
Some Thoughts about the Optimistic Pessimism of a Good International Lawyer

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Abstract

The author presents various critical comments on several developments of international law in fields which have been particularly studied and practised by Antonio Cassese. Some final reflections focus on the question whether international lawyers can realistically cherish feelings of optimism as to the development of international law in a humane direction, or whether instead the study of the past and the present ought not rather to impel one towards disillusioned pessimism.

1 Introduction

Everyone the organizers of this round table invited to participate responded positively to the invitation, for at least two reasons. First of all, because attending offered a fine occasion to demonstrate their appreciation, friendship, and gratitude to Nino Cassese, to whom we are all linked by intense relationships which go beyond our common work interests and closeness in methodological approaches and scientific convictions. Secondly, because the book we have been asked to discuss is much more than a collection of studies on various topics published over the course of the last four decades by our friend and colleague: his pupils' happy initiative in bringing together writings differing in age and subject allows the reader who goes through them systematically (or dips in here and there) to follow a fascinating cultural journey, where the rigour of the erudite, intelligent scholar is never separated from ethical commitment. But the collection at the same time allows us to perceive the pathways along which, amid thousands of difficulties and resistances, the development of international law has

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been taking shape. This growth has certainly been tortuous and difficult, made up of steps forward and steps backwards, falling short of expectations in many respects and often tragically disappointing, but its general direction – and Cassese helps us to see this – has, despite everything, been consistent: international law seems, so to speak, condemned to take on an increasingly human dimension. And those who know our author know that his work has not consisted just in studying that pathway; he has also actively participated in shaping it.

I have been asked to present some considerations by way of conclusions to our debate. I am accordingly expected to make some comment at least on some of the themes we have been discussing: themes which have concerned specifically the matter of human rights and the international obligations of individuals in various sectors of contemporary international law, as well as the relations between human rights and humanitarian international law. It is to this that I shall devote the first part of these conclusions.

I would note, however, that the previous speeches have not touched on the dimensions of criminal international law, yet Cassese has devoted much attention to it in his studies, as well as a great part of his actions in the last quarter of a century. It is accordingly worthwhile, even if only to fill this gap, to dwell at least a little on this development, which is so important in the human dimension of today's international law, and I shall do so in the second part of my conclusions.

But the book we have been discussing does not speak only of where international law is going. Particularly in the 'soliloquy', an unpublished work which appears as a sort of introduction to the collection, Nino also raises problems which engage us personally as scholars of international law in our way of working. Given that today's lawyer must be committed to contributing to promoting and improving the human dimension of law, leaving enough room for reflection and a search for values, ought he accordingly to favour the scientific approach, opting if appropriate for the insider's language of the specialist, or ought he instead to write in such a way as to persuade everyone, sacrificing the technical side even at the risk of appearing to be a mere popularizer, who then even ends up – despite all efforts – not reaching the great public anyway? And if he does not take refuge in technicalities, ought he to allow disappointment and pessimism to show through or not – since the progress of the human dimension in international law has been so slow and intermittent, and observed practices often so disquieting, if not intolerably negative as regards human values? This is a central topic which has thus been placed on the table, on which I feel some final comment is in order.

2 The ICJ and the Gradual Opening of International Law to Individuals

It is impossible to talk about the more or less significant developments in today's international law as regards openings towards individuals without mentioning the International Court of Justice. Our debate has been no exception, and there have in fact been those who have expressed criticisms, sometimes rather harsh, of its 'judicial

policy', which some attribute to its composition (in which there is an increasing 'diplomatic' component, it has been noted), while others have emphasized its contributions, some of them important, particularly as regards the 'humanization' of contemporary international law.

