ABSTRACT

International law feeds on preconditions which it cannot guarantee itself. International scholarship, too, must come to grips with pre-conditions and existing parameters over which it has no control itself. But such scholarship must not ‘succumb’ to these factual and ideational realities by adapting its methods and findings to any given political, social, and economic climate. It is the job of international legal scholars to produce ideas in a spirit of realist utopianism (John Rawls). Depending on the existing parameters, these ideas are apt to shape attitudes and actions, or not. Such scholarship also needs to distance itself from its object of study in order not to lose its capacity to criticise the law and the practice. How far exactly scholarly writing should transcend or keep aloof from the prevailing political climate and from concerns of feasibility depends on the research questions under discussion and is a matter of judgment.

The style of scholarship suggested here is illustrated by the work of three eminent scholars whose careers continued through different political eras more or less favourable to the international rule of law: Hersch Lauterpacht, Antonio Cassese, and Josef Kunz.

KEYWORDS:

international law, utopia, idealism, realism, inter-war period, First World War, Second World War, international criminal law, human rights, option of nationality
The Rise and Decline of the International Rule of Law and the Job of Scholars

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International law feeds on preconditions which it cannot guarantee itself

‘The state feeds on preconditions which it cannot guarantee itself.’¹ This axiom, formulated by the German constitutional scholar Ernst-Wolfgang Böckenförde, is also true for the international legal order, which is created mostly by states. That order feeds on preconditions which it cannot guarantee itself. And this means that international scholarship, too, must come to grips with pre-conditions and existing parameters over which it has no control itself. These pre-conditions and existing parameters are not only material and economic, but also intellectual and moral.² Does this mean that scholarship must ‘succumb’ to these factual and ideational realities by adapting its methods and findings to any given political, social, and economic climate? I would argue that this should in principle not be the case.

The example of ‘national socialist international legal scholarship’ which adapted to National Socialism,³ and the example of a ‘socialist international legal scholarship’, cherished by Soviet scholars,⁴ shows that such type of treatment of a given political reality by scholarship cannot be a good thing. An Islamist international scholarship or an anti-Islamist international legal scholarship would not be a good idea either.

The deeper reason why international legal scholars — if they want to remain scholars — must not simply turn with the political tide, is that international law, as every law, consists of norms, and this means pre-scription and not de-scription. Law is by definition counterfactual. It does not only describe how states behave because otherwise it would not be law. It prescribes how states and other international actors should behave. Law is actually a social

² The latter sphere is probably what Böckenförde had on his mind.
instrument designed specifically to deal with the situation that the actors subjected to the norms do not always comply with them but also break them.

Legal scholarship describes these norms, analyses and comments on them, extracts the norms’ general principles, points out consistencies and inconsistencies, fills gaps by relying on principles within the system, or criticises state behaviour as violating the norms, sometimes makes proposals for better norms, or finally contextualises, historicises, and problematises the norms. All these scholarly intellectual operations relate first of all to the world of the ‘ought’. Most varieties of scholarship also deal with the norms’ interaction with the ‘is’. Scholarly attention to the interaction between the ‘ought’ and the ‘is’ seems appropriate, because ─ I submit ─ legal scholars should neither confine themselves to an analysis of norms in clinical isolation, as a ‘pure theory of international law’ would have it, nor just describe norms in terms of current power relations, but should seek to combine both strategies by employing legal reasoning which takes into account the realities of politics and of the economy. Put differently, it is exactly the job of international legal scholars to produce ideas, ideas which ─ depending on the side conditions ─ potentially have the power to shape attitudes and actions, hence also law-making and legal interpretation, together with political, social, cultural, and other factors.5

Three examples of scholars: Hersch Lauterpacht, Antonio Cassese, and Josef Kunz

This style of scholarship is well illustrated by the work of three eminent scholars whose careers continued through different political eras, in which the power of international law was weaker or stronger, in terms of a political climate more or less favourable to the international rule of law.

