledge.*

Legal scholars acknowledge that legal research should, in principle, produce 'new discoveries'.[12] However, in legal scholarship, knowledge gains are not as obvious and it is even explicitly denied that they exist.[13] What is the reason for the lacking

[9] 'We all conceive that a thing we know scientifically cannot vary; ... An object of Scientific Knowledge, therefore, exists of necessity. It is therefore eternal, ...': Aristotle, *The Nicomachean Ethics*, Bk VI, iii, 2 (trans. H. Rackham, 1996).

[10] '[I]t follows that Prudence is not the same as Science, ... because matters of conduct admit of variation': *ibid.*, Bk VI, iv, 3). According to Harold Berman, Aristotle's jurisprudence was not even a τέχνη, rather it verged into ethics, politics, religion, and rhetoric: H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), at 133.

[11] See, e.g., Weinberger, 'Der Wissenschaftsbegriff der Rechtswissenschaften', 5 *Studia Leibnitiana*, special issue (*Sonderheft*) (1975) 102; Kaufmann, 'Über die Wissenschaftlichkeit der Rechtswissenschaft', 72 *Archiv für Rechts- und Sozialphilosophie* (1986) 429; C. Engel and W. Schön (eds), *Das Proprium der Rechtswissenschaften* (2007).

[12] C.F. von Savigny, *System of the Modern Roman Law* (trans. W. Holloway, 1867), i, at pp. ix–x stressed that 'the mass of acquirements [*Kenntnisse*] brought into operation, in comparison with that earlier time, stands very high. ... Nothing certainly is more commendable than the effort to enrich science by fresh discoveries; ...'.

[13] J.H. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (ed. H.H. Meyer-Tscheppe, 1988) at 13: '[l]egal scholarship ... has, since at least the times of Bacon remained stationary ...[,] the controversies have not become less, but more, even where the most laborious full investigation thought to have finally reached a stable result, barely a decade passes and the quarrel begins anew' (author's trans.).

accumulation of knowledge in legal research?[14] The reason does not appear to lie in the methods of producing knowledge. The core of the scientific procedure is the intersubjective replicability of method, i.e., of the path that leads to the result.[15] In legal scholarship, results are obtained primarily through argument rather than through empirical observation. The standard of argumentation in legal scholarship is obviously high. Findings of legal research will generally be intersubjectively replicable. The reason for the meagre accumulation of knowledge is rather the focus of legal research on concrete applications of law. Legal scholarship has been conducted as 'applied legal science' for the last 100 years. The connecting link between theory and less abstract research results is lacking. This is 'less the construction of a building … but the accumulation of unused bricks in a pile'.[16]

To construct the edifice of legal scholarship we need theories. In the theory of science, theories are conceived of as models or structures rather than as systems of statements.[17] The most general requirement for all scientific theories is as follows: theories should express the patterns or structures of data or of phenomena in the field under observation, as parsimoniously and concisely as possible. They should reduce complexity. So, 'a useful theory is a compression of the data; comprehension is compression. … The simpler the theory, the better you understand something.'[18] Importantly, theories must interrelate like stones in a house or pieces of a puzzle.

This concept of theory is applicable to legal scholarship. Admittedly, the majority of the so-called legal 'theories' are not scientific theories in the sense just discussed. Examples of such 'non-theories' in public international law include the declaratory against the constitutive theory of recognition, the constitutional against the internationalist theory with regard to Article 46 of the Vienna Convention on the Law of Treaties, or the absolute against the relative theory of reservations to multilateral treaties. These are not theories, but merely singular recommendations for solutions to concrete legal questions.

By contrast, there are theories in public international law that do reduce complexity. An example of such a 'data-condensing' theory is that of subsidiarity. The idea of subsidiarity forms the common basis of different rules (e.g., the local remedies rule, the priority of regional organizations over UN peacekeeping operations, and the complementarity of the International Criminal Court to domestic courts in the prosecution of international

[14] One reason could be that legal scholarship actually does not strive for truth (and with that for knowledge). This view, however, does not do justice to the aspirations of legal research.

[15] Accordingly, the central feature of science is neither the use of mathematics, as Galileo Galilei thought, nor the inductive procedure, as Francis Bacon suggested. See H. Schwenke, *Zurück zur Wirklichkeit: Bewusstsein und Erkenntnis bei Gustav Teichmüller* (2006), at 293–297.

[16] J. Binder, *Philosophie des Rechts* (1925), at 948, referring here to comparative law (author's trans.).

[17] A.F. Chalmers, *What is this Thing called Science?* (3rd edn, 1999), at 104–148.

[18] See Chaitin, 'The Limits of Reason', 294(3) *Scientific American* (Mar. 2006) 74 and the literature cited therein. 'Conversely, if the only law that describes some data is an extremely complicated one, then the data are actually lawless.' So 'a theory has to be simpler than the data it explains, otherwise it does not explain anything' (*ibid.*). Chaitin draws support here from Leibniz: 'Mais quand une règle est fort composée, ça qui luy est conforme, passe pour irrégulier': G.W. Leibniz, *Discours de Métaphysique* (2nd edn, 1985), at 14 (author's emphasis).

crimes under Article 17 of the ICC Statute).[19] On the basis of this reduction of complexity, scholars can show that the subsidiary responsibility of the international community for guaranteeing human security when the territorial state fails in its duty to protect 'fits' into the international legal system. International legal theories in that sense[20] generate replicable intersubjective knowledge and are thus successful scholarship.

4 International Legal Scholarship and Law Reform

For Antonio Cassese, the international legal scholar should act as a law reformer. He opined, '[F]or a lawyer to be not a mere technician, but also somebody who has a broader mind, it would also be important to try to *contribute to changing* the law in addition to interpreting the existing law'.[21] It is, Cassese thought, 'the moral duty for lawyers to propose reform of rules and regulations whenever this proved necessary'.[22] This section discusses how scholarly contribution to law reform can be explained doctrinally and how it could be justified in normative terms.

