

The Spiritual Exercises of Antonio Cassese and the Re-Forming of a ‘European Tradition’ of International Law

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Abstract

*This article describes Antonio Cassese’s vital influence on the ‘European tradition of international law’ through an attentiveness to those specific activities through which Cassese, as heir, received this tradition and through which Cassese, as ancestor, transmitted it. The specific activity that the article chooses to describe is that of writing – one of the several activities through which a tradition might be transmitted and received. It does so especially through close readings of several pieces of international legal writing wherein Cassese explicitly sought to dialogically redescribe the practices of an older generation of Euro-American international lawyers, including *The Tokyo Trial and Beyond* (1994) and *Five Masters of International Law* (2011). This training repertoire is his ‘spiritual exercises’, and, as the article shows, it invites others to take up their role as international lawyers and to conduct themselves as international lawyers in a specific way by cultivating in them conscience as a capacity to actualize judgment in the world.*

1 Introduction

Antonio Cassese’s vital influence on the ‘European tradition of international law’ is undeniable and demands to be reckoned with. In attempting such a reckoning, through an attentiveness to specific activities through which Cassese, as heir, received a tradition and through which Cassese, as ancestor, transmitted it, I will show that Cassese transformed the tradition(s) of international law and transmitted to

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subsequent generations of international lawyers a powerful training repertoire of ‘spiritual exercises’ that invite others to take up their role as international lawyers and to conduct themselves in a particular way.¹ The specific activity that I have chosen to describe is that of writing – one of the several activities through which a tradition might be transmitted and received. I describe this activity through close readings of selected writings that Cassese produced over his career.² From Cassese’s voluminous written output, I have selected several key specimens of writing wherein he explicitly sought to dialogically redescribe the practices of an older generation of European international lawyers and, through this exercise, to transmit to a younger generation what he took to be the appropriate modality of conducting oneself as an international lawyer. These include two major works of published interviews that Cassese conducted with different prominent European/Euro-American international lawyers belonging to an older generation – *The Tokyo Trial and Beyond* in 1994 and *Five Masters of International Law* in 2011.³

I am also attentive to how specific theories and/or methods perform the work of training and how this ethical formation work is assisted by the adoption of different genres of writing.⁴ As I show, an invitation to a ‘way of life’ is essentially an invitation to practise particular theories and/or methods (or a specific repertoire of theories and/or methods) that enable the embodiment of dispositions required to live that ‘way of life’. In Cassese’s case, as I describe it, this repertoire of theory and/or method is what he collectively refers to as ‘critical positivism’, and its genres include that of the dialogic inter-generational interview and the confessional.⁵ At the outset, I will distinguish my own choices in this exercise from three significant assumptions commonly made in writings in ‘the genre of legal biography’.⁶ First, this is not an exercise aimed at revealing Cassese’s pre-existent ‘inner self’ through a description of his writings (which is very much the conceit of Cassese’s own writings).⁷ Nor does it simply treat

¹ P. Hadot, *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault*, translated by M. Chase (1995), at 81–113. I provide a more detailed explanation for this concept, which I take from Pierre Hadot and use interchangeably with Michel Foucault’s ‘care of the self’, in section 3.

² B.V.A. Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, edited and with an introduction by Antonio Cassese (1994); A. Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jimenez de Arcega, R. Jennings, L. Henkin and O. Schacter* (2011); A. Cassese, *The Human Dimension of International Law: Selected Papers* (2008); Cassese, ‘B.V.A. Roling: A Personal Recollection and Appraisal’, 8 *Journal of International Criminal Law* (2010) 1141; A. Cassese, ed., *Realizing Utopia: The Future of International Law* (2012).

³ Röling, *Tokyo Trial and Beyond*, *supra* note 2; Cassese, *Five Masters*, *supra* note 2.

⁴ On this function of genres, see A. Genovese, *Feminist Jurisography: Law, History, Writing* (2022), at 14–16.

⁵ Cassese, ‘Final Remarks’, in Cassese, *Five Masters*, *supra* note 2, 251, at 258–260.

⁶ Genovese, McVeigh and Rush, ‘Lives Lived with Law: An Introduction’, 20 *Law Text Culture* (2016) 1, at 1.

⁷ Cf. Weiler, ‘Editorial: ‘Nino – In His Own Words’, 22 *European Journal of International Law (EJIL)* (2011) 931, at 932. Where Joseph Weiler, the interviewer, describes the aim for his interview of Cassese in the following terms: ‘The purpose of this interview is ... primarily to get to know the person behind the judicial robes. The following transcript of the interview conducted on 4 September 2003 with Nino. It is only very slightly edited. I have not corrected the usual lexical gremlins which creep into free flowing discussion. I believe that in this unadorned way one can hear the authentic Nino – self-deprecating, earnest, passionate, with a twinkle in his eye, and that wonderful child-like little smile and giggle.’ Cassese’s own, quintessentially modern, conceit of presenting his *essai* as confessional revelations is not some

the 'inner self' presented or performed by Cassese in these writings as just some mask or style donned by an 'author' 'with a project'.⁸ Eschewing both these approaches to what has been referred to as the 'sentimental life',⁹ this article takes seriously how the 'inner life' gets formed through embodied exercises and explores the role of particular writing exercises in this cultivation. It is an exercise in describing conduct, not revealing or unmasking being. To paraphrase Michel de Montaigne, I do not seek to portray Cassese's being but, rather, his becoming.¹⁰

Second, my descriptions of Cassese's writing practices are not limited by the purpose of evaluating them in terms of what he did not do, failed to do or could have done otherwise (either in terms of the contingency of his specific context or outside of it).¹¹ Eschewing this modality of critique of practices of historical actors, my focus is on closely describing the practical ethical effects of what he did practise. This allows me to make visible the ethical work performed by the activity of international legal writing, as against an almost exclusive focus on the epistemic or ideational effects/contributions of these writings.¹² With this approach, as the Australian Feminist legal historian Ann Genovese notes, 'writing ... is understood, then, as a practice: a conscious and productive activity through which ... training [is offered] ... to self and others, in how to consciously form a life'.¹³

However, this is not to bracket the practice of evaluation of these ancestral writing practices *tout court*. Instead, it is to enact a distinct modality of redescriptive critique. I commence by describing how Cassese's writing practices operate as exercises for ethical formation, as well as the kinds of ethical dispositions they make available for selves and others. I then proceed to redescribe and evaluate the practical actions that these embodied dispositions make possible to be actualized in the world. This mode of evaluation is not meta-ethical but necessarily limited and historical.¹⁴ It also does not allow us to distance/extricate our own conduct from evaluative judgment by exteriorizing critique onto ancestral figures and their actions/inactions. The object of such critique is the available 'forms of life' in a tradition that has very much formed our very selves as well.

Third, and relatedly, unlike a historian of international law who relates these practices as an 'objective construct',¹⁵ describing Cassese's ethos as an international lawyer has an immediate significance for how I conduct my own life as an international

idiosyncratic failing on his part, but rather a practice with strong historical pedigree. See J.J. Rousseau, *The Confessions*, translated by J.M. Cohen (1964).

⁸ Cf. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002).

⁹ Simpson, 'The Sentimental Life of International Law', 3 *London Review of International Law* (2015) 3.

¹⁰ The original phrase reads as: 'I am not portraying being but becoming,' Montaigne, 'On Repenting', in M. De Montaigne, *The Complete Essays*, translated by M.A. Screech (1995) 907.

¹¹ Cf. Koskenniemi, *supra* note 8.

¹² Cf. A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014).

¹³ Genovese, 'Inheriting and Inhabiting the Pleasures and Duties of Our Own Existence', 38 *Australian Feminist Law Journal* (2013) 41, at 42.

¹⁴ My use of the categories of potentiality and actuality take up the distinction Aristotle makes, especially drawing upon his account in *Metaphysics*, Book IX, and the *Nicomachean Ethics*, Book II. See R. McKeon (ed.), *The Basic Works of Aristotle*, translated by W.R. Roberts and I. Bywater (1941).

¹⁵ T. Asad, *Secular Translations: Nation-State, Modern Self, and Calculative Reason* (2018), at 92.

lawyer. Thus, this reception through description of the ethical life of Cassese's writing practices is animated by a concern to consciously form my own life – in community with other international lawyers – as an international lawyer. That said, my own task and responsibilities in this article are slightly different from those of certain other international lawyers. I am not writing this article as a direct participant in a 'European tradition of international law'. I have also been trained in and have sought to embody a rival tradition of international law – a Southern/Third World tradition. It would however also be disingenuous to suggest that these rival traditions are entirely disentangled and that one cannot, and does not, participate in a broader shared tradition of international law. In this article, I have thus adopted the role of an heir to, and participant in, this broader tradition as guiding my activity of writing this description of Cassese's practices. I therefore take this activity of description and evaluation as being tied to making available to the participants of this tradition different repertoires of conducting oneself as an international lawyer. The aim is to make visible through this account both the limits and possibilities of the ethical training offered by Cassese to international lawyers in the present.

