

Realizing Whose Utopia? The Structure of Normative International Law Arguments

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Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford, Oxford University Press, 2012, 728pp., ISBN 9780199647088, (p/b) £34.99, 978-0-19-969166-1, (h/b) £95.00

1. Introduction

Antonio Cassese's last book is a massive compilation of forty-eight chapters written by some of the world's leading international law scholars. The contributions discuss on-going and anticipated transformations of the discipline that the new generation of international lawyers are expected to witness in the course of their career. Eight contributions are written by or with the participation of Cassese himself, as the editor replaced several desisting contributors. Some other contributions, previously published elsewhere, are translated from Italian or French. The merits of the book have already been hailed, in particular through a collection of eight essays in the *European Journal of International Law*.² The analyses offered by this book are perhaps not always revolutionary, but their gathering does much to take stock of existing debates that relate to multiple fields of international law. *Realizing Utopia* should be of interest to any international law scholar and could be recommended to some practitioners (diplomats, international civil servants, NGOs) interested in the evolution of international law.

The introduction opens with Aldous Huxley and a distinction between two categories of sociologists: the *Technicians* who 'like the details,' and the *Utopians* who 'are much too preoccupied with what ought to be to pay any serious attention to what is' (p. xvii). The aim of the book is 'to avoid the extremes of both blind acquiescence to present conditions and the illusion of being able to revolutionize the fundamentals' (ibid.). In that sense, Cassese asked the contributors to:

- (i) reflect on the conditions of some of the major legal problems of that [the world] society and compendiously analyse inconsistencies or inadequacies of current law;
- (ii) highlight the elements – even if minor, hidden, incipient, or *in fieri* – that are likely to lead to future changes or improvements; ... and
- (iii) suggest how these elements can be developed, enhanced, and brought to fruition in the next two or three decades, with a view to achieving an improved architecture of world society or, at a minimum, to reshaping some major aspects of international dealings. (p. xxi)

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² (2012) 23 EJIL 1029-1173 (essays by M. Milanovic, H. Ruiz Fabri, P.-M. Dupuy, I. Scobbie, P. Alston and C. Gillespie, F. Francioni, O. Ben-Naftali, and I. Feichtner). See also L. Casini's review, (2012) 10 *Journal of International Criminal Justice* 1452.

The table of contents reveals a wide-ranging yet thorough analysis of the current dynamics. The first part of the volume gathers eleven contributions covering broad issues that are related to the notion of a ‘global community.’ They cover the evolutions of the notion of state sovereignty, the functions of the United Nations and more specifically of the Security Council as well as the role played by non-state actors and the ‘international civil society,’ and the progressive constitutionalization of the world community. In the second part of the volume, three chapters address evolutions in the sources of international law: customary international law, *jus cogens*, and the new function of the Security Council as a law-making institution. The third part, throughout its thirteen chapters, discusses possible ways through which international legal imperatives could ‘be more effectively brought into effect.’ It addresses for instance the relation between international and domestic law, state responsibility, state immunity, the reform of diverse international judicial bodies, and possible avenues to promote compliance with standards on the peaceful use of nuclear energy, human rights compliance, and the protection of the environment. The sixteen chapters of the fourth part ask ‘what law should be changed?’. Proposals extend from law on the use of force to self-determination of the peoples, from development to trade, financial, and environmental laws, genetic manipulation, the use of cyberspace, and *jus ad bellum*. Lastly, the fifth part, with four chapters, questions the ability of international and domestic justice to play a ‘more incisive role.’

It would be beyond the scope of this review to try and relate to all these discussions.³ Rather than their theme, what unites the contributions is their overly prescriptive perspective – the quest for a ‘realistic utopia,’ as was the first proposed title for the book.⁴ Or perhaps rather in plural – *realistic utopias* – for utopias are no exact science. Utopias involve values. As Philip Alston recalls while reviewing the projects of reforming the United Nations, ‘[o]ne person’s utopia is the next person’s nightmare’ (p. 38). This essay inquires whose utopias are considered in the book, and whose nightmares these utopias could be. *Realizing Utopia* is an authoritative example of a great many normative arguments in international law scholarship, through which international law experts suggest reforms – new rules or new interpretation – through which, these experts consider, the world would become a better place. Rather than constituting a specific type of scholarship, normative arguments impregnates most, perhaps all international law literature.⁵ It is my contention here that such scholarships raises unaddressed methodological issues and that, in particular, one should not readily take for granted that expertise in *lex lata* necessarily extends to a specific understanding of *lex ferenda*.⁶ It may be, after all, that a utopian world

³ For a summary of the contributions, see Casini, *ibid*.