Article 38(1)(d) of the ICJ Statute mentions the 'teachings of the publicists of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law'. The phrasing of Article 38 (dating from 1922) manifests the *zeitgeist* at the beginning of the 20th century. The reference to 'teachings of publicists' is inspired by the historical school of law and its benevolent attitude towards 'the law of jurists' or 'learned law', and was an heir to the (romantic) reaction against the codificatory ideal of the enlightenment. The formulation of law by academics is typical for young and undeveloped areas of law (such as, in the 19th century, the domestic private law in continental European states, and in the 21st century the European private law). Any new, rudimentary and largely uncodified area of law needs academic standard-setters. Talking of Hugo Grotius as the 'father of international law' exactly points to this ground-laying work of academics. With more intense codification and concretization of a legal order this contribution must necessarily fade into the background.

But the importance of academic writing remains, and this can be explained by pointing to some special features of international law. These are notably the law's high dynamism and the lack of legislative organs. Therefore, as, for example, Johann Caspar Bluntschli wrote, it falls upon academics to 'pronounce [the law] afresh', 'and through this pronouncement further its recognition and validity'.[23] Bluntschli thereby ascribed

[19] Cf. Carozza, 'Subsidiarity as a Structural Principle of Human Rights Law', 97 *AJIL* (2003) 38.

[20] See on 'theoretical' research in a different sense, namely in the sense of theories *about* law, below sect. 8C.

[21] Cassese, *supra* note 3, at 143.

[22] *Ibid.*, at 256.

[23] J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (1878), preface ('Vorwort'), at pp. iv–v: 'Die Rechtswissenschaft darf … meines Erachtens nicht bloss die schon in frühern Zeiten zur Geltung gelangten Rechtssätze protokolliren, sondern soll auch die in der Gegenwart wirksame *Rechtsüberzeugung neu aussprechen und durch diese Aussprache ihr Anerkennung und Geltung verschaffen helfen*. Je empfindlicher der Mangel gesetzgeberischer Organe ist, welche für die Fortbildung des Völkerrechts sorgen, um so weniger darf sich die Wissenschaft dieser Aufgabe entziehen. Freilich muss sie sich auch davor hüten, der Zukunft vorzugreifen. Sie darf nicht unreife Ideen als wirkliche Rechtsätze und selbst dann nicht verkünden, wenn sie ihre Verwirklichung in der Zukunft klar vorhersieht' (emphasis added).

an indirectly law-creating function to academics. By speaking and writing about an amorphous practice and *opinio iuris*, academics perform a task of verbalizing and ordering, which is needed for grasping an international norm and making it operational in the first place. Indeed, it seems as if the special difficulties of identifying international norms make the clarifying role of international legal scholars crucial. And because the identification already carries in it a kind of systematization, all international legal scholars are to that extent 'law-makers'. As the former British legal adviser Michael Wood put it, 'a broader and important function played by the most eminent of the writers (who were frequently also practitioners), to give shape and order to the disparate strands that make up international law. Even more than in most areas of law, international law owes its framework and often indeed the elucidation of its rules to writers, ... In that sense they are fundamental to the international legal system.'[24]

Still, academic texts are *not* law. It is a commonplace that these '[w]ritings are not a (formal) source of the law, but they may be evidence of the law'.[25] Scholars are 'supposed to elucidate what the rules to be applied by the Court were, not to create them'.[26] Article 38(1)(d) is the 'storehouse from which the rules of heads (a), (b), and (c) can be extracted'.[27]

The classical explanation for the lack of law-making power of scholarly writing is that academics are not part of the machinery of the sovereign state. 350 years ago, Thomas Hobbes expressed this fact as follows: '[t]he Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true. ... For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law'.[28] And the English Admiralty Court found in 1778 that '[a] pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him. The usage is plainly as arbitrary as it is uncertain; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius.'[29] However, deducing the authority of the speakers and thereby the validity of international norms from state sovereignty is no longer in line with current understanding of the meaning of sovereignty, which is nowadays considered not to be a self-sufficient source of authority, but rather as instrumental to the realization of human objectives.

The second standard explanation for the lack of law-making power of academic writing does not fare much better. It is the assertion that scholarly texts are not an acknowledged 'source' of international law.[30] However, the normative closure of

[24] Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), available at: www.mpepil.com, at para. 3.

[25] *Ibid.*, at para. 17.

[26] Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice* (2nd edn, 2012), at para. 304.

[27] S. Rosenne with the assistance of Y. Ronen, *The Law and Practice of the International Court of Justice, 1920–2005* (4th edn, 2006), iii, at 1551.

[28] T. Hobbes, *Leviathan* (1943 (Orig. 1651)), ch. 26, at 143.

[29] The '*Renard*', 9. Dec. 1778, 165 ER 51, Hay Marriot, 222, at 224.

[30] In German not a 'Rechtsquelle' but a mere 'Rechtserkenntnisquelle': Hillgruber, 'Braucht das Völkerrecht eine Völkerrechtstheorie?', in M. Jestaedt and O. Lepsius (eds), *Rechtswissenschaftstheorie* (2008), at 113, 115.

the international legal system through the immanent construction of 'sources' has proved unhelpful and is, from the perspective of legal theory, highly dubious. It seems more fruitful to determine the quality of 'law' of a given social norm, not through recourse to the paradoxical metaphor of the sources, but on a case-by-case basis.[31] From this perspective, which draws on legal pluralism, law-making by social actors is not categorically a no-go.[32] In consequence, a modern 'learned law' is conceivable.

A different line of reasoning which leaves space for academic law-making is espoused by critical legal studies which mix up the *observation* of the law and its *creation*. When Martti Koskenniemi declares '[i]nternational law is an argumentative practice',[33] he does not say who argues and whose arguments count as juris-generative. An understanding of international law as an argumentative practice implies that the discourse of academics *is* international law and not just talking *about* international law. However, this approach risks throwing the baby out with the bathwater. The academic discourse does not as such make law.