The first example is Hersch Lauterpacht (1897-1960).6 When Lauterpacht published the first book ever on international human rights in 1945,7 no one would have thought that 21 years later two binding international human rights covenants would be adopted. When Hersch Lauterpacht gave his seminal course in The Hague on international human rights in the summer of 1947,8 not many people believed that 18 months later a universal declaration of human rights would be adopted by the General Assembly of the new world organisation, the

5 See on the promise of normative analysis as opposed to purely positive analysis Anne Peters, ‘International Legal Scholarship Under Challenge’ in Jean d’Aspremont and others (eds), International Law as a Profession (CUP 2017) 117 at 130-134.
7 Hersch Lauterpacht, An International Bill of the Rights of Man (Columbia UP 1945). This book then became one chapter in his Hague course (note 8).
United Nations. Lauterpacht moreover postulated a general principle according to which individuals are the ultimate addressees of all law: ‘[H]aving regard to the inherent purposes of international law, of which the individual is the ultimate unit, he is in that capacity a subject of international law’. According to Lauterpacht, the international legal personality of the individual has ‘a source independent of the will of States’, without requiring an explicit or even just implied consent of the States. On this point, State practice is ‘essentially declaratory’.

Hersch Lauterpacht had smuggled this doctrinal view into the 5th edition of the textbook of his mentor, Lassa Oppenheim, whose previous editions had been strictly statist. Hence, already in 1937, Lauterpacht wrote: ‘While it is of importance to bear in mind that primarily States are subjects of International Law, it is essential to recognise the limitations of that principle [...] In particular, when we say that International Law regulates the conduct of States we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the state. [...] Also, although States are the normal subjects of International Law they may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of International Law [...] The doctrine adopted in many municipal systems to the effect that International Law is part of the law of the land is upon analysis yet another factor showing that International Law may operate per se upon individuals [...].’ The necessity of the status of the individual as a subject was justified by Lauterpacht with reference to the prevention of general irresponsibility due to the establishment of a protective screen by the State.

Not many realised at the time that exactly this idea formed the core argument of the Nuremberg judgement of 1946 against the major war criminals whose key phrase was: ‘That International Law imposes duties and liabilities upon individuals as well as upon States has long been recognized. [...] Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the

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10 Ibid 532-533.
provisions of International Law be enforced.’ It took more than 50 years to operationalize this postulated criminal responsibility with the help of a permanent institution, the International Criminal Court (ICC), based on the Rome Statute of 1998. Moreover, the legal justification of this criminal liability has been long in dispute, and still does not unequivocally follow Lauterpacht’s construction.

My second example is Antonio Cassese (1937-2011). Cassese studied law and began publishing during the era of the Cold War, an era in which the power of international law was limited and the Security Council blocked. After 1990, in his capacity as the first President of the Yugoslavia tribunal, Cassese ran the Tadić proceedings against a major war criminal. The jurisdictional decision of the Appeals’ Chamber of 1995 basically created new law which was immediately accepted. First of all, the decision established the principle that the Security Council has the power to establish a criminal tribunal but is nevertheless bound by the principles of the Charter. This passage has become a seminal text on the constitutionalization of international organisations. Second, Cassese, together with his colleagues on the bench, found that certain breaches of the rules of non-international armed conflict are prohibited, and even saddled with criminal responsibility, in the same way as comparable acts in international armed conflict: ‘What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’ This part of the decision was a decisive building block of the ongoing approximation of the law of international and non-international armed conflict.

Both the Nuremberg trial and the Tadić proceedings have been called ‘Grotian moments’ in the formation of international customary law. A Grotian moment is a moment of change in which new rules are more or less instantaneously accepted by the international community. For sure, the changes of the law occurred in a new political context, and depended on this context: The Nuremberg tribunal was ‘a political solution to a practical problem’ and ‘individual responsibility under international law was [only] a by-product of that solution.’

13 ‘International Military Tribunal, judgment of 1 October 1946’ in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August, 1946 to 1st October, 1946), 446-447.
15 Cassese was President from 1993 to 1997, and continued to sit as a Tribunal judge until 2000.
19 Kate Parlett, The Individual in the International Legal System (CUP 2011) 352.
And the ICTY was created in 1993 in reaction to the Yugoslav secession war in whose course atrocious war crimes and genocide had been committed which screamed for a response. Due to the overall political constellation, the permanent members of the Security Council agreed to establish a War Crimes Tribunal, and so it was done.

These Grotian moments were surely facilitated by the influence which Lauterpacht and Cassese (respectively) had as legal practitioners. Lauterpacht was inter alia a counsellor to the British prosecution team at Nuremberg and Cassese was the President of the Yugoslavia Tribunal at the time of Tadić. But a modified political context and the practitioners’ work cannot function as a catalyst of legal change if there is no legal substance to draw on. This substance was the scholarly work of our two protagonists. In their scholarship, they had formulated principles, thought them through and explained their consequences, and fitted them into an intellectual system. Importantly, this ground work was in both cases performed in a political climate which was hostile to international law but could nevertheless unfold its potential once the climate changed.