In the following sections, I first provide a productive conceptualization of tradition. Problematizing negative conceptualizations of tradition – as either 'invented' or as essentially 'pre-modern' rigid moral codes associated with 'unfreedom' – I draw out a more positive account whereby innovation and tradition are no longer conceived as necessarily juxtaposed. Developing upon the scholarship of the anthropologist Talal Asad, this reconception of tradition illuminates how a tradition consists of different inter-generationally transmitted repertoires of practices that cultivate different ethical capacities or embodied dispositions in its participants/members, enabling them to practically conduct themselves in the world(s) they inhabit in community with others.

In the next section, I develop Asad's account of tradition by turning to the literature on the 'art of living'. Commencing with an engagement with the scholarship of the French philosophers Pierre Hadot and Michel Foucault,¹⁶ I show how the 'art of living' draws our attention to specific arts ('embodied practices') that train us to take up particular 'ways of life', including philosophy and law. Furthermore, the 'art of living' literature offers illuminating reflections on how the activity of writing is an important part of this ethical training repertoire. This includes an explicit attentiveness to specific dialogic genres of writing, which retain 'the direct and indirect echo of an oral teaching' into a specific philosophical school and its particular 'way of life', which I find particularly conducive to the task of interpreting Cassese's writings that themselves carry this strong echo.¹⁷ There is also a further breaking down of the activity of

¹⁶ Hadot, *supra* note 1; P. Hadot, *The Selected Writings of Pierre Hadot: Philosophy as Practice*, translated by M. Sharpe and F. Testa (2020); P. Hadot, *The Present Alone Is Our Happiness: Conversations with Jeannie Carlier and Arnold I. Davidson*, translated by M. Djaballah (2009); P. Hadot, *What Is Ancient Philosophy?*, translated by M. Chase (2004); M. Foucault, *The Hermeneutics of the Subject: Lectures at the Collège De France, 1981–1982*, translated by G. Burchell (2001); M. Foucault, *The History of Sexuality*, vol. 2: *The Use of Pleasure*, translated by H. Robert (1987); M. Foucault, *The History of Sexuality*, vol. 3: *The Care of the Self*, translated by R. Hurley (1988).

¹⁷ Hadot, 'Ancient Philosophy: An Ethic or a Practice?', in Hadot, *Selected Writings*, *supra* note 16, 55, at 58.

writing into the components of writing theories and methods, with Hadot's account of the ethical practical work of theories and methods being particularly instructive for my redescription of the ethical practical work done by Cassese's 'critical positivism'.

I conclude the section by critically redescribing the 'art of living' tradition itself, and showing how Hadot and Foucault narrowly restrict these repertoires to forms of spiritual training that are organized around and develop a unitary or integral 'being'/spirit. This leaves out an entire repertoire of ethical training exercises that actively seek to train selves and others to take up what Jeffrey Minson has referred to as 'an art of living with limits'.¹⁸ As Minson and several others have shown, these ethical training repertoires that rivalled 'spiritual exercises' were organized around a 'multiform view of moral personality' and were particularly significant for the training of officials attached to early modern desacralizing civil authorities.¹⁹

When situated within these two rival formulations of ethical training for a 'way of life', Cassese's training exercises and his concomitant transformation of a 'European tradition' of international law become audible as a taking up of a wider and longer tradition of a Christian training into integral 'personal' conscience and away from the competing demands of a purportedly 'depersonalizing' official role. As I show it, this comes across in the repeated professions of the significance of the unofficial/inner/personal life that subordinates the 'official lives' of the international lawyers who Cassese interviews and writes about in all his writings. Exemplary in this regard are two contrasting 'primal scenes' involving two ancestral figures (the Italian jurist Tomaso Perassi and the Dutch jurist B.V.A. Röling) narrated several times by Cassese. Both scenes are centrally organized around dialectically contrasting attempts at practising an 'arid' separation of 'official obligations' and 'personal obligations', with a 'heroic' refusal to subordinate the principled obligations of personal conscience to 'official obligations' that results in banishment from 'official life' and the synthesizing overcoming of both by way of a 'realistic' rendering of limited subordination of the universal obligations of 'official life' to the similarly morally absolute obligations of the international lawyer's 'back shop' of conscience in Cassese's own practice of 'critical positivism'. I argue that this 'back shop' or 'inner self' is itself a cultivated effect of the exercises that these writings enact. In other words, the 'inner self' is an ethical capacity or embodied disposition.

Finally, I offer a description of the practical actions that are enabled to be actualized by the embodied conscience that Cassese's 'spiritual exercises' cultivate in international lawyers. I redescribe and evaluate this action of judgment through which such an international lawyer with a 'conscience' determines and responds to 'evil' in the world. I also show that, by thus capacitating the linkage between conscience and the activities of international law-making, the actualization enabled by Cassese's training exercises has authorized the expansion of the jurisdiction of international

¹⁸ Minson, 'In the Office of Humanity', 14 *Cyber Review of Modern Historiography* (2009) 1.

¹⁹ See McVeigh, 'Office and Conduct of the Minor Jurisprudent', 5 *University of California Irvine Law Review* (UCILR) (2015) 499; Minson, 'How to Speak Well of the State: A Rhetoric of Civil Prudence', 4 *UCILR* (2014) 437; I. Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Europe* (2001); P. Du Gay and T. Lopdrup-Hjorth, *For Public Service: State, Office and Ethics* (2023).

law's institutional life such that, in the name of 'heed[ing] our Daimon'²⁰ and, thus, by adding a 'human dimension' to international law, more and more aspects of existence have been brought under its 'universal' juridical remit. I conclude this evaluation by offering the lineaments of two alternative ethical training repertoires – one a training into conscience that inherits the natural law training otherwise and the other a training into the limits of 'official life' that inherits the positivist training otherwise – that are also available for us today.

2 Tradition

For my conception of tradition, I turn to the scholarship of the anthropologist Talal Asad. Asad himself heavily drew upon the scholarship of the Thomist philosopher Alasdair McIntyre in developing his own extremely fecund conception of tradition in order to make critical interventions in significant debates around the anthropology of Islam since the late 1980s.²¹ This was a rehabilitation of the concept that contested its largely negative theorization by generations of Marxist and liberal scholars. In these rival negative readings, tradition, and the practices attached to it, was either a purely ideological 'invention' (thus, never 'authentically' inter-generational)²² or 'the passing on of an unchanging substance' of code-like obligations and proscriptions,²³ characteristic of so-called 'non-modern'/traditional 'forms of life', which acted as constraints on the freedoms of its adherents (the assumption being that 'moderns', and their 'forms of life', have overcome tradition).²⁴ For Asad, these negative conceptualizations of tradition by rival Marxist and liberal scholars share an assumed colonial-modern framework. They are both organized around abstracted 'universal' ethical categories of a self-determining modern 'autonomous self' and its auto-generated unconditional duties and ascribe to modalities of ethical education that are underpinned by mythologies of self-invention, self-tutelage and absolute freedom from any 'external' ethical guidance.²⁵

Asad's positive account of tradition is organized around relational-embodied selves and their practical purposive obligations embedded in 'forms of life' lived with others. He brings to our attention how selves and others are trained and capacitated through the repeated performance of 'embodied practices', always in relationship with others. For this account, a tradition provides to its members:

²⁰ Cassese, 'Soliloquy', in A. Cassese et al. (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (2008) ix, at xxx.

²¹ See Asad, 'The Idea of an Anthropology of Islam' (1986), 17(2) *Qui Parle* (2009) 1.

²² E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition* (1983).

²³ T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (2003), at 222.

²⁴ Instructive here is Asad's critical analysis of the influential liberal Orientalist thesis that the Islamic legal tradition is 'static'. *Ibid.*, at 221.

²⁵ *Ibid.*, at 245–247. Asad identifies this modality of colonial modern ethics with Immanuel Kant, and his 'modern ethics', founded on a 'disembodied conscience', that self-sufficiently 'needs no guide' in order to judge between good and evil actions. See I. Kant, *Religion within the Limits of Reason Alone* (1960), at 173.