What gives some texts status as 'international law' is not the fact that these have been edicted by a sovereign nor that they are defined as a 'source'. It is the dual fact that some norms are socially necessary for global regulation and that they have been elaborated with the participation of affected persons. If we take this as a yardstick, scholars, as individuals or as an epistemic community,[34] are not authorized to make law. Their expertise is not a sufficient basis of authority for making international law. Referring to an experts' 'code', the then Court of First Instance of the EU formulated the following 'grounds of principle relating to the political responsibilities and democratic legitimacy of the Commission', and stated, 'Whilst the Commission's exercise of public authority is rendered legitimate, pursuant to [Article 17(1) of the TEU (Lisbon), ex-Article 211 EC], by the European Parliament's political control, the members of SCAN [Scientific Committee for Animal Nutrition], although they have scientific legitimacy, have neither democratic legitimacy nor political responsibilities. Scientific legitimacy is not a sufficient basis for the exercise of public authority.'[35]

Although expertise may be one source of legitimacy and authority, further factors must add to it so as to warrant an authority to make law, namely institutional and procedural ones such as representativity, participation, and publicity. International legal scholars are not elected, and they do not represent stakeholders. Because they do not attempt to regulate their own affairs (in the style of indigenous people, religious communities, or globally active merchants), their texts are not comparable to indigenous and religious law and the *lex mercatoria*.

To conclude, international legal scholars, even when acting in institutionalized groups such as the *Institut de droit international* or the International Law Association, cannot and should not 'make' international law in the same sense as governments.

[31] T. Vesting, *Rechtstheorie* (2007), at 78–95.

[32] Cf. A. Peters, L. Köchlin, T. Förster, and G. Fenner Zinkernagel (eds), *Non-state Actors as Standard Setters* (2009).

[33] Koskenniemi, 'Methodology of International Law', in Wolfrum (ed.), *supra* note 24, at para. 1.

[34] According to Peter M. Haas, EpComs are 'networks of knowledge-based experts': Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination', 46 *Int'l Org* (1992) 1, at 2.

[35] Case T–13/99, *Pfitzer Animal Health v. Council of the EU* [2002] ECR II–3305, at para. 201.

Academic 'codifications' can acquire the status of law only through adoption by a governmental or inter-governmental actor. An example is the Lieber Code, which became a formal instruction to the army only after its incorporation into a ministerial order issued by the Secretary of War.[36]

Again, the reason for the need for such an endorsement is not that academics are not part of the sovereign state machinery or that the texts are not defined as a 'source', but that the institutions and procedures in which they make codes, resolutions, and memoranda largely lack the legitimizing factors of representativity, participation, publicity, and accountability. In consequence, the authority of scholars is not an institutional, procedural, or social one, but purely an *epistemic* one.

And this state of affairs, to make an important point, cannot be changed if scholarship is not to lose its essence. Scholars are not and should not be accountable to real clients, but only to ideal entities such as the scientific community, the truth, the public, with this ideational accountability being in no way formalized. It is exactly this lacking accountability which is the counterpart to the scholar's lack of law-making power. And this, in turn, is a precondition for thinking freely and out of the box. Only because academic treatises do not have direct legal consequences (as 'law'), and only because scholars are devoid of formal and institutional responsibility (which does not exclude a broader 'responsibility' towards society at large), can they devote themselves to thought experiments and speculation, and thereby 'provide ideas and float proposals which could act as "midwives" for social and legal change', as Cassese, ever the social engineer, put it.[37]

5 International Legal Scholarship and Politics

Antonio Cassese's work is profoundly political. It belies the 'pure' quest for a strict separation between law (and legal scholarship) and politics, as most forcefully formulated by Hans Kelsen. In Kelsen's foreword to the commentary on the UN Charter of 1950, as well as in his *Principles of International Law* of 1952, that author stressed that these works embodied 'a juristic – not a political, approach' to the United Nations and other international issues. Kelsen went on, this book 'deals with the law of the Organisation, not with its actual or desired role in the international play of powers. Separation of law from politics in the presentation of national or international problems is possible.'[38]

[36] 'Lieber Code', Instructions for the Government of Armies of the United States in the Field, 24 Apr. 1863. The norms were overhauled by a group of army officers and then endorsed by the then Secretary of War, Ed Townsend, Assistant Adjutant General (General Orders No. 100), available at: http://civilwar.home.com/liebercode.htm.

[37] Cassese, *supra* note 2, at 683.

[38] H. Kelsen, *The Law of the United Nations* (1950), at xiii. See also Kelsen, 'Preface to the First Edition (1952), in H. Kdelsen and R.W. Tucker (eds), *Principles of International Law* (2nd edn, 1967), at ix: 'I think it necessary to emphasize the *purely juristic character* of this book, I do so in opposition to a tendency wide-spread among writers on international law, who – although they do not dare to deny the legal character and hence the binding force of this social order – advocate another than a legal, namely a political, approach as adequate. This view is in my opinion nothing but an attempt to justify the non-application of the existing law in case its application is in conflict with some interest, or rather, with what the respective writer considers to be the interest of his state.' Everything else was 'not a political theory of public international law but a political ideology' (author's emphasis).

In contrast to what Kelsen believed and what he aspired to do, it is nowadays widely accepted that international legal scholars are political actors. First, because the object of their studies is itself a political matter. International law is highly political. Hard-core realists like Georg Schwarzenberger call it 'power in disguise'.[39] In contrast, the realist idealist Antonio Cassese (quoting Georges Scelle) characterized international legal law (in my view more appropriately) as the 'result from the blending of ethics and power'.[40]

International law is political, not only because of its dependence on political power, but also because it transports political values. The most influential academic schools of our time, the New Haven School[41] and Critical Legal Studies, have both, although with quite different arguments, insisted on this point, and have not tired of revealing, through ever new examples, the pretences of neutrality and technicity of international law to be a chimaera.

Secondly, legal scholars are political because they are experts. Experts are not technical, neutral, non-ideological, in short 'unpolitical'. Rather, what is going on is the 'politics of expertise'.[42] '[F]or knowledge itself is a power', as Francis Bacon[43] put it. Michel Foucault gave this insight a different twist: the objectives of knowledge and the objectives of power are the same: 'in knowing we control, and in controlling we know'.[44]

Finally, the international legal scholar is a political actor because her value judgements normally carry political implications. Values are one component of any scholarly treatment of international law. The *Werturteilsstreit*[45] and the *Positivismusstreit*[46] have done away with the previously cherished belief that science

[39] G. Schwarzenberger, *Power Politics: A Study of World Society* (3rd edn, 1964), esp. at 199 and 202–203: 'the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power … power politics in disguise'.