⁴ See O. Ben-Naftali, ‘Sentiment, Sense and Sensibility in the Genesis of Utopian Traditions’ (2012) 23 EJIL 1133 at 1133.

⁵ The creative role of publicists in ‘teaching’ international law is explicitly recognized in article 38(1)(d) of the Statute of the International Court of Justice.

⁶ I do not argue that international lawyers have *no* specific expertise relevant for contributing to international law reforms: they obviously have. My argument here is rather that they do not have the sole necessary expertise.

would be one without international law, where each individual and each state would autonomously comply with moral duties – a hypothesis that is remarkably denied by the subtitle of *Realizing Utopia: 'The Future of International Law.'* Suggesting a 'realistic utopia' calls for some trade-offs between what is perceived as a social good and what is perceived as the obstacles thereto. Unlike ethicists and international relations scholars, the expertise of international lawyers does not extend to assessing what the social good is, or what are the obstacles that raise before it. For lack of interdisciplinary discussion, normative international law arguments are often based on silent and arbitrary assumptions.

This essay starts with discussing the value(s) of utopia, through discussing some contributions to *Realizing Utopia*, as a hard case for the later discussions (2). It then questions (and refutes) the appeal to objectivity in some contributions (3), and identifies the singular utopia of international lawyers (4). This essay concludes by suggesting that normative arguments by international lawyers can make a useful contribution to on-going debates if they prove able to relate to other disciplines, in particular ethics (defining "utopia") and international relations (defining "realistic") (5).

2. The Value(s) of Utopia(s)

Thomas More's biographer argued that '*Utopia* is a kind of literary masque, and More never removes the covering to let us see exactly what lies behind'⁷ – which moral values he promotes, and why. As 'an ideological critique of ideology,'⁸ an Utopia certainly has some important social and political functions, in sparking debates about what *ought to be*, but it also involves a dissimulation of the authors' intents: the fiction conceals the argumentative commitment of the author; storytelling is a pretext for a socio-political critique.⁹ Precisely because they are held implicitly, as is often the case in art generally, such arguments need not be reasoned, or at least not in the same way as academic scholarship generally are. Therefore, transposing Utopia from literature or politics into academic scholarship, as *Realizing Utopia* suggests can be done, creates a tension with our expectation that the latter be – at least to a certain extent – based on explicit arguments expressed in a rational format, hence capable of being challenged by other reasoned arguments.

International law's utopias in Cassese's volume like elsewhere often lack a solid reasoned argument. In particular, they rarely involve any explicit discussions as to what international law should achieve, and why – as if the answers to these questions were all too evident. These questions may indeed be evident *to some*, and they may be consensual within small academic debates, but some of their assumptions may crumble when exposed to different disciplinary perspectives.¹⁰

⁷ R. Marius, *Thomas More: A Biography* (1999), 153–54.

⁸ Louis Marin, 'Thesis on Ideology and Utopia' (1976) 6 *Minnesota Review* 71 at 71.

⁹ See Frederic Jameson, 'The Politics of Utopia' (2004) 25 *New Left Review* 35; Krishan Kumar, *Utopianism* (1991).

¹⁰ This is a point I tried to make with regard to proposals for an international legal protection of climate-induced migration when asking why these migrants should be

To this extent, one of the merits of *Realizing Utopia* is to avoid any claim to an objective or rational normative argument. Although the title – in particular the use of singular – seems to suggest a certain consensus, there has apparently been no editorial pressure to lessen tensions between the conflicting political views of different contributors. Thus, for our purpose, the book is an opportunity to discern the political perspectives adopted by a handful of today’s most influential international law scholars – their commonalities and their contradictions. The book’s contributions share common references to a language of ‘human rights’ and ‘equity,’ but this terminological agreement reflects conceptual differences. The following subsections discuss three examples of dissensions amongst utopians regarding, respectively, moral assumptions, ideological paths, and the distribution of power within international institutions.

