Journal of International Criminal Justice, 2025, **00**, 1–17
https://doi.org/10.1093/jicj/mqae056
Article

OXFORD

Antonio Cassese and *The Man in a Case*

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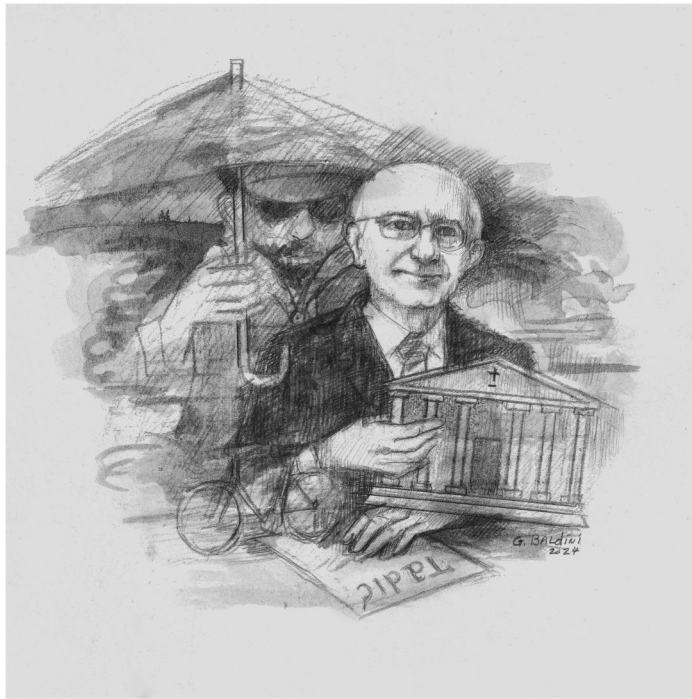

Cassese Escapes the Spectre of Belikov, by Gene Baldini

ABSTRACT

As we mark the 30th anniversary of the *Tadić* interlocutory appeal on jurisdiction of the International Criminal Tribunal for the former Yugoslavia, this special contribution commemorates the moment by looking at Antonio Cassese's impact on international law, with a particular focus on his understanding of his own methodology, which could be described as 'critical positivism' and

executed by a 'judicious reformer'. 'The Man in a Case' in the title is a reference to a famous short story by Anton Chekov, a piece that Cassese particularly liked. With a wry smile, he used to say that lawyers who adhered to strict legal positivism risked becoming like the character in the story, Belikov, who lived a solitary existence and adhered strictly to a rigid set of rules and principles, building metaphorical walls around himself like a 'man in a case'. Although Cassese recognized the safeguarding role that legal positivism can play in shielding legal discourse from ideological manipulation, he cautioned against the potential of pure positivism to put distance between lawyers and the socio-political challenges he thought we should be addressing in the real world. In his approach to law, as a scholar, a judge, and a practitioner, Cassese sought to balance methodological rigour with principled engagement. He emphasized the imperative for jurists to avoid becoming mere instruments of power and strove to maintain a delicate equilibrium between adherence to legal principles and active participation in moral and political discourse. In essence, Cassese's approach sought to harness the protective function of legal positivism to his need to engage his moral and political commitments.

1. INTRODUCTION

Antonio Cassese — known affectionately as 'Nino' to his family, friends and colleagues — was a jurist who left an indelible mark on international law and more particularly on international criminal law. As President and Judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), he played a key role in shaping the ICTY's jurisprudence and advancing the development of modern international criminal law. His legacy includes landmark judgments such as the *Furundžija* case,[1] which established rape as a punishable war crime; the *Kupreškić* case,[2] which confirmed a customary international law norm prohibiting reprisals against civilians during hostilities; and the *Tadić* case,[3] which introduced the principle that the laws applicable to international armed conflict apply when a state exercises overall control over an armed group involved in hostilities within another state.

These and other cases highlight Cassese's innovative approach, often departing from more restrictive or traditional applications of the law. While some critics argued that he overstepped his role as a judge by acting as a 'law-maker',[4] others admired his efforts to gently humanize international humanitarian law.[5] Wherever one stands in this debate, Cassese consistently adhered to a positivist method, guided by a deeply humanistic belief, captured by the Roman jurist Hermogenian's phrase: *hominem causa omne ius constitutum est* ('all law is made for the sake of humanity').

As the first President and a Judge of the ICTY, the first international criminal tribunal established since Nuremberg and Tokyo following the Second World War, Cassese put his particular vision of legal positivism into practice. This was evident from the start, particularly in the Appeals Chamber's 1995 interlocutory decision on jurisdiction in the *Tadić* case,[6]

[1] Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998.

[2] Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000.

[3] Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999 ('*Tadić* appeal judgment').

[4] See, for instance, M. Swart, 'Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrech* (2010) 459–486.

[5] T. Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague, 2010) 58–80.

[6] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR 72), Appeals Chamber, 2 October 1995 ('*Tadić* interlocutory appeal decision on jurisdiction').

which expanded the scope of international criminal responsibility for war crimes to include non-international armed conflicts. Now, 30 years after that groundbreaking decision, we take this opportunity to reflect on Antonio Cassese's contributions to international criminal law. Our approach here is personal rather than strictly academic. For both of us, Nino Cassese was not just a mentor and friend, but also a father figure. This close bond makes it hard to maintain complete objectivity. With this in mind, we frame our reflections around the idea of *The Man in a Case*, which we are delighted to see captured by Gene Baldini's evocative illustration found at the front of our essay.

2. *THE MAN IN A CASE* AND LEGAL POSITIVISM

The Man in a Case is the title of a famous short story written by Anton Chekhov in 1898.[7] In the story, two hunters — Burkin (a teacher) and Ivan Ivanych (a vet) — had set up camp for the night in a barn. Burkin was lying on the hay inside the barn, while Ivan Ivanych was standing outside smoking a pipe. Burkin was telling his friend the story of a colleague called Belikov, a Greek teacher who had recently died.

> He was famous for always carrying an umbrella and wearing galoshes even in fine weather, and he also never failed to wear a warm coat with a lining. He had a case for his umbrella, and a case for his watch made of grey suede, and when he took out his penknife to sharpen his pencil even that had a little case; his face also seemed to be in a case, because he kept it hidden in his raised collar. He wore dark glasses and a sweater, he stuffed his ears with cotton wool, and whenever he took a cab, he ordered the hood to be raised. Basically, he was someone who had a constant and overwhelming need to envelop himself in a protective cover, to create a kind of case for himself which would isolate and protect him from external influences.[8]

His portrait of the Greek teacher continues, highlighting how he was annoyed by reality and suggesting that: 'the classical languages he taught were also just like his galoshes and umbrella really, hiding him from real life'.[9] Furthermore, Burkin continues, the teacher 'even tried concealing his ideas in a case. All he could understand clearly were regulations and newspaper articles in which something was forbidden'.[10] To cap it all, the teacher's 'bedroom was small, just like a box, and his bed had a curtain. When he went to bed, he wrapped himself up completely; it would be hot and stuffy, the wind would knock on the closed doors, and the stove would hum.'[11] Burkin then surprises his friend by announcing 'can you imagine, this teacher of Greek, this man in a case, almost got married'.[12] A new teacher came to town accompanied by his sister Varenka. She was slim with black eyebrows and red cheeks, always singing Ukrainian songs and laughing. She charmed everyone with her songs, including Belikov the Greek teacher. He even moved to sit next to her and said, with a sweet smile: 'Ukrainian is like Ancient Greek in its softness and pleasant sonority.'[13]

[7] A. Chekhov, 'The Man in a Case', in idem, *About Love and Other Stories*, R. Bartlett (tr) (Oxford University Press, 2004) 134. The original title in Russian of this short story is: 'Человек в футляре'. Our synopsis of the story relies on this translation and all quotes are to this version.