This is obviously too broad a theme to do more than mention it here. I would however like to comment on at least a couple of profiles. In fact, not only the well-known stances recently aimed at reinterpreting the classical international instruments, traditionally interpreted as exclusively concerning relationships between states, in terms of individual rights (I am obviously alluding to the *LaGrand* and *Avena* cases), but also – indeed, especially – the case law regarding extraterritoriality of human rights, have rightly been stressed here. From the 2004 opinion on the *Wall* to the 15 October 2008 order in the case of *Georgia v. Russia*, the Court has insisted on the idea that states' obligations regarding human rights must be respected, not just within their respective territories but also outside them – where, for instance, a state engages in activities on the territory of another state, with or without the latter's consent.

I like to describe this idea using the metaphor of the snail and its shell: international human rights obligations bearing on states cannot be discarded by them when they 'travel', but they have to take them along everywhere they go to carry out their public functions, just like the snail with its house. To be sure, every state normally exercises such functions within its own territorial sphere, but it happens – indeed, particularly to some states, increasingly often – that activities, whether or not involving the use of force, are carried out *extra territorium*, in breach, it may be, of others' sovereignty, for instance in carrying out missions in the context of organized international cooperation, or in pursuit of unilateral choices. It is logical (and sound) to hold that in situations of the sort the state must comply with its human rights commitments in exercising 'jurisdiction' over individuals, wherever that may come about.

The ICJ has reiterated this conception on various occasions, and has done so with considerable firmness: something which cannot, instead, be said of the European Court of Human Rights. The latter, indeed, in 2001 (in its judgment in *Banković*) unfortunately maintained that the obligations deriving from the European Convention of Human Rights must be respected by each of the states parties even *extra territorium*, but only where the state in question was exercising its jurisdiction over individuals within the 'European' space constituted by the whole of the territories of all the states parties. From 2001 to date the European Court has unfortunately never retracted this highly questionable case law (at any rate explicitly, even if perhaps it has done so implicitly), according to which the states of the Europe of human rights are exempt from respect for the European Convention when they go off to exercise state powers outside Europe. The World Court instead rightly does not hesitate to affirm the extraterritoriality of human rights, without falling for any questionable *distinguo*.

3 The ICJ and Genocide

On themes close to this one (and in a certain sense mirroring it) I do not feel the World Court has displayed the equally progressive attitude one might have logically expected.

On the contrary, in some cases we may note positions which I find decisively formalistic and restrictive, and I am surprised that this point has not been noted.

I wish here in particular to allude to one point in the judgment of 26 February 2007 on genocide (*Bosnia-Herzegovina v. Serbia-Montenegro*) which concerns the obligation on states to deter genocide, proclaimed by the 1948 Convention in provisions which must undoubtedly be regarded as corollaries of the principle of *jus cogens* that bars genocide. I would recall that among Bosnia's requests was one to assert that Serbia had breached and continued to breach its international obligations, as laid down in particular by Article 6 of the 1948 Convention, by the mere fact of not having engaged in enforcement in relation to one of the main perpetrators of the Srebrenica genocide, General Mladić, in that it had neither opened criminal proceedings against him through its own judges nor placed him in the hands of the International Criminal Tribunal for the former Yugoslavia. Now, as we know, the Court found in favour of Bosnia on this point. Nonetheless, it found that in this connection the sole breach of the Convention attributable to Serbia was the one regarding the handing over of Ratko Mladić to the International Tribunal. For, the Court maintained, the tenor of Article 6 imposed enforcement through its own judicial apparatus only upon the state on the territory of which the genocide was perpetrated. In short, according to this reading of the 1948 Convention, since Srebrenica is in Bosnia, had there not been any competent international tribunal Serbia would have had the full right to consider itself as scrupulously respectful of its obligations regarding deterrence of genocide, while allowing the undisturbed presence on its territory of the perpetrator of such a dreadful crime immediately outside its own frontier.

You may ask: but is this really the only possible interpretation of the Convention? Are we really obliged to subscribe to it despite the truly repugnant consequences that result? I am highly doubtful of that, and I am convinced that the very same judgment gives hints which, if properly evaluated, fully justify a different interpretation.