2.1. Moral assumptions

There is no agreement as to what is ‘good,’ in international law scholarship, and three different broad ethical languages are for instance present throughout the book: a deontological ethics (e.g. human rights), a utilitarian ethics (e.g. economic growth), and mixtures of deontology and utilitarianism *à la* Rawls (e.g. through the concept of fairness). Concededly, the differences between the contributors are subtle, mid-to-dark tone, but they have tremendous consequences, as moral assumptions are the foundation of normative arguments.

An example of the deontological perspective, Peters considers individuals as the only ethical end, ‘the ultimate unit of legal concern’ (p. 129). Would *everyone* agree blankly with this approach? Without necessarily going all the way down to the political slogan of collectivist ‘Asian values,’ others might consider that international law should also give some place for, for instance, the recognition of community values or collective identities. By contrast, Michael Reisman tends to take a holistic economic development as a goal of international relations, in a more utilitarian perspective. Reisman suggests ideas to advance international investment law and arbitration on the ground that, in international trade, ‘an economic transaction is reciprocally enriching, with each participant net better off thanks to the exchange’ (p. 276). Reisman’s argument does not seem to extend to the consequences of trade within the states, but only as to the growth of each state.

Other contributions adopt the in-betweenness of a fairness perspective. In his contribution on the ‘role that equal rights and self-determination of peoples can play in the current world community,’ Abdulqawi A. Yusuf argues that, in addition to the external and internal right

protected rather than others. The legal debate, in this area, is at odds with empirical evidence, for instance on the impossibility to identify individual ‘climate migrants.’ See B. Mayer, ‘Fraternity, Responsibility and Sustainability: The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads’ (2012) 56 *Supreme Court Law Review* [Canada] 723; ‘Climate Change and International Law in the Grim Days’ (2013) 24 *EJIL* 947 at 962-964.

of peoples to self determination, a ‘third normative strand ... is the right of peoples freely to pursue their economic, social, and cultural development, and to participate, contribute to, and enjoy such development’ (p. 377). Accordingly, international law should address in particular the ‘inequalities which result from foreign exploitation or economic domination by other peoples, or by foreign institutions and enterprises, or due to patterns of global trade and investment underpinned by inequitable rules’ (p. 388).

2.2. Ideological paths

Beside, authors adopt different assumptions as to the nature of the world, borrowed from different ideologies. Reisman’s contribution is coloured by the sunset of history: ‘[e]fforts to achieve development autochthonous, on the model of Chairman Mao’s oxymoronic ‘Great Leap Forward’ *demonstrated conclusively* that, in the contemporary world, a satisfactory rate of development cannot be secured without the participation of foreign capital, technology, and enterprise’ (p. 277). The structure of the argument is inconsistent: the failure of an individual policy cannot demonstrate the impossibility of any similar policies (circumstances, or specific modalities, could be responsible for a failure). It is based on an amalgam between Mao and ‘economic nationalism’ (p. 277), as if any economic nationalism was necessarily Maoist by nature. The use of such polemic arguments shows how political passions may divert the best scholars from the rational argumentation that characterizes the academic endeavour.

Whereas Reisman presents trade as a win-win, Yusuf highlights that the benefit of free transactions has sometimes been ‘diverted by the political leadership for their own personal ends, or otherwise misused by autocratic ruling elites,’ and that ‘it has been observed that an inverse relationship often exists between resource endowment and economic development’ (p. 389). In a similar vein, Emmanuelle Jouannet’s contribution on ‘how to depart from the existing dire condition of development’ (p. 392) reviews possible ‘solutions for the twenty-first century’ in one of the few openly political sections of the book. By contrast perhaps to Reisman, she refuses to ‘stick ... to the neo-liberal pro-market paradigm’ as ‘economically efficient but socially unfair’ (p. 406) and calls for a ‘new and fair NIEO’ (p. 409).

These ideological assumptions, at least, are made explicitly, if they are not fully justified. Many other such assumptions remain implicit, but equally influential. As Isabel Feichtner notes, the New Haven school (to which Reisman relates) attempted ‘to lay open the values and social theories instructing their policy suggestion’: this was at the same time ‘one great advantage’ and the reason of dismissing it as ‘ideological’.¹¹

2.3. Distribution of power within international institutions

¹¹ I. Feichtner, ‘Realizing Utopia through the Practice of International Law’ (2012) 23 EJIL 1143, at 1155.