My third example is Josef Laurenz Kunz (1890-1970), the probably most influential disciple of Hans Kelsen. Kunz’ career in some sense followed the opposite trajectory from that of Lauterpacht and Cassese. The former had begun to exercise their profession during political periods in which the power of international law was weak, but then lived on to witness a change of the political climate which was more favourable to the international rule of law, and which they could then exploit. In contrast, Kunz, who earned his degree of Dr rer pol in 1920, started out in the post-Versailles era in which an international law optimism, the ‘Geneva spirit’ reigned. Kunz shared Kelsen’s cosmopolitan convictions, reinforced by his experience of the First World War.


Kunz then witnessed, as he himself put it, a ‘swing of the pendulum’, ‘from overestimation to underestimation of international law’. He noted, in an article published post World War II (in 1950), that a spirit of underestimation of international law had already begun in the 1930s. Kunz also insisted that ‘[i]nternational lawyers must not forget that international law does not operate in a vacuum, that even proposals de lege ferenda have sense only within the boundaries of political possibilities of being realized at a particular juncture of history.’ Put differently, scholarly writing on international law which floats up in the air out of touch with reality will hardly be ‘successful’ in the sense of contributing to better law and more global justice.

At the same time, the essence of scholarship is its distance to the object of study. Without this distance, scholars would be sucked up and would lose their capacity to criticise the law and the practice. It is of course not possible to measure and define the distance that would be exactly right for all purposes, as this is a matter of judgment. How far scholarly writing should transcend or keep aloof from practice, from the law as it stands, from the political climate, and from concerns of feasibility depends on the research questions involved. In short, it might always be open to doubts and discussion how ‘counterfactual’ scholarly normative reflection should be.

Josef Kunz’ reminder of the limits placed on legal scholarship by politics is saturated with his own academic experience. Kunz had, inspired by the international practice of territorial re-arrangement after World War I, written an opus magnum in two volumes on the law of option, that is the rules governing the choice of nationality after territorial changes, published in the 1920s. Josef Kunz here asserted a customary right of option. In hindsight, we realize that this was too early. Kunz’ thesis was — at the time of writing — wishful thinking. Options of nationality after World War I were based on specific treaty provisions and did not give rise to any independent customary obligation. In state practice after 1989, when the Soviet Union and Yugoslavia broke up, only around half of new states allowed for a choice of nationality by the inhabitants of territories which came under a different jurisdiction.

However, it nowadays seems fair to say that procedural rules on options of nationality exist. If an option is granted either by treaty or by domestic law, time limits for the exercise of this

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22 Josef L Kunz, ‘Swing of the Pendulum: From Overestimation to Underestimation of International Law’ (1950) 44 AJIL 135-140.
23 Ibid 140.
25 Peters (n 5) 150.
26 Josef L Kunz, Die völkerrechtliche Option (F. Hirt 1925-1928).
right must be reasonable. This rule of reasonableness is apt to deploy some normative power. To give one example, the inhabitants of Crimea had only one month after the annexation of the peninsula by Russia in March 2014 to opt for upholding their Ukrainian nationality, and they had to declare this in specific Russian administrative centres which were not easily accessible, otherwise they automatically became Russian nationals. This scheme appears unreasonable.

So Kunz’ grand design to some extent bore fruit and his intellectual groundwork may have contributed to rationalising subsequent practice. He did not live to see this but — quite to the contrary — suffered career setbacks: His Habilitation proceeding at the university of Vienna was opposed by a nationalist colleague at the faculty of Vienna who disliked his cosmopolitan outlooks, and his promotion was therefore delayed. So Kunz personally had been penalized for his ‘progressive’ scholarly opinions.

**Idealist scholarship and international political crises**

Let me tie these examples back to the assumption that international law has now entered into a new phase which maybe started with the illegal Iraq war by the US in 2003, or maybe with the Russian unlawful annexation of Crimea in 2014. The question is what international legal scholars in this new phase of international law might learn from the historical fate of previous international law scholarship. The sub-text of this question might be that the ‘idealist’ scholarship of the 1990s was naive and utopian in the bad sense.