[8] *Ibid.*, at 134–135.

[9] *Ibid.*, at 135.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, at 138.

She showed him affection; and Burkin and his friends sought to marry them off. When Burkin tried to encourage Belikov to propose, the idea only made the teacher ill, and he would respond: 'marriage is such a serious step, first you need to weigh up all the duties and responsibilities you will have … to avoid mishaps'.[14] In the end, following the circulation of a mocking cartoon of the two together and a humiliating fall in front of Varenka, he went home 'removed her picture from his desk and then went to bed and never got up again'.[15] He died a month later.

Burkin describes how, at the funeral, Belikov 'had such a meek, pleasant, and even happy expression on his face lying in the coffin that it was as if he was glad that he had finally been put in a case which he would never climb out of. Yes he had reached his goal!'.[16] But, Burkin continues, this story is not just about Belikov, 'there were so many other people in cases still, and just think how many more there are going to be!'[17] The vet, Ivan Ivanych agreed, adding 'But what about the cramped, stuffy lives we lead in town, writing useless papers and playing cards–is that not living in a case too?'[18]

Cassese loved the Belikov story and used to joke that lawyers should not be like Belikov and box themselves in, confining themselves to worrying about enforcing rules and fulfilling duties, whatever they may be, distrusting change, cased inside their studies, protecting themselves from the outside world. For him, all of us as lawyers should deal with real problems, should be open to the world and innovations and, above all, avoid being obsessed with dry theories devoid of any practical use for tackling real world problems.[19]

For Cassese, Belikov also symbolized the risks of strict legal positivism, which, according to him, could lead the scholar to avoid dealing with real problems, to construct cold conceptual abstractions and, ultimately, to isolate lawyers from their own political and moral values. Consider this exchange between Antonio Cassese and Gaetano Arangio-Ruiz about Gaetano Morelli, one of the most important scholars of the Italian school of international law and a personification of legal positivism at the time. Addressing Arangio-Ruiz, Cassese emphasizes how disconcerted he was to learn that, in his youth, Morelli had spent 5 years of his life writing a book in which the main question was whether the judgment of an international court was a fact, or a legal act, under international law. Cassese listened attentively to Arangio-Ruiz's reply, in which the latter stressed why and how the question raised by Morelli was important in framing the broader issue of the institutionalization (or lack thereof) of the international legal order in relation to domestic legal systems. Cassese interjects several times to offer his own perspective. At one point, in his politely amused and provocative manner, he asks rhetorically: 'Don't you think that devoting an entire monograph to the question of the nature of international jurisdiction is typical of the tendency of a certain Italian

[14] *Ibid.*, at 140.
[15] *Ibid.*, at 144.
[16] *Ibid.*
[17] *Ibid.*, at 145.
[18] *Ibid.*, at 145.
[19] Cassese himself mentions Chekhov's account, and says that a colleague of his in Pisa reminded him of the Belikov character. Cassese recounts that this colleague, who worked in classical philology, 'had spent years working on a medieval text that contained a passage from Plato in which a few words were "missing" in the transcription. And he was studying all the possible solutions to the puzzle.' Cassese recalls that once he told his colleague: 'Big things are happening and you're spending your time breaking your head over a few words.' For his colleague, though, that activity 'was reassuring' and so Cassese compares him to Belikov, adding: 'Well, I don't think a lawyer can be like Belikov. They must have their eyes open to reality and assiduously investigate what is happening around us. Of course, they must not be influenced by ideologies (or at least not to the point of having blinkers on), but by the human aspect of events.' See Cassese, *L'esperienza del male Guerra, tortura, genocidio, terrorismo alla sbarra. Conversazione con Giorgio Acquaviva* (Il Mulino, 2011). Original text in Italian. English translation of the book available online at https://cassese-initiative.org/the-book-interview/ (visited 29 December 2024).

doctrine at that time to focus on abstract and theoretical questions?' For him an international lawyer had to be concerned with more pressing issues.[20]

Ultimately, for Cassese, legal positivism was in danger of becoming a box in which lawyers could find refuge and escape reality, particularly when that reality was at odds with their moral and political convictions. In another interview, this time with Giorgio Acquaviva,[21] he mentions the case of Tomaso Perassi, a leading Italian international lawyer. He notes that Perassi, 'as a young man was a lively republican and apparently even clashed with the police'. However, 'as the years went by and the political situation in Italy worsened', he 'built himself an "armour" with his positivist, formally perfect method, which allowed him to act as an adviser to the Foreign Minister during the years of Fascism, without, however, adhering to Fascist ideology, but remaining democratic and republican at heart'.[22] Cassese recalls that 'Galeazzo Ciano[23] despised him, describing him "a professional pettifogger"' (*professionista del cavillo*).[24]

None of this means that Cassese rejected the positivist method. On the contrary, he considered legal positivism 'a great conquest' because 'the "purity" of legal positivism is a way of keeping legal science (as opposed to the practical work of lawyers) as safe as possible from ideological manipulation'.[25] In this regard, he recalled the 'poisoned gifts' of famous jurists such as Carl Schmitt. According to Cassese, Carl Schmitt had left behind 'a lesson in legal methodology' as he had shown that 'we cannot be content with an external and superficial reading of norms and normative institutions', and that the jurist 'has much to learn from political scientists, historians and sociologists if he does not want to limit himself to a frigid hermeneutics that does not grasp the global reality of legal institutions'. At the same time, however, he warned that Schmitt, in his criticism of legal formalism, saw lawyers as 'auxiliary organs' of power, 'called upon to offer only those opinions that confirm the point of view of the political patron'. It is therefore not surprising, according to Cassese, that during the Nazi years, jurists like Schmitt 'did not hesitate … to deliberately–and in a macroscopic way–bend scientific concepts to political-ideological needs'.[26]

In sum, for Cassese, legal positivism was a necessary tool because, among other things, it allowed the jurist to escape political and ideological manipulation. At the same time, he was well aware that the rigorous method of legal positivism ran the risk of leading the jurists to isolate themselves in 'rarefied spaces, far removed from everyday politics, and thus to avoid to a great extent taking principled positions'.[27] Encased, like Belikov, and isolated from the elements and

[20] Cassese interviewed Gaetano Arangio-Ruiz in 1996, and intended to publish this interview together with the interview with other 'masters' of international law. Arangio-Ruiz finally was not happy with the interview, which therefore was not included in the volume that Cassese eventually published in 2011: A. Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jimenez de Arechaga, R Jennings, L Henkin and O Schachter* (Hart, 2011). However, a part of the interview with Arangio Ruiz was printed as *Personal Recollections*, 9 *European Journal of International Law* (*EJIL*)(1998) 386, at 386–387. The audio transcripts of parts of these interviews, including the one with Gaetano Arangio-Ruiz, are on file with the present authors.