[40] Cassese, *supra* note 2, at 683; G. Scelle, *Manuel de droit international public* (1948), at 6: 'Les règles de droit viennent de la conjonction de l'éthique et du pouvoir'.

[41] Cf. R. Higgins, *Problems and Process: International Law and How We Use it* (1994), at vi: 'I try to show that there is an unavoidable choice to be made between the perception of international law as a system of neutral rules, and international law as a system of decision-making towards the attainment of certain declared values.'

[42] Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise', 5 *European Human Rts L Rev* (2001) 463; *id.*, 'Challenging Expert Rule: The Politics of Global Governance', 5 *Sydney L Rev* (2005) 3.

[43] Francis Bacon, *Mediationes Sacrae* (1597), ch. 11, 'Of Heresies', at M4 (with regard to God).

[44] Stanford Encyclopedia of Philosophy, 'Michel Foucault' (2008). M. Foucault, *Discipline and Punish* (trans. A. Sheridan, 1975), at 170–177. Foucault analysed the mutual co-constitution of knowledge and power with regard to (visual) observation in prisons as a means of exercising 'disciplinary' power, but his writing on this point has been received as a more general insight by later legal (notably critical legal) scholarship.

[45] According to Max Weber, 'jurisprudence … ascertains what is valid according to the rules of juristic thought, which is composed partly of logic and partly of frameworks established by convention. Thus it determines *if* certain legal rules and certain modes of interpretation are to be seen as binding. It does not answer the question of *whether* precisely these rules should be created. Jurisprudence can only declare that, if one wishes to succeed, then this legal rule is the suitable way of doing so according to the norms of our legal system': Weber, 'Science as a Vocation', in M. Weber, *Science as a Vocation* (trans. M. John, ed. P. Lassman *et al*. 1989), at 3, 19 (emphasis in the original).

[46] See H. Maus and F. Fürstenberg (eds), *Der Positivismusstreit in der deutschen Soziologie* (1969).

and values could be separated. The question before then had only been whether the academic *should* pronounce a value judgement or not. Beyond the *Positivismusstreit*, the problem is conceived the other way round: The severability of science and values has been called into question. The issue is no longer whether the scholar should pronounce a value judgement but, on the contrary, whether she *can* actually *abstain* from doing so. The answer mostly given today, and by Isabel Feichtner too,[47] is that she cannot. A complete value-free academic activity appears impossible, because any kind of statement and any interpretation are pre-structured by the speaker's *Vorverständnis.* International legal scholarship is 'value-free' only in the sense that it does not generate the (legal) norms (as explained above) but only statements *about* norms (about law).

On the other hand, it is not the primary purpose of scholarship to give expression to subjective convictions. International legal scholars should therefore find a middle ground between the unrealistic postulate of value-freedom (*Wertfreiheit*) and unbounded evaluation.[48] When these values are reflected and laid open and not sold as scientific insights the reliance on such values does not damage the scholarly character of reflection, wrote Max Weber.[49] Antonio Cassese says along the same lines: '[w]hat matters, … is that he or she [the scholar] 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'.[50]

In this sense all academic activity is inescapably political. Martti Koskenniemi at the opening conference of the European Society of International Law in Florence in 2004 put it as follows: '[t]he choice is not between law and politics, but between one politics of law, and another. Everything is at stake, but not for everyone. And how to distinguish? Well, in the same way we distinguish between kitsch and non-kitsch.'[51]

6 International Legal Scholarship and Practice

Antonio Cassese was a brilliant academic, un *homme de lettre*, but also a very active and renowned international legal practitioner.

A *How Practice Supports Scholarship*

For Cassese it was 'obvious to say that one cannot be a good lawyer without having, at some point or other, practised law'.[52] First, international legal practice (and notably

[47] Feichtner, *supra* note 4, at 1154–1155.

[48] Engi, 'Wissenschaft und Werturteil – Wissenschaft und Politik', 4 *Ancilla iuris* (2009) 25.

[49] Weber, '"Objectivity" in Social Sciences', in M. Weber, *The Methodology of the Social Sciences* (trans. and ed. E.A. Shils and H.A. Finch, 1949), at 49–112.

[50] Cassese, *supra* note 3, at 259.

[51] Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *EJIL* (2005) 113, at 123.

[52] Cassese, *supra* note 3, at 260.

one's *own* practice) in fact provides themes for academic writing.[53] Secondly, one's own practical experience helps one to realize where international law empirically really stands. For example, a teacher who explains the law to his students can check whether his assertions reflect the law as it stands if he considers whether these explanations would also hold before the ICJ.

Thirdly, practice allows one to test one's (academic) theories. Lord McNair, when he was president of the ICJ, said:

> If I may give my own testimony both as a teacher of law and as a practitioner, I can say that I have constantly had the following experience. Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or contributing to a judgment, I have been struck by the different appearance that the rule may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in the textbook it may sound the quintessence of wisdom, but when you come to apply it its many necessary qualifications or modifications are apt to arise in your mind. I am not for a moment suggesting that the academic approach is more superficial than the practical one. … [I]n my opinion, when counsel and judge are confronted with the need of applying a rule of law, or an alleged rule of law, to certain facts established by evidence, it is probable that the legal element in the resulting solution will be a more useful and more practical rule of law than a rule elaborated by a teacher or writer in his study working alone and in the abstract.[54]

Overall, legal practice provides the 'reality check' for international legal scholarship.

B *How Scholarship Supports Practice*

But while international legal practice is obviously useful and important for the scholar, the reverse is equally true: international scholarship can help international legal practice. Under what conditions and in what manner does this occur?

Hans Georg Gadamer wrote that 'theory must justify itself before the forum of practice'.[55] So is 'theory' valuable only if it has a practical use? I submit that the explanatory power of a theory is already one form of practical use: There is nothing more practical than a good theory.[56]

[53] See more generally on the roles of practitioners and scholars in international law Peters, 'Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht', in 47 *Berichte der deutschen Gesellschaft für Völkerrecht* (2012), at 105–173.