To be sure, the 1948 Convention is in some respects an antiquated instrument, given that for the 'crime of crimes' it does not lay down the principle of universal jurisdiction, as do various successive instruments concerning other equally abhorrent crimes normally conceived of as of lesser gravity, such as torture. However, from there to holding that no obligation regarding deterrence of genocide obtains for states other than the one in which it was committed is quite a long way! And I am not intending just to allude to the obligations regarding extradition with which Article 7 deals. I wish instead to stress that when the Court affirms that Article 6 'only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction' (at paragraph 442), it is saying something which is certainly true, but not sufficient for solving the problem. By confining itself to this too narrow observation of a literal nature, in fact, the Court seems to forget what it itself affirmed in connection with Article 1 of the Convention. The undertaking to prevent and to punish genocide proclaimed in Article 1 'is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. . . . Article 1 creates obligations distinct from those which appear in the subsequent articles' (paragraph 162). In other words, in the words of the Court itself the Convention lends itself to an interpretation capable of making it

clear that the deterrence obligations incumbent on every state party do not reduce to what can be derived from Article 6. It may thus be said that if, despite what this latter Article provides, the perpetrator of the genocide is not subject to punishment by the territorial state, the general obligation on all states to act by all means at their disposal to combat that impunity still remains standing. To be sure, the Convention does not specify exactly what the states in question ought to do, thus leaving up to them the choice of instruments to use in each individual situation to comply with the obligation laid down in Article 1 to punish and prevent genocide. But I feel it is obvious that the instruments which can be used in the fight against impunity by the state on whose territory the perpetrator of genocide has taken refuge are certainly not confined to cooperating with some international criminal tribunal which may be competent.

The important judgment just cited deserves much more comment, in the logic of the 'humanization' of international law, especially if it is recalled that it was subjected to criticism, sometimes very harsh (in particular from Cassese), especially as regards the restrictive criteria used by the Court to deny the attribution to Serbia of acts of genocide despite the intimate and strong links between the perpetrators of the Srebrenica massacre (the military apparatus of Republika Srpska) and the Belgrade government. I feel, however, that it is best for me to avoid getting into an argument on this point, since I was counsel for Bosnia-Herzegovina in that trial and actively argued before that Court on the very question just mentioned. I am, however, convinced that the judgment we are talking about has to be recognized as having various qualities, even by those who find it has much to be deplored for. Among these qualities one aspect deserving mention has – I feel – escaped the attention of the bulk of observers.

The Court had very limited jurisdiction in the matter, resulting from the compromise clause provided for in Article 9 of the 1948 Convention: it could decide only on breaches of the provisions of that Convention exclusively concerning genocide. No jurisdiction was instead given to it in the case in point to identify any responsibility of Serbia for other international crimes (crimes against humanity, war crimes) committed against Bosnian Muslims. But to verify whether there had been genocide, as Bosnia alleged, or not, and to arrive at the conclusion that one can speak of genocide – given the restrictive definition of the crime in question laid down in the Convention – exclusively in the case of the Srebrenica episode, the Court reviewed the whole enormous mass of criminal acts committed and found a large portion of them to be judicially established – in other words it found that their existence, gravity, and massive nature had been fully proved. For instance in paragraph 276 we read that the Court 'finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred'; or again in paragraph 319 that the Court 'considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm'. Now it might be asserted that, strictly speaking, this sort of judicial finding was within the Court's competence only for acts which could be described as genocide, and not for those lacking the necessary elements to fall within the concept of genocide. But that was not enough: the International Court considered itself authorized even to go beyond what has been mentioned