[21] Cassese, *supra* note 19. In some parts of this interview, Cassese takes up considerations he had already made in his 'Soliloquy', in P. Gaeta and S. Zappalà (eds), *Antonio Cassese, The Human Dimension of International Law—Selected Papers* (Oxford University Press, 2008) lix, at lxxii.

[22] Cassese, *supra* note 19, at 227–228. See also Cassese, *Soliloquy*, *supra* note 21, at lxi, where Cassese observes — regarding Perassi's writings: 'Those essays, as well as other writings by Perassi that appeared in the 1930s and 1940s, all perfectly technical and abstract, reminded me of a well-known poem by Fernando Pessoa (*Ouivi contar que outrora, quando a Pérsia*). The poem talks about two chess players in Persia who, unperturbed, carry on playing with great acumen and skill amidst the raging of an implacable war, their gaze fixed on the chessboard, bent only on thinking up the best move, while all around them houses are burning or are pillaged, women are being raped and children killed.'

[23] Galeazzo Ciano served as Minister for Foreign Affairs in Italy, from 1936 till 1943, and was the son-in-law of Benito Mussolini.

[24] Cassese, *supra* note 19, at 228. See also Cassese, *Soliloquy*, *supra* note 21, at lxii.

[25] Cassese, *supra* note 19, at 229. In his 'Soliloquy', Cassese also explains: ' … this abstract positivist approach was important in at least two respects: it did away with the confusion between legal and historical or political inquiries, which had plagued many legal works in the nineteenth and early twentieth centuries; it enabled lawyers to keep politics at bay thereby avoiding smuggling political or ideological leanings into scholarly inquiries.' However, he adds: 'Still, this dry investigation of legal institutions–devoid of any consideration of their social context as well as hindering any move from the study of existing law to a proponent approach–did not satisfy me at all.' (Cassese, *Soliloquy*, *supra* note 21, at lxii).

[26] Cassese, *supra* note 19, at 228–229.

[27] *Ibid.*, at 229–230.

the real world, such a situation could ultimately lead the jurist to endorse the status quo implicitly and make themselves 'a servant of the master of the moment'.[28] Cassese's approach to international law was therefore the result of what he saw as dual needs. The need, first, to follow a rigorous method that protected law and its practice from ideological manipulation; while at the same time following the need to follow one's personal and political morality without becoming slavishly attached to the rigour of positivism or being instrumentalized by powerful actors (which would involve a transformation into a 'professional pettifogger').

3. LEGAL CHANGE AND INTERNATIONAL LAW OUT OF THE BOX

At one level, Cassese thought that he could combine these two needs (the need to follow a positivistic method and the need to remain in touch with his own political and moral values) by adopting a writing style which, it turns out, was inspired by his conversations at All Souls College Oxford, where he came across the books written by the historian of antiquity, Moses Finley. As he explained: 'Finley's ability to combine rigorous historical method with the capacity to expound the results of his research in plain language, highly attractive even to the layman, struck me as an exemplary way to tackle scholarly problems.'[29]

His newly accessible writings that followed, however, did not quite garner the reception he had hoped for. Looking back, he concluded: 'I now feel that, in the end, they did not attract either legal experts (who disparaged them as being merely intended to popularize legal topics) nor the wider audience they had [been] targeted at.'[30] We remember his disappointment at reading the endorsement of Michael Banks from the London School of Economics, when it appeared on the back of his newly published English version of *Human Rights in a Changing World* (1990). It read 'Professor Cassese is an outstanding popularizer of academic material. This book displays at its best his exceptional gift for explaining complicated issues in clear, bold language without losing any of the complexities … [Cassese] manages to attract our sympathy for the cause of human rights without once losing sight of the obstacles that are strewn across the path to their fulfilment.' Nino saw this review as a damning verdict, seemingly affronted at being seen as a vulgarizer, when, in fact, this endorsement was a sincere compliment and pointed to the success of his attempt to stimulate engagement and deploy his legal skills to progressive ends.

What, then, was Cassese's eventual articulation of his method for satisfying this double demand? He summarized his approach in these words:

> I believe that a lawyer should be able to inquire into a legal institution, a cluster of legal issues or a legal provision both by applying a strict and rigorous legal method and also by inquiring into *why* the institution, the cluster of issues or the provision have been formed the way they have; or in other words, what political, social or economic motivations have led to their present configuration. Furthermore, a lawyer should not shy away from suggesting how the institution, the issues or the rules might be improved better to take account of social needs.[31]

[28] *Ibid.*, at 230. See also Cassese, *Soliloquy*, *supra* note 21, at lxii, speaking of the risk of becoming a 'Servant of the Prince'.

[29] Cassese, *Soliloquy*, *supra* note 21, at lxiv–lxv.

[30] *Ibid.*, at lxv; he is referring to the following books, among others: A. Cassese, *Violence and Law in the Modern Age* (Polity, 1988) and A. Cassese, *Human Rights in a Changing World* (Polity, 1990).

[31] Cassese, *Soliloquy*, *supra* note 21, at lxv.

Formulated thus, Cassese's approach to the role of the jurist is presented as a modest one and as he put it: 'once it is so formulated, this scientific programme appears to be an easy task'.[32] We will here call this approach 'critical positivism'. Although this label can be a reference point for a number of analyses,[33] we return here to the moment that Cassese came to articulate critical positivism as a new approach. Having gently encouraged Louis Henkin and Oscar Schachter in interviews to explain what sort of positivism they adopted, he came to conclude that they both were paving the way for 'a new positivism' liberated from the traditional method.[34] He saw that Henkin considered that 'law was not an abstract set of rules removed from the fabric of life but an integral part of the social process, a corpus of behavioural standards put in place by politicians and legislators to allow a relatively smooth unfolding of social intercourse. For him, law was essentially a piece of social engineering'.[35] And he saw that Schachter's positivism allowed him freedom to 'trace rules or principles all the way back to the original policies or objectives which spawned them (these policies I would call "values"). Once this "genealogical" investigation is completed, the positivist lawyer can decide which principles should prevail in the interpretation of a particular norm, as well as which policies or objectives (values), as embodied in law, should be given precedence.'[36]

Building on these insights related to context and values, he proposed 'a new approach to law, which one could call *critical positivism*', based on the following assumptions (which we have taken the liberty of summarizing):

a) The investigation of legal rules and institutions requires an inquiry into the socio-political and ideological context. This will allow the lawyer to unearth the purpose of the rule and the motivation for establishing an institution.
b) Interpreting a rule will almost inevitably involve drawing on general principles consecrating universal values. These include 'the pursuit of peace, human rights— and chiefly respect for human dignity — self-determination of peoples, the rule of law, democracy'.[37] Where these values are in conflict, the interpreter will have to rely on their own leanings, but where this choice involves such a bias this should be explicitly acknowledged.
c) The next stage is to evaluate the rule or institution to see to what extent it conforms to the general values mentioned above.
d) The critical positivist is now in a position to criticize existing law and suggest reforms.