[54] Lord McNair, 'The Development of International Justice: Two Lectures Delivered in the Law Centre of New York University' (1954), in Lord McNair, *Selected Papers and Bibliography* (ed. Sir Gerald Fitzmaurice and R.Y. Jennings, 1974), at 242, 257–258.

[55] Gadamer, 'Lob der Theorie', in H.-G. Gadamer, *Lob der Theorie: Reden und Aufsätze* (1983), at 26, 38 (author's trans.).

[56] This dictum is often ascribed to Immanuel Kant but was probably coined by Ludwig Boltzmann. See Peters, 'There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law', 44 *German Yrbk Int'l L* (2001) 25; Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts in der Praxis', in W. Weischedel (ed.), *Immanuel Kant: Werke in 12 Bänden*, xi (1977), at 127–172, esp. Ch. III, 'Vom Verhältnis der Theorie zur Praxis im Völkerrecht, in allgemein-philantropischer Absicht, d.i. kosmopolitischer Absicht betrachtet'. This was first clearly expressed (without reference to Kant) by Boltzmann, 'Über die Bedeutung von Theorien (1890)', in L. Boltzmann, *Populäre Schriften* (ed. E. Bora, 1979), at 54, 57: 'Daß … die Theorie auch das denkbar praktischste, gewissermaßen die Quintessenz der Praxis sei.'

Legal scholarship's link to practice has traditionally been especially close. In continental Europe, legal scholarship has therefore been called 'a theory for reflecting practice', the essence of which consists in that practical relevance.[57] Seen in this light, legal scholarship is in a peculiar way an 'applied' as opposed to a 'foundational science' (see on this section 7 below).

In contrast, in the US, legal scholarship seems to have drifted away from legal, notably judicial, practice. Academic writing appears to be so theoretical, so much 'law and …' that it seems irrelevant and uninteresting for legal practice and is in consequence not cited by the courts. An observer has characterized the situation as 'estrangement', as 'mutual indifference', as 'disconnection', and 'gap between academy and profession'.[58] Recently John B. Bellinger III, legal adviser to the US Department of State from 2005 to 2009, encouraged the student-run US-American international law journals 'to try to stay away from the theoretical, which is generally not helpful to practicing government lawyers … I found 90% of law review articles not terribly helpful' because they were 'too academic'.[59]

I submit that while the US-American state of alienation is infertile, the continental European fetishism with practice is, too. In the following sections, I plead for a *via media* on three levels: First, applied legal research must be complemented by foundational research. Secondly, doctrinal analysis must be complemented by empirical, ethical, and theoretical research. And thirdly, positive analysis must be complemented by normative analysis.

7 Applied and Foundational International Legal Scholarship

At the risk of stating the obvious, it should be pointed out that foundational international legal scholarship is indispensable. That quest concerns the ideal-typical dichotomy between 'applied' and 'foundational' science. 'Applied' international legal scholarship generates knowledge at a low level of abstraction, which knowledge can be directly used to solve concrete legal problems. Application-oriented studies advise institutions and office-holders, providing concrete help in decision-making or

[57] Von Arnauld, 'Die Wissenschaft vom öffentlichen Recht nach einer Öffnung für die sozialwissenschaftliche Theorie', in A. Funke and J. Lüdemann (eds), *Öffentliches Recht und Wissenschaftstheorie* (2009), at 65, 75 with n. 52; Schulze-Fielitz, 'Staatsrechtslehre als Wissenschaft: Dimensionen einer nur scheinbar akademischen Fragestellung', in H. Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft* (2007), at 11, 26.

[58] Twining, Farnsworth, Vogenauer, and Tesón, 'The Role of Academics in the Legal System', in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), at 920, sect. 3 by Farnsworth, 'The United States', at 929–933.

[59] Bellinger and his colleagues are – if at all – interested in overview articles, e.g., on some treaty negotiations, especially on older treaties, and with information about foreign states. At least: 'occasionally we would find people who really thought hard about an issue and who would give us something that we hadn't thought of before. So I think the work that is done by international law journals can be very helpful as long as it doesn't get too academic': Bellinger III, 'Interview', 52 *Harvard Int'l LJ – online* (2010) 32, at 33.

prompting the preparation of international agreements. The line between this type of research and international legal practice is blurred.

'Foundational' scholarship, in contrast, furnishes knowledge about basic structures, developments, or patterns of international law. An example is the scholarly designs of global constitutionalism and a global administrative law.

Only this type of research can withstand the extreme dynamics of international legal development, notably in some fields, such as international criminal law or international investment law. International legal scholars should react by working on a sufficient level of abstraction and generality. Only then will their work be independent of the latest technical changes, and refer to a *lasting* object of study.

Only then can scholars escape the fate expressed by the Prussian Prosecutor Julius Hermann von Kirchmann in his famous 1847 Berlin lecture on the 'Worthlessness of Jurisprudence as a Science'. Kirchmann had identified the transitoriness of the subject matter of law 'as the fundamental ill, from which the science suffered'. 'By making the accidental its object, it becomes random itself; three corrective words of the legislator, and entire law libraries become scrap paper.'[60] The way not to produce scrap paper is to engage with foundational legal issues.

8 Multidimensional International Legal Scholarship

The activity of international legal scholars will be successful, i.e., will generate knowledge which can be transmitted in an intersubjective way, when it is conducted in multiple dimensions.[61]

A *Doctrinal*

First, some of it should be doctrinal. Doctrinal scholarship maps the structure of public international law. First, it conveys an overview of the law as it stands by arranging legal concepts, basic principles, and rules on decision making. Secondly, it orders and structures the law. This research dimension is called doctrinal because it is tied to legal rules, principles, and decisions that count as 'doctrines' or even as 'dogmata'. The method of doctrinal research is primarily logical semantic analysis. A scholar can, for example, examine the meaning of the term 'jurisdiction' in Article 1 ECHR, which is of fundamental importance for the applicability of the Convention in complex situations such as peace missions abroad.

Doctrinal analysis seeks to impact directly on court decisions and on treaty-making. It is practice-oriented to such an extent that it has been called a 'scholarship of law application'[62] and a 'scholarship to prepare decisions'.[63]

[60] J.H. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (ed. H.H. Meyer-Tscheppe, 1988), at 15, 29 (author's trans.).