Yet another source of contention amongst utopians relates to the place where power should be concentrated, and in particular how it should be distributed between the organs of the United Nations. Bardo Fassbender suggest that, '[i]n an "unrealistic utopia", the [Security] Council would take a more proactive attitude and seek to identify and improve, in accordance with Article 34 of the UN Charter, situations "which might lead to international friction or give rise to a dispute", including long-term developments like desertification, overpopulation, and climate change' (p. 60). Similarly, Alan Boyle argues for a recognition of the legislative power of the Security Council with the approval of the General Assembly, as a way to circumvent stalling of negotiations with regard to, in particular, climate change (p. 175). Prosaically it is not evident whether states other than the P5 (and in particular developing states) could possibly agree with further expanding the mandate of the Security Council. More fundamentally, in an 'unrealistic utopia,' one may wonder whether decisions that involve all states and all peoples should not rather be taken by the General Assembly, or even by an assembly of peoples' representatives (rather than states' representatives), if any such decision was necessary at the first place.

Alternatively, Luigi Condorelli suggested to expand the role of the ICJ to counter the fragmentation of international law, in particular through developing a judicial review of Security Council resolutions (p. 156). Commenting on this chapter, Marko Milanovic recalled that 'exercising such review is not simply a matter of *doing the right thing*, but is also a claim to *power*, and of redistribution of power in the zero-sum international order.'¹² How much power to give to each organ raises geo-political questions of balance of global power with which the contributions do not deal in depth. The localisation of power influences the content of international law: it is unlikely, for instance, that the Security Council would recognize developing countries' interests in climate change governance (e.g. funding for adaptation, loss and damages) as strongly as the UNFCCC and its Conferences of the Parties (COPs) have done: changing the forum would metamorphose the balance of bargaining powers between states.

More 'radically' – that is, in an attitude which is less common within international law scholarship, but not necessarily uncommon in our societies –, some may question the legitimacy of international organizations altogether. Jose Alvarez's contribution opposes the 'mostly European defenders of global institutions on behalf of the "world community"' to 'those who purport to speak on behalf of the South and who see the hard-won sovereignty of the formerly colonized as a last bastion of protection against overweening global tools of the market and institutionalized hegemony laundered as "international regulation"' (p. 28). In this perspective, international law, as power, institutionalizes schemes of domination and exploitation. In a real (or not fully utopian) world where there are inequalities and conflicting interests, the localisation of power does matter.

3. In search of objectivity

¹² M. Milanovic, 'On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese's Last Book' (2012) 23 EJIL 1033, at 1038.

Some chapters, however, appear not to mingle with any such politically-loaded discourse. These chapters adopt a seemingly ‘neutral’ or ‘apolitical’ stance: accordingly, they are *just* about improving the *efficiency* of international law. One way of doing this is through addressing inconsistencies among norms. In that vein, Anne Peters’ chapter on the constitutionalisation of international law participates to an effort at imagining ways to overcome the fragmentation of international law. Another way of improving the efficiency of international law consists in improving compliance. This is for instance the perspective that contributors to the third part – on effectively bringing in effect international legal imperatives – were invited to adopt. These authors may argue that they are less reliant on external values: they – as lawyers, as technicians – aim at sharpening a tool (international law), not interfere into political decisions as to how this tool is used.

However, even these contributions are necessarily rooted in value-loaded assumptions. At least, such works assume the continued relevance (and, often, increasing importance) of international law in the conduct of international affairs. The apology of law as an instrument that guides international relations is, in itself, part of a political agenda, although this political agenda remains largely uncontested within our epistemological community, as will be argued in a next section. By focusing on inconsistencies among norms of international law, Peters suggests that consistency should be a priority, hence assuming that other issues – such as the objective of a wide participation in law-making processes, which may be affected by the construction of a pyramidal regime of norms – are comparatively less pressing. This is what I suggest could be called the *productivist* type of normative international law arguments, which justifies normativity on the ground of expanding the yield of international law,¹³ not necessarily at improving its social outcomes. Productivist arguments seek to define a utopian international law, but a utopian international law is not necessarily an international law for a utopian world – one may even wonder whether an utopian world needs any international law.