Cassese then, in a characteristically sideways move, ventures to flavour this new scientific approach with an attitude inspired, perhaps, by the approaches of writers such as Bertolt Brecht and Roland Barthes. In applying this method, the jurist could *provoke* the active involvement of the reader, encouraging, not just a critical stance, but even 'outrage'. The idea was to stimulate other scholars to suggest 'new ways of implementing the universal values of the international community'.[38] In other words, to think of critical positivism as performance.

[32] *Ibid.*, at lxv.

[33] I. Feichtner, 'Realising Utopia through the Practice of International Law', 23 *European Journal of International Law* (2012) 1143; see also A.H. Khan 'The Spiritual Exercises of Antonio Cassese and the Re-Forming of a "European Tradition" of International Law', 35 *EJIL* (2024) 331.

[34] Cassese, *supra* note 20, at 258.

[35] *Ibid.*, at 257.

[36] *Ibid.*, at 258.

[37] *Ibid.*, at 259.

[38] *Ibid.*, at 260.

Building on this new formula, he explained, a year later, how critical positivism was an approach which provided a suitable environment for the 'judicious reformer'. In his last book *Realizing Utopia: The Future of International Law*, he explained as follows:

> Our approach reflects the attitude of the 'judicious reformer', whose contributions are not obfuscated by an overabundance of legal technicalities, though he moves on the solid ground of 'critical positivism' and knows how to use the traditional tools of jurisprudence … . The 'judicious reformer' is also alert to the present — to its merits but also to its pitfalls — and suggests realistic and viable avenues in order to avoid, at least to some extent, those pitfalls encountered when trying to build a better path.[39]

This idea, of navigating through various options, while finding the best path through judicious use of principles and values, is not unique to Cassese, although Gleider Hernández has more recently highlighted how Cassese's critical positivism can be seen as having its own characteristics. 'In terms redolent of Ronald Dworkin, but recast in cosmopolitan terms, Cassese's "critical positivist" would, in situations of indeterminacy in particular, be empowered to draw on "universal principles of the world community", for example the pursuit of peace, the protection of human rights or democratic governance.'[40] Continuing with the theme of critical positivism, he captures, in our view, Cassese's approach nicely: 'through a clear signposting of one's analytical framework, one can avoid the accusation of being opaque, seeking covertly to influence the object of its analysis in the service of a specific set of values or a specific vision of the common good.'[41] Hernandez also draws an interesting comparison with Gramsci: 'One can even see traces of Antonio Gramsci's concept of the "organic intellectual" in Cassese's critical positivist, an intellectual whose role is to participate actively in practical life, as "constructer, organiser, 'permanent persuader' and not just a simple orator"'.[42]

The key point is that, in many situations, Cassese did not limit himself to 'suggesting' how the law could or should develop in the light of 'social needs', as this would have been tantamount to reintroducing the well-known distinction, so dear to positivists, between *lex lata* and *lex ferenda*. Instead, Cassese often went further, or attempted to go further, by presenting a positivist method infused with certain values. By presenting such a customized positivist method, he could then claim that the international law under examination had *already* evolved to take account of the 'social needs' he had previously identified. Let us break this down into two separate ways in which Cassese worked for 'legal change' using this technique of a judicious reformer solidly grounded in critical positivism. First, we find him as a lawyer proposing change, then we look at how he worked as a judge to find change through two separate cases.

A. Proposing Change

The first way to work for change is through making proposals in a legal context. Cassese articulated this idea when describing the task of the jurist. In essence, according to this route, legal change results from proposals that the lawyer makes having carried out a legal

[39] A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), at xvii-xviii. The book was published a few months after Cassese's death.

[40] G. Hernández, 'The Responsibility of the International Legal Academic: Situating the Grammarian within the "Invisible College"', in J. d'Aspremont, T. Gazzini, A. Nollkaemper, and W. Werner (eds), *International Law as a Profession* (Cambridge University Press, 2017) 160–188, at 182 (footnote omitted).

[41] *Ibid.*, at 183.

[42] *Ibid.*, at footnote 113. Hernandez is quoting A. Gramsci, 'The Formation of the Intellectuals', in V. Leitsch (ed.), *Norton Anthology of Theory and Criticism* (Norton, 2001) 1135, at 1138.

investigation, using a rigorous legal method, taking into account the processes and context that led to the formation of the legal norms under examination. Regarding the need to study the processes and context of the formation of legal norms, we need to make two clarifications. First, for Cassese, such a contextual investigation serves to mitigate the risk of an excess of 'abstraction', which would hinder the jurist who limits themselves to a rigorous investigation by simply relying on pure positivism (boxing oneself in or living in a case). Secondly, by breaking out and immersing oneself in reality, discovering the processes and conflicting interests that led to a particular rule or regime, such an investigation would indirectly provide the reformer with the signposts to determine what kind of innovation was possible.

We want to stress that, for Cassese, this investigation was not a 'legal' investigation, that is it was not about outlining 'the law', which he seemed to understand in an exclusively, almost exquisitely, positivist sense. For example, in the introduction to his book *Self-Determination of Peoples—A Legal Reappraisal*, Cassese writes that he intends to study the principle of 'self-determination as it exists in international law'. However, he then specifies that he wants to go 'beyond the field of law', adopting a contextual approach 'in which history, politics and jurisprudence are used in the service of legal elucidation'.[43] It is clear, then, that for Cassese contextual enquiry goes 'beyond the law'. This promise of separating law from context was not always understood, and prompted James Crawford to comment in his review of this book: 'Why such a contextual approach takes one beyond the realm of the law is not explained'.[44] To abandon the separation of strict positivist analysis of the law from an illumination of the political context would have been to betray his traditional positivist training.

It would be wrong, however, to think that Cassese, in the role of 'reformer', simply remained holed up in his study. On the contrary, he also had an active vision of the role of the jurist, preferring to describe himself as an 'explorer' rather than a 'geographer',[45] and he never missed an opportunity to put his 'thoughts into action' (to adapt a well-known motto from Mazzini). In particular, he considered it important to influence decision-makers, that is the representatives of the 'cold monsters', as he was wont to call states (alluding to Nietzsche). For this reason, he paid particular attention to the role of government legal advisers and parliamentary foreign affairs committees. Indeed, he designed and published research on these topics, often interviewing and spending time with key individuals.[46] The outcome was that he nevertheless came to realize the limits of expecting to achieve reform through influencing international lawyers advising governments. He concluded:

> after politicians have made their decisions with or without [legal adviser (LA)] input, when the LA is later requested to step in, his action normally will not lead to a repeal of the wrong decision, even if he feels the decision was made contrary to international law. This is because LAs feel that they should act as 'advocates' of the State once a decision is

[43] A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge University Press, 1995).

[44] J. Crawford, 'Book Review: *Self-Determination of Peoples. A Legal Reappraisal*, By Antonio Cassese', 90 *American Journal of International Law* (1996) 331, at 331.