[61] See in detail Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus', 67 *ZaöRV* (2007) 721.

[62] 'Rechtsanwendungswissenschaft': van Aaken, 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft', in M. Jestaedt and O. Lepsius (eds), *Rechtswissenschaftstheorie* (2008), at 79.

[63] 'Entscheidungsvorbereitungswissenschaft': von Arnauld, *supra* note 57, at 87.

However, because of specific qualities of international law, doctrinal analysis in this field is of limited value. First, the stuff of public international law is less dense than in the main field of application for doctrinal research: domestic contracts, tort, and property law. There are, in total, fewer rules and judicial decisions. So a logical-semantic analysis of this 'thin' legal subject matter yields less.

Secondly, a considerable amount of international law is still uncodified. The exact content of customary international law must first be investigated with non-logical-semantic methods. This is a different task from the investigation of the meaning or sense of a written rule (treaty interpretation). Fernando Tesón mainly refers to this feature: 'it is not possible to identify international legal rules by conventional doctrinal methods. If international legal scholarship is going to advance human values and not simply serve those in power, it must supplement legal doctrine with international relations theory and political philosophy. Otherwise, it will continue to be an exercise in futility.' [64]

Thirdly, international law is to a higher degree than domestic law the result of political compromise, and for that reason less systematic and less clear than other legal materials. These three peculiarities of international law require additional research dimensions, besides the doctrinal analysis of the law.

B *Empirical*

Such a dimension is empirical research. Here international legal scholarship attempts to 'study the conditions under which international law is formed and has effects'.[65]

Cassese himself used an empirical method, namely interviews with eminent lawyers, in order to find out something about 'the current role of international law in the world community' and also to find out how eminent international lawyers 'had come to grips with this problem [of legal positivism], and in particular to what extent they had segregated law from other social sciences'.[66]

Empirical international legal scholarship may be conducted at the micro or macro level. At the micro level, the researcher investigates the origins of a particular norm. At the macro level, s/he studies larger trajectories, e.g., the evolution of whole legal regimes, such as the law of the sea or the climate change regime. In either case, the concern is the investigation of concrete factors behind the development of norms and the identification of the conditions under which the rules work.

Empirical scholarship can also be historical. For example, we can investigate the historical evolution of Article 42 of the International Law Commission's Articles on State Responsibility to test a hypothesis about the development of the concept of obligations *erga omnes* (research into foundations) or to apply that provision correctly in an actual case of liability (applied research).

[64] Twining *et al.*, *supra* note 58, at 920–949, therein Tesón, at 941–947, quotation at 947.

[65] Shaffer and Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *AJIL* (2012) 1, at 1.

[66] Cassese, *supra* note 3, preface, at viiii.

Empirical research is notably concerned with the *effects* of public international law. In this research dimension, norms are seen as a mode of governance, and compliance with these norms is investigated. This type of research explores the impact of international law on international relations. It attempts to establish when, where, and to what extent these norms actually direct the behaviour of the relevant actors, and asks why and under what circumstances international law is followed or disobeyed. Given the difficulties with enforcing international law, this dimension is particularly important. However, it does not work without a glance outside the discipline. It can profit from new governance theories in administrative law and administrative theory. More than anything else, it should embrace the results of parallel research in international relations.

Compliance research is empirical research, but it is also theory-based, since it works on models. Gregory Shaffer and Tom Ginsburg have called this 'emergent analytics', that is 'analytics that oscillate between empirical finding, real-world testing, and back again'.[67] For example, Jack Goldsmith and Eric Posner employ a rational choice model for studying public international law,[68] with legal norms backed by sanctions functioning much like prices for certain behaviour. For these authors, the scarcity of 'hard' sanctions for breaches of public international law is the decisive factor behind deficiencies in the operation of public international law. There is, however, much to be gained by working with other models as well in such 'real-world' legal research.[69]

C *Theoretical*

A third dimension of research is the theoretical one. What is meant here is 'theories about law', as the New Haven School called it.[70] This is something other than 'methods' or the so-called theories, as used by law-appliers to interpret a legal norm in an actual case, but not to reduce complexity. The theoretician of law is concerned with questions such as 'What is public international law?' and 'How does argument in public international law function'? Gender-focused investigations of the structure of public international law and its potential gender bias fall within this dimension as well.[71] Good research questions can be asked in the theoretical dimension. For example, theories about the emergence of customary norms have so far not really been satisfactory. None of them has been able plausibly to explain the transition from breach of the old rule to the establishment of a new customary rule.[72] Or, to give another example, against the background of denials of public international law[73] it seems particularly

[67] Shaffer and Ginsburg, *supra* note 65, at 1.

[68] J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

[69] H. Albert, *Rechtswissenschaft als Realwissenschaft: das Recht als soziale Tatsache und die Aufgabe der Jurisprudenz* (1993), at 7 and *passim*.

[70] McDougal, Lasswell, and Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 *Virginia J Int'l L* (1968) 188, at 200 (Faculty Scholarship Series, Paper 2577).

[71] H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

[72] See on the impossibility of distinguishing the error in law (in relation to a still-valid customary rule) from the new *opinio iuris* Kelsen, 'Théorie du droit international coutumier', 1 *Revue internationale de la théorie du droit* (1939) 253, at 263.

[73] Bolton, 'Is There Really "Law" in International Affairs?', 10 *Transnat'l L and Contemporary Problems* (2000) 1.

important to conduct new research into the legal-ness of public international law notwithstanding its weak enforcement and weak democratic legitimacy.

In the theoretical research dimension a plurality of theories is emerging. Until recently, post-modernism, in the form of critical legal studies, occupied the space for theory. Presumably, however, critical studies will slip into the background as (by definition) they can offer no constructive solutions to problems. Other approaches may play a larger role, depending on the area of public international law, e.g., feminist approaches in international criminal law and human rights law, or rational choice theories in treaty law.