Objectivity is also invoked through another form of argument which identifies ‘precursory signs’ to predict forthcoming changes. This *bandwagon* type of normative international law argument consists in jumping into a train already on the move, confident that it will lead us to better horizons. Jouannet, for instance, asserts that ‘the idea of a fair globalization has precisely become the watchword of the last ten years’ (p. 410), in support of her prescriptive argument for a fair globalization. Other authors emphasize the continuity of the changes they prescribe in broader historical processes. Thus, Andrew Clapham, for instance, argues that the creation of a World Court for Human Rights ‘is simply the logical development of the protect human rights through international law’ (p. 324). Similarly, in a contribution by Cassese that proposes institutional changes to bring the International Court ‘into the twenty-first century’ (p. 239), jurisdictional developments are phrased within a call for continued modernization (p. 249). Yusuf notes that the right to self-determination now operates internally, but that ‘[i]t might ... be realistic to assume that this situation is in

¹³ On the mainstream idea that ‘more international law is always better,’ see B.S. Chimni, ‘An Outline of a Marxist Course on Public International Law’ (2004) 17 LJIL 1 at 2.

the process of changing and that the twenty-first century will most likely witness the emergence of a legal guarantee at the international level' (p. 384).

If it was to be taken seriously – rather than as a purely rhetorical argument –, the bandwagon argument would appear as deeply flawed. It is evidently not because something *is* happening that it *ought to* be happening; history is to be written rather than followed. Moreover, the argument always requires a selection of certain 'precursory signs' over others, and light is only shed on one of multiple potential 'historical trends.' Someone who would not share Clapham's perspective might for instance oppose other 'precursory signs,' ranging from the war on terror to the rise of China, which may be held to conclude that human rights are, *hence* should be declining. Instead of a rational reason, the bandwagon argument calls for academic herding: precursory signs suggest to the reader that the author is only part of a powerful trend which is already successfully pushing for changes, and shared perspective are more likely to be true. There is also, after all, some comfort in thinking that what *is* happening is what *should* happen. In other words, the bandwagon argument does not prove anything, but it tends to persuade. So doing, it avoids a genuine argumentative engagement with the proposed utopia.

Irremediably, normative arguments are rooted in value-loaded assumptions. On a more theoretical perspective, this can be attributed to an insurmountable tension between what *is* and what *ought to be*.¹⁴ Martti Koskenniemi's analysis of the structure of the international legal argument revealed a similar tension, although he focused on doctrinal international law arguments. According to Koskenniemi, international law arguments are based on a tension between 'concreteness' – the quality of being 'verifiable, or justifiable, independently of what anyone might think that the law *should be*' – and 'normativity' – the quality of being 'applicable even against a State (or other legal subject) which *opposed* its application to itself.'¹⁵ Koskenniemi argues that '[i]f we insist that the law be normative, then we must rely on some non-consensual standard – if we persist in demanding that it be concrete, then we have nothing but the State's own view on which to rely.'¹⁶

The tension that Koskenniemi identifies in doctrinal scholarship has a parallel in normative international law arguments, between the doctrine of international law (itself the outcome of the first tension between international law's concreteness and normativity) and what are assumed to be the principles guiding the evolution of international law. The productivist and bandwagon arguments have in common to induce principles from doctrine (or from its evolution), and then to deduce a plea for reform from such principles. The argument is biased because values are instrumental in the selection of possible alternative principles underlying the doctrine and its evolution: it is on the basis of this discrete selection of

¹⁴ David Hume argued that claims about what *ought to* be cannot be deduced solely from claims about what *is*. International lawyers are experts in what *is*, but this may only be of a little help when arguing about what *ought to* be.

¹⁵ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 513.

¹⁶ *Ibid.*, 514.

‘principles’ that a statement about what *is* (the doctrine) leads to another statement about what *ought to be* (the need for reform). Thus, if we return to Clapham’s argument for a World Court for Human Rights, one may note that, if the creation of such a court *really* followed from existing trends in the doctrine of international law, a *normative* (rather than purely predictive) argument for its establishment would be unnecessary. On the other hand, if – as it seems to be Clapham’s claim – such a court is presently just a part of an on-going project, which remains the object of political debates, the normative argument that such a court should be established originates from a value-loaded support to such a project.