*a practical mode of living ... as techniques for teaching body and mind to cultivate specific virtues and abilities that have been authorized, passed on, and reformulated down the generations ... as sound and visual imagery, as language uttered and inscribed (on paper, wood, stone, or film) or recorded in electronic media ... as ways in which the body learns to paint and see, to sing and hear, and to dance and observe; as masters who can teach pupils how to do these things well; and as practitioners who can excel in what they have been taught (or fail to do so).*²⁶

Asad's understanding of ethical training through repeated exercises that form the necessary ethical dispositions to undertake practical activities in the world has a strong Aristotelean provenance, whereby an ethos is a potentiality that is acquired/cultivated through repeated guided embodied exercises.²⁷ Once acquired, as *habitus*, the capacity becomes 'second nature'. However, habits can also be lost/transformed through a transformation of the repertoires of embodied exercises themselves or simply through the arrest of inertia.²⁸ Different repertoires of these embodied exercises form a part of a tradition, which helps its members in 'the acquisition of aptitudes, sensibilities, and propensities through repetition. ... Through such practices one can change oneself – one's physical being, one's emotions, one's language, one's predispositions, as well as one's environment'.²⁹

Furthermore, the necessary relationality of any ethical training or education that this conception of tradition brings to the fore is of particular significance. A vital set of relations here are no doubt those between different generations of members of a tradition as these ethical repertoires on how to conduct oneself get 'passed down the generations',³⁰ with ancestral generations, and their narrated conduct of life, performing the role of exemplary guides or models in order to train and capacitate a younger generation's conduct.³¹ Here, the ancestral master as moral exemplum inhabits the concerned purposive obligations, which are specific to different practical activities, by way of conducting those activities well (as against pronouncing some deontological moral duty that the inheritor student must obey). Tradition, as Asad notes, 'links the dead to the living',³² and this 'generational collaboration'³³ imparts embodied practical education.³⁴

Significantly, for Asad, a smooth and homogenous chain of transmission and reception is not a *sine qua non* for the existence of a tradition.³⁵ Generational transformation

²⁶ Asad, 'Reading a Modern Classic: W.C. Smith's "The Meaning and End of Religion"', 40 *History of Religion* (2001) 205, at 216 (emphasis added).

²⁷ See H. Khan, 'The Dispositional Formations of International Lawyers', *Opinio Juris* (2022), available at <http://opiniojuris.org/2022/01/26/international-laws-invisible-frames-symposium-the-dispositional-formation-of-international-lawyers-a-commentary-on-akbar-rasulovs-the-discipline-as-a-field-of-struggle-the-pol-2/>.

²⁸ See S. Mahmood, *Politics of Piety: Islamic Revival and the Feminist Subject* (2005) at 143; see also H. Khan, *supra* note 27.

²⁹ Asad, 'Thinking About Tradition, Religion, and Politics in Egypt Today', 42 *Critical Enquiry* (2015) 166, at 166.

³⁰ *Ibid.*, at 166.

³¹ Asad, *supra* note 15, at 96.

³² *Ibid.*, at 92.

³³ *Ibid.*, at 74.

³⁴ Asad, *supra* note 23, at 247–248.

³⁵ *Ibid.*, at 222.

and disagreement within a tradition do not render it ‘spurious’, ‘inauthentic’ or ‘invented’. On the contrary, as Asad puts it, ‘[c]ritique is central to a living tradition’.³⁶ A ‘living tradition’, as he calls it, contains the embodied stickiness of both inter-generational transmissions and innovation, both continuity and discontinuity. In this reconception of the category of tradition, ‘techniques of innovation’ themselves get conceived as a set of practices and their attached embodied capacities (that is, a trained potentiality to innovate and transform).³⁷ Acts of innovation do not intervene from some ‘outside’ of a tradition (including from the ‘revolutionary mind’ of a ‘genius’) in order to rent it asunder. Rather, transformation is a matter of ‘trying to persuade others (that is, other members of a tradition) that what was hitherto thought to be “outside” is really “inside”’.³⁸

3 Of Spiritual Exercises: Writing as the Art of Living

In this section, I develop insights gained from Asad’s account of tradition as a repertoire of practical training – by focusing on the practical activity of writing. I do this primarily through offering reflections on the work of the French philosophers Pierre Hadot and Michel Foucault on the activity of writing as forming part of an ‘art of living’.³⁹ Notably, following Hadot and Foucault, the engagement here is with traditions that are organized around teaching/learning how to live specific roles or disciplines (for example, philosophy) as ‘ways of life’.⁴⁰ Finally, after troubling the restrictive account of the ‘art of living’ tradition that Hadot and Foucault transmit, I draw attention to how the activity of writing law can also be a part of the ‘arts of living’, training us for ‘law as a way of life’.⁴¹

Both Hadot and Foucault trace the ‘art of living’ for a philosophical life back to ancient Greek and Hellenistic philosophers and their subsequent transmissions and receptions.⁴² Hadot describes these embodied practices as ‘spiritual exercises’, while Foucault most often refers to them as ‘care of the self’. Undergirding both is an assumption that ‘selves’ must be trained (or capacitated) in order to live a specific/chosen ‘way of life’. As Hadot observes, ‘[t]he philosopher did not finally form his disciplines

³⁶ Asad, *supra* note 29, at 167.

³⁷ See Asad, *supra* note 15; Asad, *supra* note 29. It is important to distinguish between innovation as embodied virtue and the generalized concept of creativity. As Asad’s student Hussein Agrama has argued, such abstracted valorization of creativity is based in modernist temporal assumptions of ‘time’s essential novelty’, and assumes that (past) experience can never train, but only hinder, present conduct. See H.A. Agrama, *Questioning Secularism: Islam, Sovereignty and the Rule of Law in Modern Egypt* (2012), at 167–169.

³⁸ Asad, *supra* note 15, at 93.

³⁹ A. Nehamas, *The Art of Living: Socratic Reflections from Plato to Foucault* (2000).

⁴⁰ See Hadot, *supra* note 1; Hadot, *Present Alone*, *supra* note 16; Hadot, *Ancient Philosophy?*, *supra* note 16; Hadot, *Selected Writings*, *supra* note 16; Foucault, *Hermeneutics*, *supra* note 16; Foucault, *Use of Pleasure*, *supra* note 16; Foucault, *Care of the Self*, *supra* note 16.

⁴¹ Genovese, ‘Feminist Jurisography’, in Genovese, *supra* note 4, 1, at 5.

⁴² Amongst the notable recipients and exponents was, of course, Michel De Montaigne. See M. Sharpe and M. Ure, *Philosophy as a Way of Life: History, Dimensions, Directions* (2021), at 163–172.

only in the sense of their knowing how to speak or to debate, but in knowing how to live in the most elevated sense of the term. It is to an art of living, a way of life that the ancient philosophers invited their disciples'.⁴³ Thus, without this ethical capacitation work, the 'pleasures, trials and duties' that are attached to any specific 'way of life' simply could not be met well.⁴⁴

For both Hadot and Foucault, these ethical repertoires were always exercised in relations with others and not as forms of solitary 'self-fashioning'. The feminist jurist and historian Ann Genovese connects this attentiveness to the relationality of the 'art of living' in Hadot and Foucault's account to the centrality of the activity of writing to these repertoires when she observes:

The writing of philosophy is understood to be a series of *spiritual exercises* through which a scholar offers training, to themselves and those who learn from them, in how to form a disciplinary life. ... The act of writing is ... always experienced by the philosopher, in this tradition, as relational. ... These relations run in several directions: between the philosopher and their philosophy, between the writing of the philosopher and those that follow them (a question of inheritance), and ... between the philosopher and their collaborators.⁴⁵

From Hadot, we learn that, in order to make audible (and inherit) the inter-generational ethico-practical work performed by the activity of writing certain texts, we must pay particular attention to the deployment of dialogic genres in, and by, them. Thus, he elucidates how much of ancient philosophical writings took the form of a 'spoken word', whereby:

Ancient philosophical writing is tied, in one way or another, to the event of oral teaching, addressed, first of all, to a group of students who hears the master or debates with him. For this reason, it demands to be understood not through an analysis of its [written] structure. One must also situate any ancient text in the context of the living *praxis* from which emanates and within which it is reinscribed.⁴⁶

Crucially, Hadot directs us to be attentive to how written texts are not always merely engaged in producing and transmitting knowledge about the world but in doing the ethical work of seeking 'not to inform but to form'.⁴⁷

In developing how the activity of writing philosophical texts seeks to form and not simply inform, Hadot further breaks down the activity writing to include the activities of practising specific methods and the exposition of theories, which form a part of the broader activity of writing most philosophical texts. Thus, he carefully illustrates how even theorizing – that universal knowledge revealing/abstracting/systematizing activity quintessentially associated with philosophical writing, whereby universal precepts or first principles ('philosophical truths') are discerned/established through contemplation – can function as ethico-practical 'spiritual exercises'. The philosopher

⁴³ Hadot, 'Ancient Philosophy', in Hadot, *Selected Writings*, *supra* note 16, 55, at 59.

⁴⁴ Genovese, *supra* note 13, at 42.