[45] Cassese, *supra* note 19, at 235–236. Cassese explains that he takes up a metaphor already used by his brother Sabino, taken from Saint Exupéry's *Little Prince*, according to which men can be divided into geographers, who study 'mountains and landscapes, without ever moving from [their] rooms', and explorers, who instead visit these places, and then go to the geographers to tell them about it. Moving on from this metaphor, Cassese thus says that he started out in his studies as a geographer, but at some point felt the need to 'explore the world'.

[46] See for example: A. Cassese, 'Parliamentary Control of Treaty-Making in Italy', 2 *Italian Yearbook of International Law* (1976) 37; A Cassese (ed.), *Parliamentary Control Over Foreign Policy* (Martinus Nijhoff, 1980); A. Cassese (ed.), *Control of Foreign Policy in Western Democracies: A Comparative Study of Parliamentary Foreign Affairs Committee*, 3 vols (Oceana Publications, 1982); A. Cassese, 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards', 14 *Michigan Journal of International Law* (1992-3) 139.

made. As a consequence, at this stage LAs will uphold and defend the decision made by policymakers, even if it is at odds with international law.[47]

Cassese did not hesitate to make innovative proposals when he himself was appointed to various roles. In some cases, certain governments did not appreciate his proposals, often considering them too radical. On occasion, these proposals may have cost him the renewal of his appointment. For example, one episode he found difficult to digest (though others could be mentioned) was the Italian Government's decision not to send him as a member of the Italian delegation to the last session of the 1977 Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.[48] According to Cassese, this decision was precipitated by a speech he had made on the need to extend the grave breaches regime for the repression of war crimes to include certain violations of the rules on the conduct of hostilities on the battlefield, protecting both civilians and combatants. Such an extension of the grave breaches regime would have criminalized the use of prohibited weapons.[49] The summary records excerpted below reveal the essence of the speech and illustrate his approach: building on the positive appreciation of customary international law, while invoking his own moral arguments for including reform in the treaty.

> His delegation favoured the idea of including among grave breaches the use of methods and means of combat prohibited by the Protocol, together with violations of the provisions protecting the civilian population against the effects of hostilities. …
>
> The argument could be advanced that while it would be justified to regard violations of rules protecting civilians as grave breaches, because that would strengthen the protection of persons not participating in hostilities, there would be no justification for considering as grave breaches the use of prohibited means and methods of warfare. It was true that combatants were by definition the most exposed to the risks of war. They were, however, entitled to benefit from all provisions restraining the use of force by the enemy. …
>
> It had been contended that violations of Protocol I committed in a combat area raised special problems as it was difficult to produce evidence to prove that such violations had or had not occurred, particularly when the element of intent was a constituent feature of those violations. That argument, if accepted, would result in totally excluding battlefield crimes from the category of breaches of the Protocol. It was difficult to think that anyone would wish to go that far if only because those violations were already crimes under customary international law. The same problems of proof would arise if the aim was to make them simple breaches of the Protocol. That being so, he [Cassese] could not see why such violations should not fall under the category of 'grave breaches' … [50]

Cassese tells us that after his speech, 'one of the US delegates, Ronald J. Bettauer, a portly and imperious man', asked him 'in a severe tone why I had taken this position'. He also tells

[47] Cassese 'The Role of Legal Advisers', *ibid.*, at 162.

[48] See Cassese's account of this in *L'esperienza del male*, *supra* note 19, at 40–41.

[49] Unfortunately, we have not been able to find the text of the speech, which Cassese had made available on his personal website (now no longer in operation) (Cassese, *supra* note 19, at 48, text of footnote 6). However, as Cassese himself indicates, the summary records can be found in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol. IX, CDDH/I/SR.44, at 28–30, also available online on the ICC Legal Tool Database (https://www.legal-tools.org/, visited 19 December 2024).

[50] *Ibid.*, Official Records, at 29.

us that the US delegate then 'convened an emergency meeting of the NATO countries at which the Italian Ambassador was made to say that this speech reflected Cassese's personal position and not that of the Italian Government, which was in fact aligned with the US position'.[51] Cassese then claims that because of his speech, the Italian Foreign Ministry 'punished' him by not sending him to the fourth and final session of the Diplomatic Conference.[52] In addition, he points out that, while the First Additional Protocol 'includes among the "grave breaches" serious violations of the rules on methods of warfare', 'it is absolutely silent on the penal consequences of the use of prohibited means of warfare'. In short, for Cassese: 'The US position had won'.[53]

Cassese kept not only the correspondence with the diplomatic counsellor from the Italian Ministry of Foreign Affairs[54] but also the draft of his own letter of protest to the Ministry.[55] It is worth noting the difference in content between the letter that Cassese actually sent and the draft that he had prepared. In fact, in the draft letter found in the archives, Cassese explicitly states that, in his opinion, the Ministry's decision not to send him to the Diplomatic Conference was due to pressure from US representatives following his intervention during the Geneva Diplomatic Conference. He added that he had been told that, on another occasion, the US representatives had also 'expressed irritation' at Cassese's presence at the 'mercenaries' trial in Luanda, as part of an 'international commission of jurists tasked with monitoring the mercenaries' trial to ensure that it was a "fair trial"'.[56] And then, returning to the US 'veto' on his continuing participation in the Geneva Diplomatic Conference, he concludes by saying that 'such an interference by a foreign state in the composition of our Government delegation is obviously a very serious political act, something that could legitimately be the subject of questions in Parliament'.[57] There is no trace of these thoughts in the letter that Cassese eventually sent, suggesting that he considered it wiser not to put his accusations and veiled threats in writing.

Cassese remained faithful to the challenge of reform until the end, as is clear from the volume he edited entitled *Realizing Utopia: The Future of International Law*, on which he was working even during the last months of his life when his illness had already taken over.[58] As he himself explains in the introduction, the volume consists of a collection of writings by various authors (including Cassese himself) who were invited to follow the method of the 'judicious reformer'.

[51] Cassese, *supra* note 19, at 41.

[52] *Ibid.*

[53] *Ibid.* Of course the war crime of the use of certain prohibited weapons was eventually included in the Statute of the International Criminal Court and the Statute continues to be amended with the addition of such war crimes for particular prohibited weapons in both international and non-international armed conflict. See the amendments related to Art. 8(2)(b) xxvii–xxix and 8(2)(e) xiii–xviii most easily accessible in W.A. Schabas, *An Introduction to the International Criminal Court* (6th edn., Cambridge University Press, 2020), at 431–434.

[54] European University Institute, Historical Archives of the European Union: Private Archives—Antonio Cassese: Typed letter from Cassese dated 8 February 1977, addressed to Councillor Paolo Pucci di Benisichi and for information to Councillor Umberto Vattani, ACA-0022, at 157–158; typed letter of reply to Cassese, for information to Councillor Umberto Vattani, from Councillor Paolo Pucci di Benisichi dated 28 February 1977, ACA-0022, at 171–173. The letters are in Italian, the English translation is our own.

[55] Handwritten draft letter by Cassese, *ibid.*, at 158–170 (the text is in Italian: English translation is our own).