D *Ethical*

Antonio Cassese called for an ethical approach to international law: 'in my view, for somebody to be an intellectual and not a mere lawyer, is also that he or she attaches great importance to ethical values and tries in a way to use them'.[74] In that ethical research dimension, international legal scholars should investigate the ethical contents of international law (often embedded in specific world views) and criticize these with reference to non-positivist standards of justice.[75]

This research task is incumbent on international legal scholars because public international law – like all law – claims to be just. The evaluation of positive law by reference to non-positivist standards of justice or rightness is even more appropriate in international legal scholarship than in the study of the domestic law of democratic states. The reason is that in a democratic order, the law is justified by its democratic genesis and by the state's constitutional confines. Considerations of an 'external' legitimacy are problematic with regard to laws which have been enacted in a democratic process. In contrast, public international law lacks a direct democratic foundation. Codified bases for public international law similar to those found in state constitutions, which would provide criteria for an assessment of the law's legitimacy, are only rudimentarily available. For this reason, the study of public international law can and must include ethical considerations to a greater degree than research in domestic law.

Natural law re-emerged briefly after World War II and in public international law is notably associated with Hersch Lauterpacht. After this short renaissance, the field was practically cleared of constructive ethics. The Kosovo intervention of 1999 represented a turning point. It initiated a 'turn to ethics', as Martti Koskenniemi called it,[76] not just in the political and legal, but also in academic discourse. This 'turn to ethics' is, to give but two examples, documented in the controversy about a responsibility to protect and in the debate on the constitutionalization of international law.

In these and other spheres of inquiry, the ethical dimension complements other areas of research quite sensibly. For example, the current international political situation

[74] Cassese, *supra* note 3, at 142.

[75] See, e.g., J. Rawls, *The Law of Peoples* (1999) who considers 'how the content of the Law of Peoples might be developed out of a liberal idea of justice' (at 1).

[76] Koskenniemi, '"The Lady Doth Protest Too Much", Kosovo, and the Turn to Ethics in International Law', 65 *MLR* (2002) 159.

suggests a scientific re-appraisal of the principle of state equality and the tension between *de jure* equality and *de facto* inequality. It is the job of international legal scholars not just to assess whether a general principle of the inequality of states is emerging. It is also their task to map the structural impact of such a change, as well as its ethical implications. Another research project in the ethical dimension would be to explicate the reformulation of state sovereignty as responsibility for human beings, which has already been accepted in state practice. Of course the world view of the researcher will influence his inquiry into the question whether the ultimate purpose of state sovereignty is human dignity and individual rights. But so long as it is argued *ex suppositione*, the method is still scholarly.

Finally, the moral foundation of human rights is a suitable issue for international legal scholarship since it determines their interpretation, and thus the application and potential limitations of those rights. For example, with the assistance of ethicists and empirical social researchers, international legal scholars can identify an existing consensus on values having regard to basic human capabilities and needs.[77]

These and other problems cannot be properly investigated if the ethical research dimension is blended out. It is not just the revival of the ethical research dimension, but also its reflection at the meta-level, which is needed *vis-à-vis* the uneasy triangle of public international law's claim to universality, the real diversity of lives, and the ideal of global pluralism.

9 Positive and Normative Analysis

Antonio Cassese deplored the tendency of European international scholarship to refrain from a critique of legal practice. He thought that US-American scholars more often, for example, attacked the position of the state department. 'But in our countries, we have the tendency to be quiet. It's an unfortunate trait.'[78]

What Cassese asks for is a *normative* analysis of international law by scholars. *Idealtypically*, the normative analysis can be distinguished from a positive analysis, in which the law is described, explained, and prognosticated. In reality, there is a blurred intermediate zone. First, because 'description' is in itself already a constructive and systematic performance, which is based on numerous distinctions and choices. The 'observer' must choose the actors, the acts, the periods of examination, and he must interpret texts. In all this, the observer's ('normative') preconceptions pre-structure her 'positive' description. This blurred zone has been well described by a law-and economics scholar who in principle insists on positive analysis of the law: 'the responsibility of scholars is *to illuminate, not to promote their own ideals.* On the other hand, good scholarship holds great promise for advocacy; for it can clarify causal relationships that are otherwise obscure. *Illumination is not neutral*.'[79]

[77] *Cf.* A.K. Sen, *Commodities and Capabilities* (1985); Sen, 'Capability and Well-being', in M.C. Nussbaum and A.K. Sen (eds), *The Quality of Life* (1993), at 30–66; M.C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000), at 4–15.

[78] Cassese, *supra* note 3, at 25.

[79] J.P. Trachtman, *The Economic Structure of International Law* (2008), at 4 (emphasis added).

The (idealtypically) 'purely' positive analysis (i.e., the identification and description of the law as it stands and of its application and interpretation as it is in fact practised) has been castigated as 'a kind of positivistic dogmatism', and as a 'dry, seemingly value-free analysis of international rules'.[80] From this perspective – which I share – the task of international legal scholarship encompasses normative analysis as well.

Normative analysis means justifying or criticizing existing norms and making reform proposals. It also means evaluating the application of the law and criticizing such practice. Because of the leeway inherent in any interpretation and application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a 'normative' and not merely a 'positive' analysis. Such a normative analysis was, for example, performed by scholars and academic institutions who analysed the application of the rules concerning the use of force and the Security Council by the US and British government in the spring of 2003, who highlighted that these rules had been misinterpreted and distorted by the political actors, and that they could not serve as a proper legal basis for the invasion of Iraq in 2003.

Such a normative analysis is rejected by traditional legal positivists, who demand that international legal scholarship should occupy a 'role [only] as a supernumerary and chronicler'.[81] It is also rejected by contemporary neo-Kelsenianists[82] and by the hard core law and economics school. For example, Goldsmith and Posner deplore that 'theorizing often fuels, and is overtaken by, normative speculation about improving international law'.[83]

In opposition to that stance, the following paragraphs seek to show that specific features of international law, notably its openness and dynamics, *require* a normative analysis of the law and of its applications.