⁴⁵ Genovese, 'Feminist Jurisography', *supra* note 41, at 3–4 (emphasis in original).

⁴⁶ Hadot, 'Ancient Philosophy', *supra* note 43, at 57.

⁴⁷ Hadot, *Present Alone*, *supra* note 16, 87, at 91.

(and Hadot and Foucault translator) Arnold Davidson explains the distinctions that Hadot makes within his description of the activity of theorizing:

Hadot has distinguished two senses of the term ‘theoretical’, for which he has employed the terms *théorique* and *théorétique*. The first meaning ‘theoretical’ is opposed to the ‘practical’, since it designates theoretical discourse as opposed to lived philosophy. But the adjective *théorétique* which characterizes the life of contemplation, the life according to the intellect ... which, no doubt, can use the theoretical discourse [*discours théorique*], but nevertheless remains a life and a praxis.⁴⁸

In this article, I have taken up this insight into the ethico-practical work of method and theory by attempting to describe Cassese’s ‘critical positivism’ as a *théorétique* that invites and trains others into taking up ‘international law as a way of life’. However, in order to extend the ‘art of living’ beyond its association/limitation to philosophy as a ‘way of life’ by Hadot and Foucault, a blind spot in their respective accounts needs to be worked through. An instructive point of departure is Foucault’s account of the interruption of the transmission of ‘art of living’ repertoires with the emergence of what he calls the ‘Cartesian moment’,⁴⁹ when ‘knowledge itself and knowledge alone gives access to the truth. That is to say, it is when the philosopher (or the scientist, or simply someone who seeks the truth) can recognize the truth and have access to it in himself and solely through this activity of knowing, without anything else being demanded of him and without him having to change or alter his being as subject’.⁵⁰

For me, this narrative of rupture and cessation of transmission by Foucault perhaps speaks more to both his and Hadot’s restricted association of the ‘art of living’ with spiritual work and trainings for philosophical/theological lives and less about the continuing vitality and historical transmission of ethical training repertoires, especially for other, possibly less hallowed ‘ways of life’ that they chose to ignore.⁵¹ In particular, this narrative elides how the so-called ‘scientific method’ (whose varied provenance includes René Descartes)⁵² historically forms a part of a rival repertoire of the ‘art of living’ – one that has a de-sacralizing and de-personalizing aspiration, seeking to create and sustain civil institutional life in a multi-confessional society.⁵³

For both Hadot and Foucault, capacitation through the ‘art of living’ is essentially concerned with transforming the integral ‘spirit’ or the very ‘being’, which animates the conduct of the initiate ‘self’ in their chosen ‘way of life’.⁵⁴ It is this assumption

⁴⁸ Davidson, ‘Introduction: Pierre Hadot and the Spiritual Phenomenon of Ancient Philosophy’, in Hadot, *supra* note 1, 1, at 29.

⁴⁹ Foucault, *Hermeneutics*, *supra* note 16, at 17.

⁵⁰ *Ibid.*, at 17–18.

⁵¹ For Hadot’s philosophy as a way of life very much retained its contemporary vitality. See Sharpe and Ure, *supra* note 42. But while Hadot disputed Foucault’s reading of René Descartes out of the ‘art of living’ tradition, he affirmed Foucault’s line of reasoning when it came to other practitioners of a more experimental (and less rationalist) ‘scientific method’ (compared with the French Descartes). Hadot, *Ancient Philosophy?*, *supra* note 16, at 263–265.

⁵² See S. Shapin, *The Scientific Revolution* (2018).

⁵³ See S. Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (1994); S. Corneanu, *Regimens of the Mind: Boyle, Locke, and the Early Modern Cultura Animi Tradition* (2011).

⁵⁴ See Hadot, *supra* note 1, at 82.

that informs their (exclusive) association of ‘arts of living’ with different repertoires of ‘spirituality’ training⁵⁵ – hence, the term ‘*spiritual exercises*’.⁵⁶ To quote Foucault:

[w]e will call ‘philosophy’ the form of thought that asks what it is that enables the subject to have access to the truth and which attempts to determine the conditions and limits of the subject’s access to the truth. If we call this ‘philosophy’; then I think we could call ‘spirituality’ the search, practice, and experience through which the subject carries out the necessary transformations on himself in order to have access to the truth. We will call ‘spirituality’ then the set of these researches, practices, and experiences, which may be purifications, ascetic exercises, renunciations, conversions of looking, modifications of existence, etc., which are, not for knowledge but for the subject, for the subject’s very being, the price to be paid for access to the truth.⁵⁷

It is Max Weber, and his description and defence of the scientific method in his famous 1917 ‘Science as Vocation’ lecture, who draws our attention to a training repertoire that rivals spiritual training.⁵⁸ In this rival account, scientific objectivity and disinterestedness operate as ethical devices, seeking to cultivate the capacity for depersonalization in the practitioner who seeks to live ‘science as a vocation’ and not as a condition for successfully attaining scientific knowledge itself (as Foucault describes it).

These ‘arts of living’ do not assume an integral ‘soul’ or ‘whole moral person’ but, rather, seek to cultivate separable and limited forms of ‘non-integral selfhood’.⁵⁹ Associated with historical projects for de-sacralizing civil space and official life, including with the early modern European experiments with the civil state, these are ethical repertoires for training into particular offices (‘impersonal and jurisdictionally limited’)⁶⁰ through the ‘compartmentalization, subordination, and indifferentism of conscience’.⁶¹ The jurist Shaun McVeigh observes that these repertoires are attentive to:

both the plurality of offices that are occupied by a person at any one time (artist, citizen, employee, friend, householder, jurist, jurisprudent, orator, philosopher, and so forth) and the different forms of ethical and rhetorical conduct ... appropriate to each. In this account, the cultivation of personae is a plural activity that accepts, as did Weber, that people require plural personae, both within and without office, as they go about their business of engaging in the world. The object of [this training] might be to enliven the persona available to those who occupy office rather than a training in formation of a unified persona fit for transcendence.⁶²

It bears emphasizing that this repertoire of ethical exercises seeks to capacitate ‘officials’ into adequately taking up potentially conflicting obligations of the plural offices they

⁵⁵ Foucault, *Hermeneutics*, *supra* note 16, at 15.

⁵⁶ Hadot, *supra* note 1, at 79–144 (emphasis added).

⁵⁷ Foucault, *Hermeneutics*, *supra* note 16, at 15.

⁵⁸ For Max Weber’s description of the scientific method as an ethic for cultivating ‘value-free objectivity’ as a dispositional capacity, see Weber, ‘Science as a Vocation’, in M. Weber, *The Vocation Lectures*, translated by R. Livingston (2004) 1; see also Hunter, ‘Science as a Vocation, Philosophy as a Religion’, 12 *Sociologica* (2018) 137.

⁵⁹ Minson, *supra* note 18.

⁶⁰ McVeigh, ‘Obligations of Office’, in D. Matthews and S. Veitch (eds), *Law, Obligation, Community* (2018) 234, at 239.

⁶¹ Minson, *supra* note 18.

⁶² McVeigh, *supra* note 19, at 507. Contrast this with Hadot when he observes of this training practice: ‘The goal is no longer, as it was in antiquity, to train people for careers as human beings, but to train them for careers as clerks or professors – that is to say, as specialists, theoreticians, and retainers of specific items of more or less esoteric knowledge. Such knowledge, however, no longer involves the whole of life, as ancient philosophy demanded.’ Hadot, *Ancient Philosophy?*, *supra* note 16, at 260.

must inhabit in their lives, not just by rendering separable the ethical capacities required to take up each distinct ‘sphere of duty’ but also by rendering each of these obligations limited and thus avoiding any ascription of ‘moral absolutism’ – either to the ‘reasons of state’ or to the ‘funerary rights of kin’.⁶³ Arguing in favour of this training, and revealing some of its rich historical repertoires, Minson describes the ethical disposition that it cultivates as ‘an ethical capacity in some circumstances to set aside ethical convictions in favour of non-principled (but not always unethical) stances. ... This way of “being as” – to be a person who is the terminal of more than one ethical capacity and compass – is what the frame of office calls for’.⁶⁴

Finally, McVeigh and his collaborators also show how ‘law as a way of life’ is attached to its own set of ‘art of life’ repertoires⁶⁵ and how the activity of writing jurisprudence forms a part of this.⁶⁶ The concern here is with ‘how we might conduct lawful relations or belong to law’⁶⁷ rather than living the philosopher’s ‘*bios theoretikos* ... the life of contemplation’.⁶⁸ Taking responsibility for the quality of ‘relationships that law engenders’ is less concerned with generating knowledge about the grounds justifying these relations and their attached obligations⁶⁹ and more about attending to the quality of the relations instituted by one’s law (that is, their lawfulness or lack thereof),⁷⁰ including with the laws of others,⁷¹ as well as devising remedies to assist with the adequate satisfaction of the obligations duly instituted in these inherited relations and, thus, with enabling living with others and their laws. Undertaking exercises of, and ability for, judgment is thus particularly significant to this ‘way of life’.