[56] The Luanda trial took place in June 1976, in Luanda, Angola to take account of events that took place during the civil war. The defendants were 13 western mercenaries (10 British and 3 American), four of whom were sentenced to death and the rest to prison terms of varying lengths. Cassese was part of the commission of jurists, consisting of 45 members sitting in their individual capacities, appointed by the President of Angola to 'supervise' the trial and make recommendations for international action on the mercenary issue. Following this experience, Cassese wrote an article on the status of mercenaries, published in Italian ('Il ruolo dei mercenari nelle guerre moderne', in *Politica del diritto* (1979) 645), and later in English in an expanded version with the title 'Mercenaries: Lawful Combatants or War Criminals', 40 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* (1980) 1. Cassese mentions the work of the Commission in footnote 45 of the English text, where we learn that — together with the two English experts — he had abstained on the adoption of a Commission resolution that the trial 'had been "fair and conducted with dignity and solemnity"'. The reason for the abstention was due to doubts as to whether the principle of legality in criminal matters (*nullum crimen*) was respected, given the law deemed applicable to the defendants.

[57] Handwritten draft letter by Cassese, *supra* note 54, at 168.

[58] A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012).

For Cassese, this was someone who would write a contribution 'not obscured by an overabundance of legal technicalities', but 'on the solid ground of "critical positivism"', knowing 'how to use the traditional tools of jurisprudence'.[59]

B. Finding Change

The second way in which Cassese conceived of achieving 'legal change' was the more subtle one of establishing that the development of the law in a given area had already taken place, either through custom or through the interpretation of existing norms. According to this second route, legal innovation is not proposed by the lawyer as possible or desirable as a spin-off from the legal inquiry, rather the change is discovered as having already occurred.

In much of his writing, Cassese followed this approach. In some cases, however, he admitted that the changes in positive law did not entirely replace the pre-existing law, but rather overlapped with it. For example, he follows this path throughout his great book *International Law in a Divided World* (1986), showing how international law developed in a 'communitarian' and 'Kantian' way after the Second World War. However, he emphasized that this 'new' international law often overlapped with the traditional and state-centred 'Westphalian' international law associated with Grotius, without necessarily replacing it. Cassese would hold out hope for the further development of international law towards the more communitarian 'Kantian' value-driven model. However, in his 'Soliloquy',[60] written a few years before his death, he noted with some sadness that 'the traditional "soul" of the international community has continued to march on unperturbed'. In his view, 'only its surface has been scratched by those new values and new standards'.[61]

In our view, however, Cassese's work did much more than scratch the surface of traditional international law. The area in which his contribution is best known and perhaps most influential is that of international criminal law, in particular his contribution as a Judge and first President of the ICTY. In this capacity, Cassese made an essential contribution, not only to the work and functioning of the first international criminal tribunal of the 'modern' era but above all to key aspects of its jurisprudence.

Let us concentrate here on the well-known decision on the *Interlocutory Appeal on Jurisdiction* in the *Tadić* case, where the Appeals Chamber ruled, *inter alia*, on the Tribunal's alleged lack of jurisdiction. Let us briefly summarize some key points to discover the 'innovative' aspects of the Appeal's Chamber decision. The defence team had challenged the Tribunal's jurisdiction by arguing, among other things, that the charges against *Tadić* could not be classified as war crimes under the Tribunal's Statute since they were allegedly committed in the course of a non-international conflict, as the conflict in Bosnia and Herzegovina appeared to be at the time of the events in question. The Trial Chamber had rejected this argument, stating that the crimes alleged against the accused (murder and mistreatment of prisoners in detention camps in Bosnia and Herzegovina) fell within the jurisdiction of the Tribunal under Article 2 of its Statute. Article 2 relates to war crimes consisting of grave breaches of the 1949 Geneva Conventions. According to the Trial Chamber, grave breaches of the Geneva Conventions were legally possible in the context of the conflict in Bosnia and Herzegovina, irrespective of whether it ought to be qualified as an international armed conflict; this was by virtue of the Security Council Resolution which had adopted the Tribunal's Statute.[62]

The Appeals Chamber took a different approach. It rejected the Trial Chamber's position, arguing that the grave breaches of the Geneva Conventions referred to in Article 2 of the

[59] *Ibid.*, at xvii.
[60] Cassese, *Soliloquy*, *supra* note 21, at lxxvii.
[61] *Ibid.*
[62] Decision on the Defence Motion on Jurisdiction, *Tadić* (IT-94-1-T), Trial Chamber, 10 August 1995, §§ 45–53.

Statute necessarily referred back to a precondition for the applicability of the grave breach regime in the Conventions themselves. This, in turn, meant that one needed the existence of an international armed conflict. Consequently, the conduct alleged against the accused — because it took place in the context of a conflict that was not considered of an international character — did not fall within the jurisdiction of the Tribunal by virtue of Article 2 of the Statute. However, the Appeals Chamber argued that a different provision of the Tribunal's Statute was applicable, namely Article 3, which dealt with war crimes other than grave breaches of the Geneva Conventions, including other violations of the rules and customs of war. This was because, according to the Appeals Chamber, the customary international law on war crimes had evolved to include as war crimes serious breaches of international humanitarian law applicable to non-international armed conflicts.[63]

In essence, while the Trial Chamber's decision found grave breaches of the Geneva Conventions applicable to the conflict in Bosnia and Herzegovina by virtue of the Security Council Resolution, the Appeals Chamber's decision, in rejecting the Trial Chamber's view, in the end, went much further in terms of developing international war crimes law. It confirmed the existence of a customary rule permitting the punishment, as international war crimes, of serious violations of international humanitarian law committed in non-international armed conflicts, not limited solely to the conflict in Bosnia and Herzegovina or to instances where the Security Council acts, but rather to all non-international armed conflicts *tout court* — at least since the early 1990s. Moreover, the punishable conduct covered, in principle, all serious violations of customary rules of international law applicable in non-international armed conflicts, including those relating to the prohibition of certain weapons. Each specific war crime allegation would have to be considered on its own merits, to assess whether its status as a war crime under custom or treaty was established in non-international armed conflict.

This all sounds as though the ruling simply required some legal gymnastics to square the circle. But in fact, the challenge was considerable. Cassese described the atmosphere in a recorded conversation with Joseph Weiler:

> So I said 'why don't we jettison this stupid distinction?' My colleagues said 'yes we agree with what you are saying, it's very nice, but how can you create this criminal offence? Nino, if you can show that there is some custom in international law supporting your views, we will go along with it. But try to find some sort of evidence.' So I took six months, and set up a team. One of the best members of our team was an American girl, Betsy Andersen, who is now working somewhere in New York. And she helped me go through state practice and we came up with a lot of evidence … well some evidence. [laughter] I was delighted when I discovered cases where the Americans had complained because of what Saddam Hussein did against the Kurds in Northern Iraq and the use of chemical weapons. I thought this was an internal armed conflict, something which happened within a state, and foreign countries including the United States are saying Iraqi authorities had breached International Law. That means that this is evidence and that you may one day be brought to trial. This is a very compelling piece of evidence; that some states consider that a breach of international humanitarian law within a state and civil war may amount to a war crime.[64]

The significance of this ruling and its reasoning is obvious, so much so that — as Cassese used to report with amusement — one senior member of the prosecution reportedly commented on seeing the lengthy judgment: 'We had gone for a steak and have got a whole

[63] *Tadić* interlocutory appeal decision on jurisdiction, *supra* note 6, §§ 79–137.