A *The Need for Normative Analysis*

International law is characterized by a typical indeterminacy and vagueness of treaty provisions and by a large number of unwritten norms. Therefore much more doubt hovers over the existence of the *lex lata* than in domestic law, which is relatively fully and precisely codified in the form of codes, laws, and decrees. In addition, international law has evolved gradually, often out of soft law texts. The exact point of change from a pre-legal practice to a hard rule of international customary law can hardly be pinpointed. For these reasons, neither the canons of construction for treaty interpretation nor empirical research on the formation of customary law will in themselves yield clear results. The findings must be complemented by normative considerations. For example, it makes sense to qualify a practice and the accompanying *opinio iuris* as

[80] Tesón in Twining *et al.*, *supra* note 58, at 942.

[81] Hillgruber, *supra* note 30, esp. at 121.

[82] Critically on creeping law-making by scholars from the perspective of a pure theory of law see Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Law "Methodology"', in J. Crawford and S. Nouwen (eds), *Proceedings of the European Society of International Law* (2012), at 115–126.

[83] Goldsmith and Posner, *supra* note 68, at 15.

sufficiently general and enduring when the legal norm identified thereby is overall in conformity with the international legal system and in harmony with other international legal principles. As Antonio Cassese put it, 'the critical positivist should feel free … critically to appraise the rule or institution … in light of the … general values upheld in the international community'.[84]

A second reason for the desirability of a normative analysis is the historical experience of the defencelessness of the 'pure' scholarship of international law against ideological modification of the law. 'Pure' positivism 'may be deemed to involve a logical and moral ban or impediment to lawyers in the fight against authoritarian regimes'.[85] Notably during the Third Reich many international legal scholars did not voice any critique. Instead of pointing out violations of international law, they subscribed to a national socialist doctrine of international law by which the norms were modified and adapted to ideology.[86]

In our times, too, purely positive analysis has engendered a false security. Because of the openness of international norms it is often not really clear what their contents are. In this situation, states will tend to assert rules which are in their favour (and thereby set up their own version of international law) or they will do what they want.[87] This false security will lead to legal advice devoid of content and to useless recommendations about compliance with those norms. And exactly this animates further disregard of international law.

B *Normative Analysis Properly Conducted*

The normative analysis we need should not take the shape of academic law-making attempts. The (lacking) authority of scholars to *make* law was explained above in section 4. An unconscious attempt to steal authority is present when scholars sell emerging norms for law as it stands. This phenomenon is widespread in international legal scholarship, last but not least because the boundary between law and not-yet-law, due to the special features of the international legal process, is often unclear. The premature labelling of merely emerging norms as valid law is in methodological terms flawed because it mixes (beyond what is inevitable[88]) positive and normative analysis, and because it derives the 'ought' from the 'is'. Moreover, it risks undermining the normative power of international law as a whole. When the legal scholar wrongly asserts the existence of a legal norm he usurps the position of a law-maker without normative justification. He is authorized only to make proposals for law reform, but that he should do, for the reasons explained above.

As long as legal scholars mark where they make an evaluation (by relying on principles found within the international legal order), and as long as they signal what is,

[84] See in this sense Cassese, *supra* note 3, at 259. Cf. for a critique of the neglect of taking into account general principles H. Lauterpacht, *The Function of Law in the International Community* (1933), at 438: 'the desire of generations of international lawyers to confine their activity to a registration of the practice of States has discouraged any attempt at relating it to a higher legal principle, or to the conception of international law as a whole'.

[85] Cassese, *supra* note 3, preface, at viii.

[86] See Vagts, 'International Law in the Third Reich', 84 *AJIL* (1990) 661 with references.

[87] Tesón in Twining *et al.*, *supra* note 58, at 942 and 945.

[88] See text to note 79 above.

according to their analysis, the *lex lata*, and what they request *de lege ferenda*, a normative analysis fully conforms to scholarly standards. Interviewed by Antonio Cassese, Louis Henkin described the tightrope walk between methodologically sound, but still creative reconstruction of the law and unscholarly juris-fiction as follows: 'I don't trust the wishful thinkers, I don't trust those who say "this is the law because it ought to be". But I support those, and I am one of those, who say "this is what the law ought to be, and whether I'm not sure it's not, let me see to what extent it is maybe, or can be made to be".'[89] In this form (as evaluative systematization and evaluative closure of legal gaps) normative analysis is not only a methodologically sound element of international legal scholarship in the sense of 'nice to have' but an indispensable part of it. Normative analysis is necessary, exactly because of the inherent graduality of the international legal process and because of the underdeterminacy of treaty law, besides the positive analysis, last but not least to help prevent breaches of international law.

Sir Robert Jennings, in his interview with Cassese, gave the following thoughts: '[l]aw reform is a very, very important subject intellectually, and not just for lawyers either. … in a way I am almost contradicting what I said at the beginning … that you have to be able to distinguish between proposals and what is really law and so on, almost stick to the law because that's your particular job. Well, life is full of contradictions and ambivalence. … ambivalence leads to the truth. Given two contradictory ideas you may then find that neither represents the truth, but that something that involves both of them and is part of both of them is at any rate a nearer approximation to the truth.'[90] Overall, it is the ambivalence between normative and positive analysis that characterizes international legal scholarship. It embodies a tension which is productive.

10 Conclusion

Although I hardly knew Antonio Cassese personally, he has become one of my heroes, exactly because his academic writing never appeared to me as a *Glasperlenspiel*. Everything I read by him (only a fraction of his huge oeuvre) seemed to me to be inspired by a deep humanism. It was clearly driven by a political agenda, but the rigour of the argument generally did not suffer from this. For me, Cassese's approach is the best demonstration that any strict separation between law and politics is neither feasible nor desirable. Cassese's legal texts are deeply political, but they are not 'unscholarly' because of this. I admire Cassese not because I approve of his political agenda (although that is the case), but because he taught me how to weave it into legal reasoning.

Antonio Cassese's concluding words in *Five Masters* are: '[p]lainly, the key to the principal problems of the world community is in the hands of politicians, diplomats and military leaders. Nevertheless, legal scholars may suggest ideas and advance solutions – without, however, harbouring too many illusions.'[91] This is the programme of a 'realistic' as opposed to an 'illusionary utopia' – and it is emphatically the province of legal scholars.

[89] Cassese, *supra* note 3, at 197.
[90] Jennings, in *ibid.*, at 143.
[91] *Ibid.*, at 271.