4 Antonio Cassese’s Spiritual Exercises: ‘Critical Positivism’ as a Training into Conscience

A Practising Techniques of Inter-Generational Transmission and Reception of Tradition

A characteristic shared by all the writings by Antonio Cassese that I have selected for description in this article is that they explicitly engage with an inter-generational

⁶³ See Du Gay and Lopdrup-Hjorth, *supra* note 19, at 50–53. The critical allusion of course is to Antigone. See A. Carson, *Antigonick* (2012).

⁶⁴ Minson, *supra* note 18.

⁶⁵ Goodrich, ‘Satirical Legal Studies: From the Legists to the Lizard’, *Michigan Law Review* 103 (2004) 397, at 501.

⁶⁶ See Genovese, McVeigh & Rush, *supra* note 6.

⁶⁷ *Ibid.*, at 2.

⁶⁸ Davidson, ‘Introduction’, *supra* note 48, at 29.

⁶⁹ Goodrich, *supra* note 65, at 501.

⁷⁰ This is a limited form of evaluation, limited to a concern with conditions for sociability – a *modus vivendi*, if you will – rather than more foundational (and essentially limitless) evaluative concerns with the (global) justice and (moral) excellence of one’s law. See McVeigh, Genovese and McMillan, ‘*Modus Vivendi*: Office of Transnational Jurisprudent’, in S. Pahuja and S. Chalmers (eds), *Routledge Handbook of International Law and the Humanities* (2021) 1.

⁷¹ See Dorsett and McVeigh, ‘Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking’, 36 *Melbourne University Law Review* (2012) 470.

tradition of international law. Two points of significance follow from this fact. First, these writings operate as specific techniques for the reception and transmission of this 'European tradition of international law'. Second, explicit engagement with tradition as guide is potentially also a moment of its attempted transformation through a transformation of its available ethical training repertoires, and this is certainly the case with what is sought in Cassese's writings. This latter technique, which introduces innovation into a 'living tradition', can take various forms, including that of critically redescribing what constitutes the tradition (that is, its 'inside') and what does not (that is, its 'outside').⁷² What this technique offers participants in a tradition (or seeks to persuade them of) is an alternative 'way of life' within the tradition and, thus, not some sort of exit from tradition or from dispositional training altogether. Apart from other things, the idioms and techniques of innovation cannot persuade either selves or others to take up this transformed ethical training repertoire without the engagement with, and invoking of, tradition.

The dispositional training exercises that I describe in this section are broadly organized around the combination of method and theory (or 'approach to law')⁷³ that Cassese referred to as 'critical positivism'.⁷⁴ Instructively, Cassese's own definitions of what 'critical positivism' was invariably took the form of describing an exemplary attitude that its practitioners must embody. Thus, in *Realizing Utopia*, this exemplary attitude took form in the figure of the 'judicious reformer' who dexterously negotiated between the extremes of an apologist positivist technician (*sans* values) and a utopian revolutionary natural lawyer (*sans* technical know-how) in order to transform existing international law so as to adequately respond to the 'inadequacies of world society'.⁷⁵

Before working through some of the constitutive elements of these exercises, I want to briefly explicate the specific techniques of reception and transmission that Cassese practised through the activity of writing texts. These are writings characterized by their adoption of an inter-generational dialogic genre, wherein Cassese is both engaged in receptive dialogue with an ancestral generation and transmitting a dialogue to a younger generation. A significant genre of these writings includes the extended inter-generational interviews with international lawyers belonging to his predecessors' generation that Cassese conducted and published. Cassese was very much an innovator in this regard. Before his undertaking of this task, with the publication of *The Tokyo Trial and Beyond*, this genre of inter-generational interviews had not really been practised in the field of international law.⁷⁶ Both his main collection of interviews contain extended accompanying editorial texts written by Cassese.

⁷² See Asad, *supra* note 15, at 93.

⁷³ Cassese, 'Final Remarks', in Cassese, *Five Masters*, *supra* note 2, 251, at 258.

⁷⁴ *Ibid.*, at 258–260.

⁷⁵ Cassese, 'Introduction', in Cassese, *Realizing Utopia*, *supra* note 2, xvii, at xvii–xviii. For an illuminating critical account that draws attention to how this incredibly influential approach both innovated upon and combined the inherited approaches of positivism and natural law, see Feichtner, 'Realizing Utopia through the Practice of International Law', 23 *EJIL* (2012) 1143.

⁷⁶ Röling, *Tokyo Trial and Beyond*, *supra* note 2. It has since become a popular genre, supplemented by the publication of video and audio recordings of extended inter-generational interviews of international

These interviews do the work of both an inter-generational reception and transmission of a tradition – from Röling and the ‘Five Masters’ to/by Cassese. This is more pronounced in the case of the interview with Röling (in *The Tokyo Trial and Beyond*), which was conducted when Cassese was still in his forties and mid-career and thus assuming his place in the tradition.⁷⁷ By the time this interview gets published, and he commences conducting interviews for *Five Masters* in the mid-1990s, Cassese is already in his fifties and is considered a senior figure himself. *The Five Masters* is a work of ‘late style’ and is one of Cassese’s last publications. All the ancestral interlocutors have passed on by the time Cassese pens its preface prior to publication, and the emphasis is overtly on the task of transmission to ‘the younger generations’⁷⁸ for an inheritor who sees himself as ‘also likely to set out on that eternal voyage soon’.⁷⁹

However, the broader inter-generational dialogic output of Cassese is not confined to the genre of interviews conducted by him. This corpus is replete with writings that expressly address his inheritance and formation as an international lawyer through encounters with his predecessor generation as well as expressly addressing the task of transmitting his legacy (and that of a ‘European tradition of international law’) to a younger generation of international lawyers.⁸⁰ It also extends to several published interviews in which he performed the role of the ancestral interviewee figure while being interviewed by international lawyers belonging to a younger generation.⁸¹ However, as I mentioned earlier, this reception and transmission was not one of a smooth continuity transmitting a timeless tradition. What we witness is a transformation of the tradition and its available ethical training repertoires. Thus, what gets transmitted to the younger generation is ‘critical positivism’ as training exercise, which Cassese re-describes as representing a synthesis of two streams of tradition – a formalist positivist training into official life and a natural law training into conscience. I describe these two streams, and Cassese’s re-description of them, in more detail in the next section, through the description of two ‘primal scenes’ that Cassese repeatedly returns to in several of these writings.

lawyers by international lawyers. See S. Pahuja and H. Khan, ‘Eminent Scholars: Audio and Video Archive of Eminent Legal Scholars’, available at <https://eminent scholars.org/about-us/>; Kemmerer, ‘“We Do Not Always Need to Look to Westphalia”: A Conversation with Martti Koskenniemi and Anne Orford’, 17 *Journal of the History of International Law* (2015) 1.

⁷⁷ See Sellars, ‘Revisiting Röling and Cassese’s Appraisal of the Tokyo Tribunal’, in this issue, XXX.

⁷⁸ Cassese, ‘Preface’, in Cassese, *Five Masters*, *supra* note 2, v, at x.

⁷⁹ *Ibid.*

⁸⁰ In particular, see Cassese, ‘Soliloquy’, *supra* note 19; Cassese, ‘Introduction’, *supra* note 75; Cassese, ‘B.V.A. Roling: A Personal Recollection and Appraisal’, 8 *Journal of International Criminal Justice* (2010) 1141.

⁸¹ See H. Verrijn Stuart and M. Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese – Interviews and Writings* (2009); Weiler, *supra* note 7; Acquaviva, ‘A Conversation with Antonio Cassese’, 25 *Leiden Journal of International Law (LJIL)* (2012) 815.