4. The singular utopia of international lawyers

Where, then, is the singular ‘utopia’ in *Realizing Utopia* – the unique ‘future of international law’ that the title suggests? Koskenniemi argues that ‘there is nothing else apart from authentic consensus on which normative problems can justifiably be solved.’¹⁷ Can such an authentic consensus be reached on what constitutes, or ought to constitute the future of international law?

There is at least one element that is common to most contributors: a commitment to the continued development of international law as being able to address the problems faced by peoples and populations throughout the world, despite its present shortcomings.¹⁸ Even Alvarez’s emphasis on states’ sovereignty relies on international law, if only as a mechanism to protect the sovereignty of states. On the other hand, numerous other contributions reflect a cosmopolitan ethos, particularly evident in Philippe Sands’ chapter on the ways to operationalize the UN Charter’s rules on the use of force (pp. 343ff) or in Cassese’s chapter hailing the role that peremptory norms could play to realize the ‘community interest in the peaceful settlement of disputes’ (p. 158). In the same vein, Cassese’s introduction notices ‘the current dramatic tensions between the old society of states hinging on self-interest, reciprocity, and ‘a parochial spirit,’ on the one side, and emerging community values, on the other’ (p. xx).

This appraisal of international law generally goes unchallenged in the epistemological community that international lawyers form. It might however be regarded critically by outsiders, as a self-justifying assumption that we (international lawyers) are important to the world. In other words, this broad commitment to international law is not part of an authentic consensus *beyond* the epistemological community. As Milanovic fairly suggests, ‘there are and will be people who quite reasonably disagree with it.’¹⁹

¹⁷ Ibid., 532.

¹⁸ H. Ruiz Fabri notes ‘Cassese’s act of faith lying in his belief that law can bring about change in the world. See H. Ruiz Fabri, ‘Enhancing the Rhetoric of *Jus Cogens*’ (2012) 23 EJIL 1047 at 1053. See also *supra* note 13, for instance, for the outline of a critical perspective on international law’s liberalism.

¹⁹ Milanovic, *supra* note 12, at 1046.

This remark also paves the way to a larger inquiry into how our identity as international lawyers may impact our values and the way we conceive utopias, even beyond the agreement that international law should be part of the equation. At the risk of stating the obvious, as international lawyers, we have a common lifeworld (to approach the issue in Habermas's tradition), a professional habitus (Bourdieu), a certain discipline (Foucault), or a culture of class (Marx) that result in a common language and a host of common assumptions.²⁰ This process of socialization (the constant interaction of international lawyers with other international lawyers, be it through institutional promiscuity or by reading international law scholarship), but also perhaps from belonging to similar socio-economic and cultural strata. The international lawyer often comes from privileged milieus as legal education is selective, long and costly,²¹ and because lawyers and professors in most countries earn far more than the national average. The international lawyer remains more frequently a man than a woman,²² and, too often, a white person.²³ (S)he travels frequently and has lived in several places, perhaps in different countries. The vast majority of leading international lawyers, even in developing countries, relate to Western countries by either nationality, education, or current place of living, and in particular to Western Europe and East-Coast Northern America.²⁴ These elements and others cannot but have an impact on the way we understand the world, then arguably also on the way we suggest changes in international law. This should not mean that all lawyers necessarily have the same view on any question, but it may suggest that some views are more likely to prevail.

Yet it would be an uneasy task to attach definite consequences to this sociological bias without falling in some sort of simplistic clichés. Hypothetically, international lawyer might be more sensitive than others to values such as international cooperation, perhaps civil and political human rights, and peace narrowly understood as the avoidance of armed

²⁰ See for instance, in general, Oscar Schachter, *Invisible College of International Lawyers* (1977) 72 *Northwestern University Law Review* 217; Anne Orford ed., *International Law and its Others* (2006); Prabhakar Singh and Benoit Mayer, eds., *Critical International Law: Post-realism, Post-colonialism and Transnationalism* (forthcoming).

²¹ See for instance Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992), and Philip C. Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* (2003).

²² See for instance Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *AJIL* 613.