Does this require scholars who had claimed that a process of juridification, legalization, proliferation, or even constitutionalization of international law has been taking place (I

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27 Cf. Art. 11(5) of the *ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries* (ILC YB, 1999, Vol. II(2) 23). Ronen highlights that the manner in which an option of nationality is granted may be subject to international customary limitations (Yael Ronen ‘Option of Nationality’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP online 2009), para 12). In state practice, the shortest time limits granted before 2009 for the exercise of the right of option had been three months (ibid para 22).

28 Art. 5 of the Agreement on the Accession of the Republic of Crimea to the Russian Federation of 18 March 2014: ‘As of the day of the admission of the Republic of Crimea into Russia and the formation of new federative entities within the Russian Federation, Ukrainian citizens and stateless citizens permanently residing in the Republic of Crimea and in the city with federal status Sebastopol are recognized as Russian citizens apart from those people who within one month from this day express their wish to retain their current citizenship for themselves and their underage children or to remain persons without citizenship.’ Inoficial transl. at http://www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebastopol_to_the_Russian_Federation_ Unofficial_English_translation_with_little_commentary).

29 The inopposability of the new Russian nationality of the inhabitants of Crimea does not only flow from the violation of the procedural rules on options, but mainly from the illegality of the territorial change. A great number of states does not recognize the incorporation of Crimea into the Russian Federation but explicitly or implicitly qualified the territorial change as unlawful. This also implies that these states do not, as a matter of principle recognize the new Russian nationality of the inhabitants except if this entails humanitarian hardships.

30 See Bernstorff (n 21), 285.
include myself) now meekly admit that this was built on false assumptions which have now shattered? Have entire juridical libraries been transformed into scrap paper, not by a stroke of the pen of the legislator, as the Prussian prosecutor Julius Hermann von Kirchmann said in his famous lecture of 1847 with regard to national law, by totalitarian and xenophobic politics, by the power of global financial actors, by the rise of new fundamentalist anti-liberal and anti-secular ideologies, and by unbridled military and criminal violence exercised in the middle East and in the middle of Europe?

It may well be that some highly optimistic scholarship of the 1990s had strayed far off reality. Does this have pernicious consequences for international relations? Can a piece of idealist scholarship, if it comes at the wrong time, or at a time which is not ripe, actually be politically dangerous? It surely cannot be as dangerous as the deeds (or omissions) of the politicians of the 1910s, who ‘sleepwalked’ into the First World War. Also, nobody would claim that Hitler would not have invaded Poland and other countries, had the realist voices in international legal scholarship of the 1920s been louder.

Nevertheless, idealist scholarship could be politically dangerous for different reasons. First, overly idealist (naïve and illusionary) scholarship might create a false security about the state of the law. However, in a global academic community, with so many contradictory and critical voices (despite a certain academic hegemony of the West) the uniformity needed to create false security will hardly ever come about.

Second, naïve and illusionary scholarship might constitute an indirect danger through a mechanism at which Josef Kunz hinted in his paper of 1950. Kunz implied that the post-World War I ‘Geneva spirit’ indirectly caused a problem, because it led to the intellectual backlash of under-estimation of international law already in the 1930s, which in turn facilitated power politics in disregard of international law. However, this view needs some temperance. It would be inconsistent to insist on the all-importance of the realities of power

31 In his lecture on the ‘Worthlessness of Jurisprudence as a Science’ in Berlin, 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.’ Julius Hermann von Kirchmann, ‘Die Wertlosigkeit der Jurisprudenz als Wissenschaft’ in Heinrich H Meyer-Tscheppe (ed) Die Wertlosigkeit der Jurisprudenz als Wissenschaft (Manutius 1988) 15, 29 (my trans).

32 Christopher Clark, The Sleepwalkers: How Europe Went to War in 1914 (Allan Lane 2012).

33 One example of overly confident inter-war scholarship is the Hague lecture given in 1931 by James Wilford Garner, ‘Le développement et les tendances récentes du droit international’ (1931) 35 I Recueil des Cours de l’Académie de la Haye 605-751. Garner celebrated the new international law which had been brought about by the sacrifices and the suffering of the Great War. He diagnosed ‘le progrès le plus remarquable que le droit international ait jamais reconnu’ (ibid at 612). Garner also called for the further development of a law to prevent war as opposed to the so-far prevailing sophistication of rules on proper conduct in war (ibid at 610-612 and 625).
for the course of international relations and at the same time assert that scholarly work (in this case ‘realist’ writings) are apt to promote realist politics.