B *Primal Scenes*

1 *Primal Scene 1*

A telling instance is Cassese's description of an incident involving the Italian international jurist Tomaso Perassi, who was a formalist positivist.⁸² The event in question took place while Perassi was serving as chief legal advisor to the Italian Ministry of Foreign Affairs under Benito Mussolini, and its redescription by Cassese follows an account of personal humiliation suffered by Cassese upon his first encounter as a young law student with this laconic elder:

Positivism's second major weakness is that in certain circumstances it may be deemed to involve a logical and moral ban or impediment to lawyers in the fight against authoritarian regimes. The example that springs most readily to mind ... concerns the distinguished Italian international lawyer, Tomasso Perassi, who, although a man of strong democratic ideals, had no qualms about his position as chief legal adviser to the Italian Ministry of Foreign Affairs under Mussolini, since he separated his official functions from his democratic ideals with the barrier of strict positivism. Perhaps it was only fair that his legal formalism ended up arousing the disdain of the fascist authorities (in 1939 the Foreign Minister Galeazzo Ciano scornfully labelled him 'a professional pettifogger' [*professionata del cavillo*]).⁸³

This cautionary tale of ancestral failure is, no doubt, a resonant one. It immediately brings to mind the case advanced by Carl Radbruch, and later invoked by Lon Fuller, against the legal positivist ethic on the account that it was 'complicit' in the rule of fascist authoritarian regimes in interwar Europe.⁸⁴ I would also note that the derogatory label of 'professional pettifogger' – whose scornfulness Cassese appears to both report and ascribe to – invokes a long-held contempt towards the 'petty' work of the official as scribe, rhetorician, casuist or jurist by those attaching themselves to the higher callings that demand an 'integral self' such as that of the philosopher, politician or artist.⁸⁵

The judgment passed on the ancestral figure of Perassi is fundamentally a critique of the ethical training exercise received from him that Cassese refers to as 'abstract positivism'. It is the strict separation of the 'personal' and the 'official' that this ethical training exercise offers to international lawyers that Cassese challenges when he warns 'once he has embraced a strictly positivist approach, a lawyer may easily risk becoming a Servant of the Prince, although he can claim he is merely a "technical expert"'.⁸⁶

⁸² On Perassi, see Gradoni, 'Feet on the Clouds, Head against the Ground: Antonio Cassese's Militant Legal Idealism', in this issue, XXX.

⁸³ Cassese, 'Preface', *supra* note 78, at viii.

⁸⁴ See Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 71 *Harvard Law Review (HLR)* (1957) 630; see also Cotterrell, 'The Role of the Jurist: Reflections around Radbruch', 26 *Ratio Juris* (2013) 510.

⁸⁵ See Minson, *supra* note 19.

⁸⁶ Cassese, 'Soliloquy', *supra* note 19, at xii.

2 Primal Scene 2

The contrasting ‘primal scene’ that Cassese repeatedly returned to involved the Dutch jurist Bert Röling. Cassese reflected on his various encounters with Röling with much affection and filial reverence in his writings. In one of the (many) tellings of this incident he wrote:

In 1958, he fell out of favour with the Dutch Minister for Foreign Affairs (who had until then sent him as a Dutch delegate to UN General Assembly), because in December 1957, *on his journey back from New York, taking advantage of the leisure time on the ship*, he had written a little book in which he stressed the urgent need for the Netherlands to grant independence to Irian (Western Guinea), then a Dutch colony. He was immediately struck off the list of Dutch delegates to the UN – something which deeply wounded him.⁸⁷

Herein, the time and space of *otium* – that is, ‘leisure time on the ship’ – not only stands apart from the ‘official life’ or ‘active public life’ (*negotium*)⁸⁸ but also influences how Röling subsequently conducts himself *vis-à-vis* the public authorities he is attached to in his ‘official life’. Thus, the time and space of *otium*, or what Cassese, referencing Montaigne, later formulates as an ‘*arrière-boutique*’,⁸⁹ does not represent a simple retreat from the tasks of the international lawyer but, rather, a resource capacitating Röling to eventually ‘speak truth to power’ very much in public life. Cassese drew attention to this capacity for ‘insubordination’ in Röling’s conduct in the introduction to *The Tokyo Trial and Beyond*: ‘Let me mention just one other facet of his character ... the most notable facet of all was his “nuisance” value for the establishment; to quote what Bertold Brecht used to say of himself, he was “*unbequem*”. Röling never bowed to the orders or suggestions of his superiors.’⁹⁰

However, it turns out that this ‘primal scene’ was also very much a cautionary one. Röling ultimately also represented a failure to maintain a viable connection between the ‘back room’ and the ‘front office’ as his ‘insubordination’ resulted in him cast out of official life altogether. In a telling critical evaluation of this father-figure, Cassese wrote:

[H]e would quote a saying attributed to Goethe ... only he who stands aside and watches can keep his conscience clear. His habit of swimming against the current and his impatience with the ways of the establishment induced him to avoid positions of power, in which he might have had to compromise. He also eschewed another possible field of action for a man with ideas such as his (and this may have been the consequence of a certain scepticism, or even of an intellectual ‘elitism’). ... All these elements – in particular, his decision to play the role of an intellectual

⁸⁷ Cassese, ‘B.V.A. Röling’, *supra* note 80, 1141, at 1142 (emphasis added); see also Cassese, ‘Soliloquy’, *supra* note 19, at xxii; Cassese, ‘Introduction’, in Röling, *Tokyo Trial and Beyond*, *supra* note 2, 1, at 9. The ‘little book’ was B.V.A. Röling, *Nieuw Guinea als Wereldprobleem* (1958).

⁸⁸ On the categories of *otium/negotium*, see Cicero, *Tusculan Disputations*, translated by J.E. King (1946).

⁸⁹ This, as M.A. Screech’s English translation of Montaigne’s essays translates it, is a ‘room at the back of the shop’ and is referred to in the essay ‘On Solitude’, wherein Montaigne critically redescribes the tradition on *otium/negotium* (including Cicero). Montaigne, ‘On Solitude’, in Montaigne, *Complete Essays*, *supra* note 10, 266, at 266–278.

⁹⁰ This was followed by the narration of a ‘primal scene’ on the boat. Cassese, ‘Introduction’, in Röling, *Tokyo Trial and Beyond*, *supra* note 2, 1, at 8–9.

who avoided political involvement and only spoke to elites, and his disinclination to involve himself in political activity – help to explain why, despite the importance of his works and ideas, Röling stood on the fringe of international affairs.⁹¹

The lesson drawn for self and others is that the training offered by this second stream of Utopian/unrealistic natural law is also lacking as it leads to a banishment from ‘official life’ altogether and, thus, also to an enforced separation between the ‘inner life’ and the ‘official life’ in practice (if not in aspiration by way of its association with a hermetical withdrawal from the *vita activa*).⁹²

The overcoming synthesis to these two streams of inheritance is offered in/through ‘critical positivism’. With ‘critical positivism’, there is no question of maintaining a clear separation between the spheres of the ‘personal’ and the ‘official’ but, rather, the bringing about of a ‘realistic’ subordination of the latter by the former. The dispositional formation of the critical positivist seeks to enable the official to both ‘speak truth to power’ by heeding the call of their ‘daimon’ while also not losing access to the imprimatur of official institutional authority.

C Cultivating an ‘Inner Self’

In this section, I describe the specific practices enacted by Cassese through which an integral ‘inner self’/‘daimon’/‘back room’/conscience gets formed or cultivated. This is the core of any repertoire of ‘spiritual exercises’. The genre of the confessional – both of selves and others – is central to Cassese’s training into conscience. In other words, in these writings, representational access to the ‘inner life’ of the ancestral international lawyer gets performed. This quest is accompanied by an acknowledgement that this access to, and transmission of, the ‘daimon’ of the ancestral figure is never entirely possible. This is not only on account of the reticence that Cassese faces from his interviewees to offer him (and his readers) such an access into their ‘personal matters’.⁹³ It is also, as he notes in the conclusion to his editorial introduction to the Röling interview, a tragic fact about the failure of the institution of the written word to be able to fully receive and transmit the charismatic.⁹⁴ As he sorrowfully observed of Röling:

⁹¹ Cassese, ‘Preface’, *supra* note 87, at 15–16.

⁹² As he pointedly observes in his introduction to *Realizing Utopia*, ‘we have refrained from chasing unattainable dreams. We did not intend to go so far as to heed the exhortation of a distinguished international lawyer, B.V.A. Röling, who called upon international lawyers to propound “the natural law of the atomic age”. We wanted to attain less forward-looking, yet more realistic goals. We have not looked at the stars, but closer to home, to the planets that turn around the earth. And have charged our intellectual weapons with relatively short-range ammunition’. Cassese, ‘Introduction’, *supra* note 75, at xxi–xxii (emphasis added).

⁹³ Cassese, *Five Masters*, *supra* note 2, at 268.