so far: for in fact it went on to reach the conclusion that – except for Srebrenica – the proof of the *dolus specialis* needed to be able to describe the acts ascertained as genocide had not been reached; but it did not hesitate to go on to assert what, strictly speaking, the limits of his competence *ratione materiae* ought to have barred it from saying: namely that while they could not be defined as constituting genocide, ‘the killings outlined above may amount to war crimes and crimes against humanity’, even if it immediately goes on to add: ‘but the Court has no jurisdiction to determine whether this is so’ (paragraph 277). Further on, in connection with the other criminal activities that the Court considered established, it accepts that ‘they too may amount to war crimes and crimes against humanity’ (paragraph 319). In short, it might be said that the Court refused to let itself be imprisoned entirely in the straitjacket of its very limited jurisdiction, so as to be able nonetheless openly to express before the whole international community its own judgment of firm condemnation of the atrocities committed even if they did not constitute the crime of genocide. The Court had judicially ascertained the existence, exceptional gravity, and systematic nature of these atrocities, and explicitly suggested that they are describable as international crimes differing from genocide: and I repeat, though actually not having the jurisdiction to do so.

4 The Immunity of States and International Organizations from the Jurisdiction of Foreign Courts

Another important and highly topical theme brought up *en passant* in the debate was that of jurisdictional immunity in favour of states and their agencies and of the current trends towards steadily shrinking its application in cases of severe breaches of human rights. This is a familiar and very delicate topic, on the various aspects of which much has been written in recent years (some of it by Cassese); and more will probably be written in future, when the Court tackles the merits of the dispute between Germany and Italy regarding the question whether a state does or does not enjoy jurisdictional immunity before the judges of foreign states when the issue is compensation for damage suffered by the victims of international crimes perpetrated in breach of norms of *jus cogens* by individuals acting in their capacity as organs of the state itself.

No mention was instead made in the debate of the similar question being raised today in relation to international organizations. For we know that these – by virtue of clauses in their founding treaties, if not of a principle of general international law – enjoy absolute immunity before the domestic judges of states (at least of member states). But does the immunity hold also in the case where the organization is claimed to have violated the human rights imposed on the state before whose judge the organization has been brought to justice?

As we know, the answer currently given to this question is in the affirmative, though it should be noted that one limitation is progressively being affirmed: verification of the existence in that international organization of mechanisms which can assure the human rights in question ‘equivalent protection’ to what they would obtain before national judges. As we know, this limitation has been developed in the case law

(particularly by the European Court of Human Rights), notably in reference to litigation involving international civil servants, i.e., matters regarding challenges to the legitimacy of the organizations' actions towards their officials and agents. Yet there is no reason to hold that an international organization can shelter behind jurisdictional immunity when, on whatever basis, it is led to engage in acts against individuals other than its own officials and it is alleged that these acts are in breach of the human rights of the persons in question. This is, in my view, the approach which ought to be followed in tackling the problems which present themselves, for instance, in relation to decisions like those the United Nations Security Council today takes in a growing number of cases which hit individuals with 'targeted sanctions', whereby the member states are obliged to seize certain of their assets, or ban their travel, and the like.

I am bringing up a complex set of issues, currently the object of intense debate and copious case law. I shall confine myself as regards the latter to mentioning the names of two cases that rivers of ink have gone to commenting on, *Bosphorus* and *Kadi*. For the purposes of these conclusions it should suffice to emphasize that obviously the United Nations too ought to respect human rights. The fact that that organization possesses no machinery for monitoring their observance which complies with the principle of due process and is accessible to the interested parties cannot be translated into legitimation for it to act illegally, or for states to become its accomplices by implementing its illegal acts. On the contrary, it should be considered right to maintain that, since within United Nations law there are no mechanisms suitable for enabling effective protection for human rights which can be rated as of equivalent scope to those operating in the domestic legal systems of states, the latter bear a responsibility to guarantee respect for human rights by not implementing illegal decisions of the Security Council, and if necessary denying immunity to the Organization where this is necessary in order to verify that human rights have not been violated.

5 The Development of International Criminal law

It is now time to move on to topics of criminal international law, this new chapter in the international legal order to which Nino has dedicated himself in exemplary fashion, at the level both of research (as attested to *inter alia* by the book which has been the object of our meeting) and of action. A brief comment aimed at recalling how and why, starting with the 1990s, the international penal tribunals were born and grew will not only enable us to stress one essential aspect of the growth of the 'human dimension' of contemporary international law, but also supply us with some elements of an answer to one of the 'existential' questions which our author raises, as I pointed out at the outset: can we realistically cherish a feeling of optimism regarding the growth in a humane direction of international law? Is it not instead – as Cassese suggests – a disenchanting pessimism which ought to prevail?