[64] J.H.H. Weiler, 'Nino in His Own Words', *EJIL: Talk!*, 3 January 2012, available online at https://www.ejiltalk.org/nino-in-his-own-words/(visited 19 January 2024).

cow!'[65] The Appeals Chamber's decision had paved the way: first, for the recognition of the existence of various customary rules applicable in non-international armed conflicts, analogous to the rules applicable to international armed conflicts. Secondly, it established that serious breaches of these rules may constitute war crimes. Finally, with its innovative approach to customary international law, the Appeals Chamber paved the way more generally for the development and consolidation of international criminal law as we know it today.

As Georges Abi-Saab — also a judge of the Appeals Chamber at the time — has rightly pointed out, the reasoning in this decision also arose from the frustration Cassese and Abi-Saab both felt at the results of the Geneva Diplomatic Conference of 1974–1977,[66] in which they had both participated as delegates (and which we discussed above when we considered Cassese's fateful speech arguing for the grave breaches regime to include the crime of using prohibited weapons). The resulting Protocols of 1977 were considered by them (and other delegates of the Conference) as unsatisfactory. Indeed, as is well known, the Conference adopted a Second Additional Protocol, relating to the protection of victims of non-international armed conflicts, which contains no rules on the punishment of breaches of the Protocol (unlike the First Additional Protocol, which deals with international armed conflicts and includes several new grave breaches as war crimes). Moreover, the rules contained in the Second Additional Protocol are certainly less detailed than those applicable to international armed conflicts. Somehow, then, the Appeals Chamber's decision in *Tadić* achieved through jurisprudence what the work of the Geneva Diplomatic Conference had failed to do 20 years earlier. Add to this the fact that, in this decision, the Appeals Chamber held that even serious violations of the rules prohibiting the use of certain weapons give rise to criminal responsibility for war crimes, and it is clear that this time, unlike at the Geneva Conference in 1977, it was Cassese who had 'won'.

C. The Method of Finding Change and Its Limits

It is important to emphasize that the Appeals Chamber, in its decision on jurisdiction in *Tadić*, did not merely affirm the existence of customary rules on war crimes in non-international armed conflicts. Rather, the judges had demonstrated the existence of such rules by referring to various elements of international practice. This may seem trivial: any student of international law knows that a customary rule is evidenced by 'a general practice accepted as law' (as provided in Article 36 of the Statute of the International Court of Justice (ICJ)) and therefore one imagines that, in order to claim that a certain customary norm has come into existence, one must also indicate which 'practice accepted as law' brought it into existence. In this respect, however, the method applied by the Appeals Chamber of the ICTY is revolutionary when compared, for example, with that of the International Court of Justice. That Court, the ICJ, has tended to affirm the existence of customary norms without providing much evidence to support its assertions.

Cassese was always critical of this 'apodictic' approach as if the Court were the 'oracle' of international law. In one academic article, he took the opportunity to openly express his thoughts on the ICJ's judgment in the *Bosnian genocide case*.[67] Cassese took issue with the part of the judgment in which the Court, recalling its own jurisprudence in the *Nicaragua* case, applied a strict test for attributing the conduct of non-state armed groups to a state. In doing so, the Court explicitly refused to apply the less stringent test which had been

[65] A. Cassese, 'The ICTY: A Living and Vital Reality', 2 *Journal of International Criminal Justice* (*JICJ*) (2004) 585–597, at 590.

[66] Episode 5 of the Podcast Series *Antonio Cassese: The Stubborn Sparrow*, 'War Crimes and the ICTY', with Georges Abi-Saab, available online at https://cassese-initiative.org/podcast/# (visited 19 December 2024).

[67] A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649.

articulated by the Appeals Chamber of the ICTY in the *Tadić* case,[68] this time in relation to the Appeal Chamber's judgment on the merits that had examined whether there was nevertheless an international armed conflict due to the overall control exercised by the Yugoslav army over the Bosnian Serb army.[69]

In his article, Cassese does something unconventional (some would say inappropriate): he criticizes the ICJ in a scholarly publication for having explicitly decided not to align itself with the jurisprudence of the ICTY, even though he himself had contributed significantly to the drafting of the relevant ICTY judgment. Arguably, he did so because he felt an urgent need to 'respond' to the Court and to censure the apodictic method that the Court, unlike the Appeals Chamber of the ICTY under his leadership, had followed. Cassese therefore concluded his article caustically, hoping that 'in the future the Court, when it returns to this matter, will pay attention to state practice and case law instead of confining itself to uncritically restating its previous views.'[70] He thought the law had changed and he had revealed his evidence for thinking so. The judicious reformer had been thwarted.

Establishing the existence of a customary international law rule by 'revealing one's cards', that is by pointing out the elements on which one bases one's findings, can of course be risky. In fact, this approach inevitably lends itself to criticism based on the choice of the elements in question. Some of these elements, for example, may carry considerable weight for the person looking to prove the rule (we saw an example of this with Cassese's glee at finding the evidence of US condemnation of Saddam Hussein's action against the Kurds), but may not weigh so heavily with others less convinced of the existence of the rule. An illustration of this danger is memorably contained in an anecdote told by James Crawford at the event organized by the Special Tribunal for Lebanon in The Hague to pay tribute to Cassese a few weeks after his death.[71] Crawford noted that Cassese 'was not immune, as none of us are, to favouritism among his sources'.[72] He recalled that Cassese, in his volume *Self-Determination of Peoples: A Legal Reappraisal* (1995), had attached great importance to the 1976 Algiers Declaration on the Rights of Peoples in determining the content of the principle of self-determination. In particular, he recalled that Cassese had stated that the Declaration 'gave teeth to the loose standards set by the United Nations'. Crawford in turn had criticized this approach, finding it strange that a declaration by non-governmental organizations could give 'teeth' to an inter-governmental principle. He then recalled, with a smile, that in his review of Cassese's volume for the *American Journal of International Law (AJIL)*, he had referenced the image of Magritte's *Ceci n'est pas une pipe*,[73] and suggested that the Algiers Declaration did not give self-determination teeth, 'but rather the image of teeth'.[74] Crawford reported that Cassese did not like this remark, but eventually forgave him. He also reported wittily that the editor of the book review section of the *AJIL* had asked him 'Who is this Magritte?', which prompted Crawford to fax him a copy of the famous image.[75]

[68] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, §§ 403–406.

[69] *Tadić* appeal judgment, *supra* note 3, §§ 116–162.

[70] Cassese, *supra* note 67, at 668.

[71] The event, entitled 'Walking the Road He Paved', was held at The Hague Academy of International Law on 16 November 2011. The full video is available on the YouTube channel of the Special Tribunal for Lebanon at https://www.youtube.com/watch?v=OWcVN9uXoyw (visited 28 November 2024). Crawford's speech is at 1:31:20. The interventions were later revised and published in G. Acquaviva and G. Pinzauti (eds), 'Walking the Road He Paved – A Tribute to Antonio Cassese: The Hague Academy of International Law, The Hague, 16 November 2011', 10 *JICJ* (2012) 1419–1447. James Crawford's tribute is at pages 1440–1443.