²³ See for instance *Symposium: Critical Race Theory and International Law*, (2000) 45 *Vill. L. Rev.* 827 (contributions by Ruth Gordon, Mikau Mutua, Penelope E. Andrews, Antony Anghie, Keith Aoki, Nathaniel Berman, James Thuo Gathii, Elizabeth M. Iglesias, Henry J. III Richardson, Natsu Taylor Saito, and Chantal Thomas); Athena D. Muthua, 'The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship' (2006) 84 *Denver University L. Rev.* 329.

²⁴ See for instance B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *Int'l Community L. Rev.* 3, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), and David Kennedy, 'Spring Break' (1984) 63 *Texas Law Review* 1377.

conflict. On the other hand, our epistemological community might put less emphasis than other epistemological communities (in particular political scientists and economists) to objectives such as substantive democracy, substantive peace, or substantive development. Feichtner notes that the contributors of *Realizing Utopia* share a ‘strong belief ... in the possibility of engaging in social engineering through law,’²⁵ and this might also be related to an epistemological bias which consists in eluding the complex social dynamics that other social sciences (including law and society scholars) have illuminated. It might also be that international law, as a discipline, invites to a certain conservatism: law (in which most of us were educated before turning to international studies) is after all about applying the rule more than about transforming it, about playing within the structure rather than challenging it.²⁶ As such, the utopia of international law may not be very creative; it satisfied itself with prolonging existing trends (cf. bandwagon argument) rather than conceiving new ones, and with suggesting better compliance with existing norms (cf. productivist argument) instead of designing new, original norms.²⁷ Defiance vis-à-vis political institutions and reliance on independent authorities is also a defining feature of large strands of normative arguments. Thus, Milanovic notes Cassese’s constant assumption that ‘States cannot be trusted; courts can.’²⁸

To take the point further, could an interest-based critique of normative arguments be relevant? Scholars often analyze biases through which states, international organizations or NGOs, and their employees, pursue their own interests. Are we (international lawyers) not also pushed by a sort of class instinct to pursue our own interests when promoting ‘realistic utopias’ on ‘the future of international law,’ when judges call for more power for international courts, and when international law scholars emphasize the need for more research in international law (or simply for more international law, which is tantamount to the same)?²⁹ Evidently, as long as the audience is mainly composed of international lawyers, such claims will generally go unchallenged.

It is because of this sociological bias that normative arguments written by international lawyers, for international lawyers, are often not properly reasoned. There is little self-restraint: authors rarely feel compelled even to identify, let alone justify, the assumptions on which their normative arguments is based – the inclination for the genre of ‘utopia,’ as a ‘literary mask,’ is no coincidence. But ‘peer-review’ and peer-evaluation, generally conducted within the same epistemological community, is certainly also part of the issue.

²⁵ Feichtner, *supra* note 11, at 1156.

²⁶ Kennedy, *supra* note **Error! Bookmark not defined.**, at 9 (noting that ‘surprisingly little scholarship in the international legal field aims to illuminate the global distribution of political authority and economic growth.’)

²⁷ Feichtner, *supra* note 11, at 1147.

²⁸ Milanovic, *supra* note 12, at 1041.

²⁹ See for instance B.S. Chimni, ‘Prolegomena to a Class Approach to International Law’ (2010) 21 EJIL 57.

Being itself a politically-loaded process,³⁰ peer-review may push scholarship toward the dominant systems of values. It is arguably this self-referentiality that pushes Cassese to identify the emergence of emerging global ‘community values’ (p. xx): those values might belong not to the international community but rather to the more narrow, even close-knit, international law epistemological community. If normative arguments on international law are to be taken seriously, they should be addressed to decision-makers rather than to fellow researchers, as decision-makers are the ones who could bring transformative proposals into being. As a result of being developed and evaluated by complacent members of the same epistemological community, normative international law arguments might not be sharpened as they would need to, were they really to attempt at convincing decision-makers.

5. Realigning utopia in an interdisciplinary debate

The starting point of normative international law arguments is the meta-argument that we, international lawyers, have something interesting to contribute to a debate about the future of international law. Nothing in the above discussion seems to contradict this meta-argument, although some may call for some refinement. The contributors to *Realizing Utopia* evidence a thorough understanding by international lawyers of not only international law, but also international politics; the contributors’ opinions are abundantly informed. *Realizing Utopia*, as a whole, is certainly helpful, if only in order to identify some of the technical failures of international law (as a tool) that need to be re-thought, as well as in analyzing how best results could be reached when pursuing specific goals.