We all know that it is for less than two decades that the international community has been endowing itself with a panoply of very new instruments of a penal nature: it now possesses tools thanks to which criminal repression of the most hateful crimes perpetrated by individuals can be accomplished directly at international level, and no

longer only through domestic legal machinery. To defeat the ‘culture of impunity’ nourished by the severe shortcomings of national justice in the face of the most serious forms of criminality, some sharp downsizing has thus been inflicted on what has always represented a sort of hard core of state sovereignty: the monopoly of criminal prosecution and punishment.

But (apart from the exceptions at Nuremberg and Tokyo) why have innovations of such importance been able to be accomplished only starting in the last decade of the 20th century, while the scourge of impunity for the most hateful international crimes has – we might say forever – been a sort of constant in international life? How is it that it is only today that the basic failure of the traditional mechanisms for repressing international crimes based on the obligation on states to provide for that repression through their domestic legal machinery on the *aut dedere aut judicare* principle suddenly began no longer to be seen as acceptable? To answer these questions we must ponder the fact that the inadequate operation of the traditional mechanisms for prosecuting and punishing these crimes (provided for in particular by *jus in bello*) was accompanied in the 1990s by the realization that there was a new failure: that of the instruments for *jus contra bellum*, entrusted by the United Nations Charter to the principal responsibility of the Security Council, which the end of the Cold War and the opposition between the blocs was finally to unfreeze.

For it is well known that the new world situation has enabled the Security Council to take in hand Chapter VII of the Charter and make it work, in a way which had never been possible in the age of the opposing blocs. But the explosion of conflictuality which was a consequence of the end of the Cold War, and especially the exponential explosion of domestic and mixed conflicts, generated new factors for impotence. The Security Council did not know how to keep up, and was unable to do so – as experience rapidly demonstrated how hard it is to intervene in order to stop or reduce domestic conflicts, and how intolerable the cost of such efforts is for those states which – in the absence of interests they feel to be truly vital for them – ought in order to do so to be employing their armies in the service of the Organization, or with its authorization. Hence the trend towards a Security Council activism, now – given that opposing vetoes no longer in principle bar the adoption of decisions and that strong and effective measures to put an end to conflicts seem in the majority of cases to be impossible – shifted in favour of the *humanitarian*, in the broad sense, option. We may, in short, speak of nothing less than a ‘humanitarian drift’ whereby the Security Council seeks to mask its inability to do the job the Charter calls it to do (to be the principal agent of *jus contra bellum*) by turning itself into an actor in *jus in bello*. In short, a sort of abdication, which has been reflected on the one hand in humanitarian assistance actions and on the other in actions aimed at imposing on combatants, if not cessation, then at least combat in respect for humanitarian principles, given that otherwise their individual criminal responsibility as perpetrators of crimes may be at stake, possibly before international judges. And it is, I feel, undeniable that the whole set of subsequent developments connected with the creation of the *ad hoc* international criminal tribunals by the Security Council in the first half of the 1990s, including the setting up of the International Criminal Court, comes under this logic.

In short, we are justified in asserting that international criminal justice is to a large extent the daughter of an accumulation of failures: that is the watermark in the story, representing a sort of confession of impotence by an international community unable to prevent, or even stop by forceful action, the great humanitarian crises brought about by human actions. But assessments of this sort do not in any way prevent us from all the same seeing the birth and growth of international criminal justice as an impressive piece of progress, in this very sense of humanization of international law. That progress is undoubtedly totally incomplete and still entirely embryonic, and many elements of it certainly remain highly criticable, but it is progress all the same: all the more so if it is true – as I feel we can observe – that it has had as its outcome a sort of stimulus to the revitalization of the classical system based on the obligation on states to take charge of the repression of international crimes through their domestic legal machinery.