[72] See Acquaviva and Pinzauti, *supra* note 71, at 1442.

[73] The painting is also titled *La trahison des images (The Treachery of Images)*.

[74] See Acquaviva and Pinzauti, *supra* note 71, at 1442. See also the oral speech of Crawford at the event to pay tribute to Antonio Cassese, *supra* note 71, at 1:35:20–1.35:40.

[75] Oral speech of Crawford at the event to pay tribute to Antonio Cassese, *supra* note 71, at 1:35:40–1:36:20.

It is clear, however, that determining which elements are said to support the existence of a new customary rule and its content, while it may give rise to skirmishes, even amusing ones at the academic level, can sometimes take on a completely different significance in court. This is particularly the case when the court in question is an international *criminal* court. In this case, the *nullum crimen* rule (non-retroactivity in criminal matters) means that there could be serious consequences for an individual should the international court find there is enough evidence to prove the existence of a customary international crime. This is where we find Cassese at his most creative and where he attracts the most criticism.

As an international judge in criminal tribunals, but also in all his other roles as an 'explorer', Cassese did not hesitate to point out where, and to what extent, the law *had* evolved, citing the elements that, in his opinion, indicated that change had already taken place. Admittedly, as noted above, the choice of these elements could be — and has been — considered by some as unconvincing. Cassese's seemingly positivist method of showing that customary law had evolved by 'proving' it with reference to international practice was therefore attacked on the grounds that he had not, in fact, found sufficient evidence. What the critics missed, however, was that there was always something more to Cassese's method of establishing the existence of new customary rules. More than the obsessive pursuit of state practice and *opinio juris*, Cassese was concerned with showing and proving that international law could gradually adapt to the emerging needs of the international society and respond to these needs from a perspective which was less 'state-centric' and more 'communitarian'. It was value-driven positivism aimed at reform (aka critical positivism). We turn finally to explaining this approach through our second case.

4. THE LAWYER ESCAPES FROM HIS BOX

The clearest example of Cassese's concern that international law should develop in ways that are less state focused, and more geared to communitarian goals, may be the *Interlocutory Decision on Applicable Law* of the Special Tribunal for Lebanon (STL).[76] Cassese presided over this Tribunal and its Appeals Chamber from its inception until 1 October 2011, when he resigned due to deteriorating health. The Appeals Chamber of the Tribunal, at the request of the Pre-Trial Judge, had to clarify, *inter alia*, the definition of 'terrorism' to be applied by the Tribunal. In a lengthy and reasoned decision, the Appeals Chamber held that there is in fact a rule of customary international law defining the crime of international terrorism. The Chamber held it was this rule that the Tribunal would have to refer to in order to interpret the definition of terrorism in Lebanese law, which in turn was the definition applicable under the Statute of the Tribunal. Cassese made an important contribution to the drafting of the decision, which he hoped would be as important — in relation to the crime of international terrorism — as the *Tadić* decision on jurisdiction had been in relation to the law of war crimes in non-international armed conflicts. As in other decisions and judgments to which Cassese contributed, the Appeals Chamber cites numerous elements in support of the existence of a customary norm. As in the *Tadić* decision, Cassese brings together — at least in part — convictions he had already expressed in numerous academic writings. However, the reverberating impact of this decision was, to his disappointment, not as great as that of the *Tadić* decision, although it has been referenced in the jurisprudence of national courts.[77] We could find many reasons to explain the disparate impact of these two rulings.

[76] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Ayyash and others* (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011.

[77] UK Court of Appeal (Criminal Division) in *R v Mohammed Gul*, 22 February 2012, [2012] EWCA Crim 280, § 35; see also in the same case UK, Supreme Court, 25 October 2013, [2013] UKSC 64, § 45.

But this is not our focus. We want to consider again the *context and values* that Cassese was concerned about in this demonstration of judicious reform.

There is no doubt that for Cassese, the *Interlocutory Decision on the Applicable Law* of the STL was a golden opportunity to break the deadlock in the negotiations on the adoption of a comprehensive convention on the crime of international terrorism. In fact, states meeting in New York at the United Nations had been unable to agree on the definition of the crime of terrorism, mainly because of the difficulty in agreeing on its 'exceptions', first in the context of the resistance struggles of oppressed peoples and, more generally, in the context of terrorism in time of armed conflict.[78] Some commentators have criticized the decision of the STL precisely for this reason, as well as for the choice of evidence provided to support the existence of a customary rule on the definition of this crime.[79]

At the memorial for Cassese in The Hague, Andrea Bianchi pondered the reasons for Cassese's attachment to his innovative views on the crime of international terrorism, expressed in particular after the events of 11 September. He concluded that for Nino, terrorism struck a sensitive intellectual and emotional chord. This was because 'Nino was a humanist' and because he had placed 'the human being and human values at the centre of his scientific work and, later, of his legal practice'.[80] It was therefore natural that he should be so stubbornly convinced of his ideas on the matter. We think that Bianchi might be partly right, but perhaps there was something else too. We would suggest it was also Cassese's deep-rooted conviction that the deadlock in the New York negotiations on the definition of international terrorism was 'merely' a political and ideological deadlock, in part exacerbated by the bloc politics of the UN General Assembly that he had experienced as a delegate to the General Assembly in New York and at the Diplomatic Conference in Geneva on the Additional Protocols in the 1970s. It was this ideological standoff and the associated bloc politics that Cassese wanted to expose and work around. As Cassese repeatedly pointed out, it was obvious that there had to be a commonly accepted definition of terrorism, this flowed from the fact that the Security Council had already adopted quasi-legislative resolutions on the fight against international terrorism and had proceeded to blacklist and sanction individuals suspected of belonging to terrorist organizations. To deny the existence of a universally accepted definition of the crime of international terrorism in the face of this activity by the Security Council (and the states that complied with its resolutions) therefore seemed, to Cassese, to be patently wrong. To allow this situation to stand would also have meant de facto endorsing the hidden 'political' agenda of some states to retain *carte blanche* in adopting measures to combat international terrorism. Without a legal definition, states and the Security Council would be free to classify any organization as terrorist and target their suspected members. Action against terrorism becomes a lawless zone, beholden only to ideological and political forces.

Faced with this challenge, Cassese, in his own way, once again resorts to judicious reform grounded in his version of critical positivism. With dozens of pages, and ample footnote support, he demonstrated that, after all, a definition of an international crime of terrorism had already coalesced in international custom, based on an actual convergence expressed in national criminal legislation and international instruments rather than on mere political statements. In so doing, he also wanted to show that he was not in the service of any ideology, nor was he beholden to any political powers. Cassese was and remains a lawyer who escaped from his box.

[78] See generally, M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention', 4 *Journal of International Criminal Justice* (2006) 1031.

[79] See for instance, B. Saul, 'The *Special Tribunal for Lebanon* and *Terrorism* as an International Crime', in W.A. Schabas, Y. McDermott, and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 79.

[80] Acquaviva and Pinzauti, *supra* note 71, at 1439.

Journal of International Criminal Justice, 2025, 00, 1–17
https://doi.org/10.1093/jicj/mqae056
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