Third, idealist scholarship could be guilty of omission. By wasting energy on illusionary projects, scholars fail to work on nitty-gritty, pragmatic, feasible legal constructs. However, I submit that any work of modest refinement and improvement of the law benefits from exposure to other scholars’ grand designs, and has value be it only in order to stimulate more exacting analysis.

Overall, despite these three drawbacks, I submit that idealist scholarship can not cause or contribute to any political crisis. First of all, as Josef Kunz pointed out in the middle of a period of disillusionment with international law, that ‘in order to establish the new attitude, very likely a distorted picture of the former one will be given.’ Writing in 1950, he meant to say that the previous pro-internationalist scholarship was not digested faithfully but rather caricatured. We need to keep this in mind and avoid distorting the scholarship of the 1990s.

Second and more importantly, the assumption of any causal link between overly idealist scholarship and international crisis would overrate the importance of international law, of international legal scholarship, and international legal scholars. Such overestimation is precisely what ‘realist’ observers seek to avoid. So any naive and illusionary utopianism – as opposed to an adequate realist utopianism –, to use John Rawls’ and Antonio Cassese’s term, is what it is: bad scholarship.

Conclusion

It remains a crucial task of scholarship to debunk pseudo-justifications which states advance to cloak their actions with the mantle of lawfulness and reveal that these are not sustainable and not lege artis. For example, it was the job of scholars to point out the unlawfulness of the US – Iraq war of 2003, as it was the job of scholars to point out the unlawfulness of the Russian annexation of Crimea in 2014.

Because scholars have no law-making and no law-destroying capacity themselves, it depends on their epistemic authority, that is, the persuasiveness of their arguments whether these will

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34 Kunz (n 22) 135.
35 John Rawls used the term ‘realistic utopia’ as a qualifier of his blueprint for a ‘law of the peoples’ which are his ‘reflections on how reasonable citizens and peoples might live together peacefully in a just world.’ (John Rawls, The Law of Peoples (Harvard UP 1999) 7 and preface p. VI). ‘I contend that this scenario is realistic — it could and may exist. I say it is also utopian and highly desirable because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests.’ (ibid at 7, emphasis added).
36 Antonio Cassese described his approach as aiming ‘to avoid the extremes of both blind acquiescence to present conditions and the illusion of being able to revolutionize the fundamentals’ (A Cassese, Realizing Utopia (OUP 2012) xvii; see also ibid at xxi).
be taken up by the political actors or not. For example, scholars could show that the annexation of Crimea was not justified by the principle of self-determination and that the situation was in legal terms distinct from the situation of Kosovo. \(^{37}\) This legal finding was then translated into political action: In a UN General Assembly vote, 100 UN members explicitly subscribed to the statement that Russia violated the territorial integrity of Ukraine and that UN members were obliged not to recognise the territorial change.\(^{38}\) However, opinions can then again diverge about the political value of this General Assembly resolution. One might optimistically find that the 100 States which denounced the annexation of Crimea constitute in fact more than half of the UN’s members. But one might inversely and pessimistically highlight that one hundred is only \textit{a little} more than half of the extant States of the world and that this is not too much, considering that we are here dealing with a violation of a core principle of the international order, the prohibition on the use of force.

However we evaluate the political use or non-use of a scholarly analysis, we can safely say so much: International legal scholars could and can do no more than produce legal ideas which are by definition not merely a description of politics. But scholars should not do less, either.


\(^{38}\) UN General Assembly ‘Territorial Integrity of Ukraine’ (UN Doc. A/Res/68/263 of 4th April 2014). Here the General Assembly ‘[a]ffirms its commitment to the […] territorial integrity of Ukraine within its internationally recognized borders’ (para 1); underscores that the referendum in Crimea had ‘no validity’ (para 5); and calls upon all States, international organizations and specialized agencies ‘not to recognize any alteration of the status’ of Crimea (para 6). The resolution was adopted with 100 votes in favour, 11 against, 58 abstentions. (UN Meetings Coverage GA/11493, 27 March 2014: https://www.un.org/press/en/2014/ga11493.doc.htm).
“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.” [transl. by S. Less]

Art in architecture, MPIL, Heidelberg