6 Optimism v. Pessimism?

The discussion we have just had on the complex pathways which have, so to speak, led to the ‘invention’ of international criminal justice enables us to draw attention to an example which is certainly limited but, I feel, significant. In fact, this example undoubtedly lends itself primarily to some reflection on the question whether we can realistically cherish feelings of optimism as to the development in a humane direction of international law, or whether instead the study of the past and the present ought not rather to impel us towards disillusioned pessimism. It is true that the development is far from being linear or continuous. Yet, if in certain sectors we are not moving ahead, and perhaps even going backwards, at times we find that in others there is progress, however limited, and that often this progress too is due to a sort of reaction to the failed advances or to the retreats. In short, the sense of disappointment and discouragement produced by the finding that there is no actual evolution in the areas where it would be dramatically needed is perfectly justified, and cannot help but nourish pessimism. Yet the pessimism ought not to prevent a recognition of the advances, when, however rarely, they do happen. And the very finding that some improvements, albeit modest, have been made cannot fail to suggest a hope for further ones, to achieve which it is therefore worthwhile continuing to engage ourselves. In short, pessimism and optimism are not at all mutually exclusive: they must instead cohabit, and indeed lend each other reciprocal support.

The example of international criminal justice in particular offers bases for reflection on the way the good lawyer who does not want to confine himself to being only an honest exegete, but intends to commit himself with all the resources at his disposal, always with absolute probity, to the success of the values he believes in, ought to do his work. For us internationalists, the need is precisely to make international law advance by making it more just, that is, at the service more of man than of the interests of sovereignty.

But now comes the point: the categorical imperative of intellectual probity requires the jurist always carefully to distinguish the law as it is from what he hopes it to be.

Confusing the two, that is, seeking by intellectual artifice and manipulation disguised as interpretations to create the impression that the latter is already in force, can turn into downright mystification which then does no service at all to the cause we wish to defend. In other words, if the lawyer, calmly and clearly employing all the tools of the trade, reaches the conclusion that the *lex lata* is bad because it does wrong to a good cause, he must then unmask it and commit himself to reforming it. He must not push for its conservation, hiding its defects and portraying it in false colours, lending it fine features it does not in reality possess. Helping to hide or disguise the truth is never a forward-looking attitude, since it does not help us to recognize the real enemy which has to be fought. To be sure, no one can claim that the demarcation line between *progressive interpretation* and *mystification* is easy to discern in the absence of precise boundary stones. However, the upright lawyer must always seek to keep to this side of the frontier, in good faith, albeit pushing himself as far as possible to the extreme limit, while still employing all his skill not to go beyond it.

I am by no means, be it understood, asserting that the lawyer ought to confine himself to analysing the law in force, remaining closed within the precincts of *lex lata*. Certainly, if he is not called upon to act as a legislator, it is not for him to negotiate and decide what new answers to give to the social needs which the law in force does not satisfy. His task is instead one for which he holds valuable competence: namely that of ‘speaking the law’, i.e. bringing out clearly and critically how far it is possible to go with the existing law and to what extent it is instead inadequate or insufficient. In the latter case, that is, when it seems necessary to develop new rules, he cannot be denied the right to commit himself also to seeking and critically suggesting the best solutions – identifying both the principles on which these solutions ought to be based and the technical rules best suited to making them work.

I believe that the book we are discussing is exemplary in this connection too, as is, by the way, the whole of Nino Cassese’s work. The study of existing international law is always done in it lucidly, unsparingly, and critically, but does not stop there, for that is not the finishing line. Critical analysis ought in fact, as it were naturally, to lead to the discourse of reform, to be proposed to all those who in any way exercise the power of decision (including, obviously, public opinion). And in this context we should welcome the option to use where appropriate the resources of non-insider language (at the cost of arousing the contempt of the experts), if in that way we may hope to get closer to those who have the responsibility for making the law.