⁹⁴ My choice of words here is guided by an attention to the intimate etymological and theological relationship between charisma and grace that no doubt had resonance for someone so steeped in classical literature as Cassese. For an illuminating discussion on the relationship and the literature, see Heurtin, ‘Weber as a Reader of Rudolph Sohm, and the Incomplete Concept of “Office Charisma”’, 19 *Max Weber Studies* (2019) 11.

he did not transmit himself wholly through his works. The *unicum* of his personality, which is but faintly preserved in the written word, lives only in the memory of those who knew him. There is a fleeting aura about those who are gone that can never be recaptured in its entirety and essence. We must turn to Phaedo's words to Echebrates: 'And then, to remember Socrates, whether it is I who speak or others, will always give me pleasure.'⁹⁵

The assumption is that fully receiving and transmitting this gift demands personal presence, which also explains why engagement with the ancestral figures in the form of in-person interviews (and not simply reading and thus absorbing their written works) is a better medium for the task of inheriting as it only is at one remove.⁹⁶

It also gives an insight into why and how what are ostensibly books of interviews assume the form of a confessional by the interviewer editor.⁹⁷ With this turn to repeated exercises in candid confessions and the revelation of his 'inner self', it is Cassese himself who assumes the status of the ancestral figure transmitting a charismatic training of cultivating an 'inner self' to his readers. Thus, for instance, in the course of reflecting upon the reticence on the part of his ancestral interviewees to take up the confessional role, Cassese writes:

I had underestimated the natural reticence of anybody to talk to an acquaintance about intimate matters, and, indeed, those matters most crucial to each of us. ... For those, like the present writer, who are radically secular, life can be more troublesome. Those who have no belief system think that *homo sapiens*, having reason, has become aware of two things of which all other animals have no consciousness, ie the great complexity and the mysterious nature of our world, and the ineluctable finitude of each individual's life; hence the dread of death.⁹⁸

From Cassese's practice, we can discern that the personal inter-generational interview, and the confessional, operate as the preferred writing techniques and genres respectively for these exercises in training into conscience, having faith that the transformative aura of grace still somehow lingers on in words that are written in presence.⁹⁹

This activity of revealing the 'inner self' is performative as it operates as a repeated exercise that cultivates an 'inner self'. This observation is not the passing of an evaluative judgment on the 'authenticity' or 'inauthenticity' of the 'inner self' so fabricated. Rather, it is an assertion that the 'inner self', much like the 'official persona', is very much an embodied disposition that requires the sustained practice of different repertoires of ethical exercises to be cultivated and maintained. We cannot discern

⁹⁵ Cassese, 'Preface', *supra* note 87, at 17.

⁹⁶ For a set of 'sympathetic' reflections on related techniques for establishing such an 'active relation' between different generations of international lawyers, see Lang and Marks, 'Even the Dead Will Not Be Safe: International Law and the Struggle over Tradition', in W. Werner *et al.* (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 321.

⁹⁷ Notably, this confessional genre deployed by Cassese is an innovation of the Catholic pastoral care technique whereby a penitent confessed their 'moral failures' to a confessor priest or minister, who in turn would guide them into resolving these problems through practical advice, thus relationally cultivating their *con-scientia* ('knowing together'). See A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (1988), at 335. In Cassese's confessional genre, more Jean-Jacques Rousseau and Kant than Augustine, the revealed/performed 'inner self' is ultimately the source of certitude, not conundrums.

⁹⁸ Cassese, *Five Masters*, *supra* note 2, at 268.

⁹⁹ Compare with Lang and Marks, *supra* note 96.

this ethical work being performed in (and demanded by) these confessional writings if, as critical readers of these texts, we solely seek to hermeneutically mine them for what their 'authors' consciously or subconsciously fail to reveal in them – for example, their actual desires or some unsavoury details about their 'personal life' that they 'hid' behind the adornments of these *faux* sincere confessions.¹⁰⁰ Instead what is demanded is a modality of description of these writings that enables us, to paraphrase Anne Orford, 'to see what is *shown*'.¹⁰¹

These repeated exercises of revelations of 'inner selves' itself take up and innovate a much longer Christian spiritual training tradition (including its genres of writing) in which it is through 'speaking truth about oneself' that the subject 'carries out the necessary transformations on himself in order to have access to the truth'.¹⁰² As suggested above, the innovation is one whereby we go from the confessional activity being essentially concerned with guiding the conscience in resolving 'cases of conscience' to a confessional activity that performs a revelation of conscience in order for this 'revealed' conscience to dictate actions.¹⁰³ It is this modality of activity that is sought to be incorporated into the 'European tradition of international law' by Cassese and transmitted to its member heirs, and it is the relationship of the conscience that it cultivates to the action of judgment to which I now turn.¹⁰⁴

D *Conscience as Capacity: The Act of Judgment*

If a tradition transmits and receives ethical trainings that enable its members to conduct practical actions required of them in their chosen 'way of life', what are the practical acts that Cassese's spiritual exercises capacitate inheritors to actualize in the world? For Cassese, the virtue of conscience, so to say, is in the capacitation of the international lawyer to 'confront evil' through pronouncing judgment.¹⁰⁵ Both identifying and adequately responding to 'evil' – which Cassese frequently uses interchangeably with 'inhumanity' – and the consequent 'human suffering' it produces in the world, is the calling of the international lawyer, and it is conscience that enables them to accomplish this calling through grounding their acts of judgment. As he writes in the concluding paragraph to his 'Soliloquy':

[p]hilosophers teach us that, whatever the general circumstances of life, one ought to heed one's *daimon* and accomplish the task of the day, however modest or tiny one's performance may be. It would be pusillanimous to stop striving for something higher than our day-to-day,

¹⁰⁰ Cf. Simpson, 'Sentimental Life', *supra* note 8. My point here is not to universally discredit or dissuade from engaging in such a modality of reading but simply to point to its limits in discerning such ethical work performed by specific modalities of writing. Apart from other things, such a modality of critical hermeneutic is engaged in its own ethical training exercises.

¹⁰¹ The original phrase being 'to see what is seen'. Orford, 'In Praise of Description', 25(3) *LJIL* (2012) 609, at 609 (emphasis added).

¹⁰² Foucault, *Hermeneutics*, *supra* note 16, 1, at 15.

¹⁰³ Jonsen and Toumlin, *supra* note 97, at 13.

¹⁰⁴ Thus making, through persuasion, ethical training repertoires, which might have hitherto been considered to be 'outside' a tradition of law, now considered and practised as its 'inside'. See Asad, *supra* note 15, at 93.

¹⁰⁵ Cassese, 'Soliloquy', *supra* note 19, at xviii.

life-sustaining job, only because the times are very gloomy indeed. Let us therefore march on and engage in our daily exertions – whatever their value – on the socio-legal problems that affect human beings.¹⁰⁶

This resort to conscience is purportedly ‘realistic’ in so far as it acknowledges that it takes place in a context of a paucity of adequate extant ‘*lex lata*’ to ground such judgments. However, it is this ‘personal conscience’ that gets identified with ‘universal/community’ values or grounds rather than with expressions of ‘private’ or ‘self-interest’, thus claiming both moral certitude and a necessary endlessness to this task. Thus, the reality of limitedness of any international legal institutions and the established international legal norms attached to them now authorizes the ‘global’ extension of their jurisdiction through norm determination and teleological transformation grounded in a ‘personal slant or bias’ that chooses one ‘universal value’ over another.¹⁰⁷

Here, it is also notable that the concept of evil mobilized by Cassese in his ‘spiritual exercises’ of ‘critical positivism’ eschews both a Manichean dualism and a neo-Platonic lack in favour of a moral anthropology with the flavour of a Freudian/tragic entanglement.¹⁰⁸ As he observes:

[a] modern philosopher, Benedetto Croce, once wrote, that were inhumanity not part of us, we could not understand Oedipus Rex, Macbeth or Othello. This remark is not sufficient, however. I have found some sense of orientation in the reflections of Martin Buber in *Good and Evil*. ... In this work, Buber notes that man has two innate urges: a ‘good’ one and an ‘evil’ one ... he notes that ‘This important doctrine cannot be understood as long as good and evil are conceived as ... two diametrically opposite forces or directions. Its meaning is not revealed to us until we recognize them as similar in nature; the ‘evil’ urge as passion, that is, the power peculiar to man, without which he can neither beget nor bring forth, but which left to itself, remains without direction and leads astray; and the ‘good’ urge as pure direction, in other words, as an unconditional direction, that towards God. To unite the two urges implies: to equip the absolute potency of passion with one direction that renders it capable of great love and great service. Thus and not otherwise can man become whole.’¹⁰⁹

This ‘realist’ moral anthropology of evil has the effect of rendering it ontological (and, thus, co-extensive with the entirety of being itself) while also entirely exculpating international lawyers and their (historical) actions from having constituted ‘evil’ and, consequently, the problems and sufferings of the world.¹¹⁰ All problems – including that of ‘humanizing’ the ‘inhuman’ – are thus potentially problems for, and categorically never problems of, international law and international legal institutions.

It appears that the ‘realistic’ price for maintaining the ‘back room’s’ principled integrity against the demands of the prince, while also avoiding banishment from the

¹⁰⁶ *Ibid.*, at xxxi.

¹⁰⁷ Cassese, ‘Final Remarks’, in Cassese, *Five Masters*, *supra* note 2, 251, at 259.