In order to convince beyond their own constituency, international lawyers need to reflect upon the contribution that they can make to the debate, and its limits. Discussing the methodology of ‘critical positivism,’ Feichtner justly concludes that ‘if the international lawyer intends to engage in normative *scholarship* he may not be able to do so without transcending the discipline of international law.’³¹ Recognizing the ‘ideological nature of critical positivism,’³² Feichtner insists that referring to other disciplines to support the assumptions that authors make would ‘serve to push back the point at which we will have to agree to disagree for the reason of our diverging politics.’³³ But she also notes the risk that the ‘disciplinary limitations’ of ‘critical positivism’ may result ‘in the neglect of knowledge that may be crucial to the international lawyer’s utopian project.’³⁴ On a more pragmatic touch, Milanovic notes that ‘methods of inducing change in the law that require the mere *acquiescence*

³⁰ J. d’Aspremont & L. van den Herik, ‘The Public Good of Academic Publishing in International Law’ (2012) 26 LJIL 1, at 6.

³¹ Feichtner, *supra* note 11, at 1151.

³² *Ibid.*, at 1154.

³³ *Ibid.*, at 1155.

³⁴ *Ibid.*, at 1154.

of states in rules laid down by wise, independent, and morally uncompromised experts or judges are not likely to produce changes that will be meaningful.’³⁵

The essence of normative argument in international law calls for its articulation with at least two other fields of expertise. Defining the roots of a normative argument – the ‘utopia,’ as an ideal reflection of what *ought to be* – is essentially the expertise of moral philosophers. Defining the ways to put reform into practice – the ‘realistic’ element, or what *could* possibly be – is something that international relations scholars have learned to do, among others through constructivist approaches on norm entrepreneurship.³⁶ In other terms, international law experts have a role to play in identifying possible ways to implement ethical concepts into viable legal reforms, but they need to rely on ethical expertise to define the utopia that they pursue, and international relations expertise to identify realistic ways to achieve progress. When ethical and international relations concepts are at all mentioned in normative international law arguments, however, it is often in the most superficial fashion.

The quality of normative international law arguments is undermined by its self-referentiality within an epistemological community. Such scholarship needs to recognize the essential inputs of other epistemological communities in defining the international law of a utopian world and in identifying the need and prospects of reform, while also aiming at contributing to such broader interdisciplinary and social debates. International lawyers will not have the final say on the reforms of international law: decisions will be taken collectively, through a long process including a social process of deliberation guided by inter-disciplinary expertise. One may even argue that the final say *should not* belong to international lawyers, who lack legitimacy to determine what international ought to be – *international law does not belong to international lawyers*.³⁷ Thus, one may wonder with Kenneth Abbott and Duncan Snidal ‘why should we trust the members of this legal community as guardians of the public interest? Substitute a different technocratic group – say, ‘economists’ rather than ‘lawyers’ – and many would be concerned about the

³⁵ Milanovic, *supra* note 12, at 1048.

³⁶ See e.g. Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887; Ian Johnstone, *The Power of Deliberation: International Law, Politics, and Organizations* (2011); N.C. Crawford, ‘Homo Politicus and Argument (Nearly) All the Way Down: Persuasion in Politics’ (2009) 7 *Perspectives on Politics* 103 at 109. See also, more generally, Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).

³⁷ For a discussion on the legitimacy of scholars to argue for political change, see Daniel Bodansky, ‘Legitimacy in International Law and International Relations’ in Jeffrey L. Dunoff & Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 321 at 325.

normative implications.³⁸ A utopia of international law, as an academic discipline, might be one where international law scholars finally open to the methodological relevance of other disciplines. If international lawyers are serious about having an impact on the reform of international law, they should try to persuade beyond their own epistemological community. A normative international law argument that only convinces international lawyers is unlikely to have much practical impact, at least not directly.

³⁸ Kenneth W. Abbott and Duncan Snidal, 'Law, Legalization, and Politics' in Jeffrey L. Dunoff & Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 33 at 40.