¹⁰⁸ For an instructive exploration, see F. Flahault, *Malice*, translated by L. Heron (2003).

¹⁰⁹ Cassese, ‘Soliloquy’, *supra* note 19, at xix–xx; see also Cassese, ‘Eichmann: Is Evil So Banal?’, 7 *Journal of International Criminal Justice* (2009) 645, at 645–646.

¹¹⁰ We do find discussions of more historical structural manifestations of these transhistorical individual drives in Cassese’s writings – for example, references to despotism, authoritarianism and the fanaticism of specific religious formations.

court, is to authorize the annexation of the entire world to this now ‘invisible’ court’s empire,¹¹¹ such that international law is made to assume the status of ‘humanity’s law’¹¹² and ‘humanity’ that of ‘juridical humanity’.¹¹³ Exemplary in this regard is Cassese’s judgment as presiding judge at the International Criminal Tribunal for the former Yugoslavia in *Tadić* (interlocutory appeal).¹¹⁴ This orientation towards legal indeterminacy, or a conflict of obligations, that ascribes to both sets of obligations a universal form is not the only possible modality available for enacting judgment. International lawyers need not inevitably be tragic heroes – Hegelian or otherwise. An available contrasting orientation to these ‘timeless insights’ of a maestro is that of ‘the workday experience of the practical craftsman’,¹¹⁵ whereby practically solving the problem of conflicting obligations regarding everyday matters of living with others, and, for that matter, with the demands of one’s conscience, requires acknowledging how neither the obligations involved nor the specific determinations made as to their applicability in the particular case at hand are ever universal/absolute.¹¹⁶ Crucially, with such a casuistic training, it is (historical) experience, rather than (universal/personal) conscience, that enable the exercise of practical judgments in the world.¹¹⁷ Consequently, the remit of these obligations, and the specific institutional authorities that they are attached to, also remain limited.¹¹⁸ This would make of international lawyers’ ‘mere’ jurists.

Finally, it is worth bearing in mind that the cultivation of conscience as a capacity to respond to evil through enacting judgment is not the only practical configuration of conscience that is available to international lawyers either. There exist different repertoires of ‘spiritual exercises’ or trainings into conscience. Here, I want to briefly draw the attention of the followers of the tradition of international law towards a training into conscience that cultivates conscience as a capacity to be responsive to ‘human suffering’ and not to the causes that produce this suffering.¹¹⁹ The distinction

¹¹¹ See Schachter, ‘The Invisible College of International Lawyers’, 72 *Northwestern University School of Law* (1977) 217.

¹¹² See R.G. Teitel, *Humanity’s Law* (2011).

¹¹³ See S. Esmeir, *Juridical Humanity: A Colonial History* (2012).

¹¹⁴ See Decision on the Defence Motions for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić aka “Dule”* (IT-94–1-AR72), Appeals Chamber, 2 October 1995.

¹¹⁵ Jonsen and Toumlin, *supra* note 97, at 26.

¹¹⁶ Pertinently, one could well put forward a redescription of H.L.A. Hart’s positivist argument against the moralization of positive law on the grounds that it leaves no space for other sources of obligation (including that of conscience), as drawing upon exactly this casuistic modality of exercising judgment. The same essay by Hart is of course never far from Cassese’s mind when describing ‘critical positivism’. See Hart, ‘Positivism and the Separation of Law and Morals’, 71 *HLR* (1957) 593. In addition, this training into maintaining the limits and fallibility of any judgment thus made (as potentially only a source of *exemplar* and not precept) has close affinity to the training exercises practised through his writing by Montaigne. See Montaigne, *Complete Essays*, *supra* note 10.

¹¹⁷ Its methods remain central to the common law tradition. See K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

¹¹⁸ On the shared ethos of limits associated with arts of casuistry and an ethics organized around the separation of ‘spheres of duty’ or ‘multiform moral personality’, see Du Gay & Lopdrup-Hjorth, *supra* note 19, at 50–53.

¹¹⁹ See Hasan Khan, ‘For “Those Who ... Lost Their Utopias ... but ... Still Rebel”: Taking Up Upendra Baxi’s Bequixotements in Times of Crisis’, 9(2) *Jindal Global Law Review* (2018) 155.

in practical effects or consequences of this capacity can be quite significant. Apart from other things, this capacity enables a ‘humanization of international law’ – rather than a ‘humanization’ *through* international law of its purported ‘inhumans’ and their victims – which can actually enable the acknowledgement of how this suffering is possibly an effect of international law (and not of its lack). Relatedly, instead of this capacity acting as the grounds for the international lawyer’s ‘imaginative thinking’ that ‘suggest[s] new legal alternatives which would better meet the existing demands’,¹²⁰ it renders them responsive to the ‘normative expectations’¹²¹ of ‘international law’s others’.¹²²

5 Conclusion

I was trained as an international lawyer at the Graduate Institute for International and Development Studies, having completed my entire graduate education in the Department of International Law. Thus, it was very much Antonio Cassese’s heirs to a ‘European tradition’ of international law who taught me international law.¹²³ While I never had the privilege to encounter Nino Cassese in this late period in his life (between 2008 and 2011) in person in Geneva, I did certainly encounter him in print as part of my course materials and, relatedly (and significantly for this article), I encountered (and was invited into) his ethical training exercises and the dispositional formations they cultivated. To deny the significance of my own formation in this tradition would simply be to betray an ‘anxiety of influence’.¹²⁴

Without sharing with the readers my own ‘primal scene’ involving Antonio Cassese, in this conclusion I want to briefly reflect upon what for me are some of the salient features of an exercise in inheritance through a critical description. This is the activity that I have both described and conducted in this article. As I have argued and shown, it is this activity that illuminates the intimate entanglements between tradition and innovation – the key concepts organizing this symposium. Each express reception and repetition of a tradition is also what introduces innovation and difference into it. This includes attempts to reconstitute not only what the tradition is but also who its possible members are. In my own redescription, I have also tried to transform Cassese’s ‘European tradition’ of international law into a more global international legal tradition. The consequence is that there is a potentially wider available set of ethical training repertoires available for me to ‘choose’ (make audible and work through),¹²⁵

¹²⁰ Cassese, *Five Masters*, *supra* note 2, at 259.

¹²¹ Baxi, ‘What May the “Third World” Expect from International Law?’, 27(5) *Third World Quarterly* (2016) 713.

¹²² A. Orford (ed.), *International Law and Its Others* (2006).

¹²³ This includes my PhD supervisor, Andrea Bianchi, and my human rights law professor and master’s thesis examiner, Andrew Clapham.

¹²⁴ H. Bloom, *The Anxiety of Influence: A Theory of Poetry* (1973); see also Marks, ‘State-Centrism, International Law, and Anxieties of Influence’, 19 *LJIL* (2006) 339.

¹²⁵ On how one never really ‘chooses’ a tradition, see Asad, ‘Thinking About Religion through Wittgenstein’, 3 *Critical Times* (2020) 403.

recombine and invite others to take up with me. Cassese's 'spiritual exercises' are one amongst several 'rival' ethical training repertoires for international lawyers that the members of this tradition have inherited in the present. These include rival trainings into conscience as well as trainings into limited forms of 'official life' (or a 'living with limits').¹²⁶ The former represents a rival transformation of our natural law inheritance, and the latter of our inheritance of positivist formalism.

Taking up this inheritance, as Cassese himself has taught us, demands neither 'worship' nor 'mindless massacre' of any of these ancestral invitations to a 'way of life'.¹²⁷ It requires a clear-eyed acknowledgement that each repertoire comes with its own limits and possibilities and that our choice of international legal method is also a choice of a 'way of life'. Above all, it requires that we acknowledge that these are all not solitary but relational activities, always undertaken with others, including generational others. To remake a tradition is necessarily to remake relations with others as well how these others relate. It is an activity of disagreement but also of persuasion, for without others taking up one's transformation of the tradition, no such generational transformation could be said to have taken place.

Undoubtedly, no member of the tradition of international law today can afford to ignore the significance of Cassese's 'spiritual exercises' simply on account of the wide take-up of his invitation to a transformed 'way of life', both within his generation of international lawyers and the ones that have followed. Our dispositional formations as international lawyers are undeniably marked by his transmissions, and this would no doubt be a source of 'great joy' for his spirit.¹²⁸

¹²⁶ Minson, *supra* note 19; see also Hasan Khan, 'Tradition', in Anghie *et al.*, *TWAIL Handbook* (forthcoming).

¹²⁷ Baxi, 'The Uncanny Idea of Development', in U. Baxi, *Human Rights in a Posthuman World: Critical Essays* (2009) 76, at 104.

¹²⁸ Cassese, 'Soliloquy', *supra* note 19, at xxxi.

