



Rasulov, A. (2019) Utopians. In: Singh, S. and d'Aspremont, J. (eds.) *Concepts for International Law: Contributions to Disciplinary Thought*. Edward Elgar: Cheltenham, pp. 879-899. ISBN 9781783474677

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/116493/>

Deposited on 1 June 2017

Enlighten – Research publications by members of the University of Glasgow  
<http://eprints.gla.ac.uk>

## UTOPIANS

Akbar Rasulov

### *Introduction*

The figure of the utopian international lawyer, without a doubt, represents one of the most enigmatic entries in contemporary international law's general catalogue of ideal types. Like the 'international relations expert', the 'human rights activist', and the 'critical scholar', it is a product of a certain kind of synthetic abstraction, a conceptual side-effect of a decades-long, largely silent and often interrupted, conversation about what international law – as an intellectual enterprise and a form of social intercourse – is, can, or ought to be 'for'.<sup>1</sup> A piece of disciplinary folklore, it both commemorates the course of international law's rich cultural history and helps illuminate some of the deepest recesses of its 'pop jurisprudence'.<sup>2</sup>

It is also an essentially derivative and logically hollow construct. Like most quasi-identitarian categories, it works off a certain idea of an *underlying process* – a set of practices, a collective conflict, or an ideological sensibility – from which it presumes, in a quasi-theological fashion, the ontological necessity of a corresponding subject category, an abstract hypostasis, a formal conclusion quickly deduced but never demonstrated. The idea of movement produces a 'mover'; writing a 'writer'. 'Nihilists' arise out of 'nihilism'; 'revolutionaries' out of 'revolution'. The concept of the utopian international lawyer, to all intents and purposes, is really nothing more than a refracted projection of whatever it is that international lawyers today understand, expressly or implicitly, by 'utopianism'.

The concept of utopianism, however one looks at it, is not a technical legal concept. It is not a formal product of the everyday legal process and it certainly cannot be considered a legal term of art – the way, for instance, the concept of anticipatory self-defence can. Nor does it form an operative part of some other legal construct or doctrine – the way, for example, the idea of the common heritage of mankind does. And yet if one looks at the broader conceptual landscape surrounding the contemporary international legal discourse, it certainly seems to carry a very particular meaning in the eyes of what one might call the international legal profession *lato sensu*, a meaning which in many ways appears to be unique and without any discernible parallel in other comparable cultural arenas and discursive traditions.

Or, at least, that is the general impression one tends to get when one starts to inquire into this subject. For, of course, no professional community, least of all one that is so deeply infused with a sense of political ambition and status anxiety as the international legal profession, could ever exist in a wholly self-enclosed cultural universe. Whatever one may think about the extreme singularity of the legal culture, a certain ineradicable sense of continuity has always existed between the internal conceptual structures of the international legal discourse and those used in the world outside its plane. This relationship of fundamental semantic continuity covers the case of international legal utopianism as effectively as any other. In this essay, I propose to explore the general limits and forms of this relationship of continuity.

---

<sup>1</sup> Cf. Martti Koskeniemi, 'What is International Law For?', in MALCOLM EVANS (ED.), *INTERNATIONAL LAW* 89 (2003); Philip Allott, *The Concept of International Law*, 10 *EJIL* 31 (1999).

<sup>2</sup> The concept of 'pop jurisprudence' was originally developed by Diego Lopez-Medina. See DIEGO LOPEZ-MEDINA, *TEORIA IMPURA DE DERECHO* (2004). On its relevance and application in an international law setting, see also Akbar Rasulov, *From Apology to Utopia and the Inner Life of International Law*, 29 *Leiden J. Int'l L.* 641, 646-55 (2008).

The argument that is presented in these pages belongs in the general category of critical discourse studies. Its structure can be essentially summarised as follows:

Section 1 outlines the basic plan and method of the proposed inquiry – a discourse-formalist study of utopianism as a regime of international legal sensibility and a genre of international legal practice. What is that basic structure of ideas, tropes, assumptions, and discursive devices by means of which the phenomenon of utopianism is constructed, encoded, and represented in the contemporary international legal culture?

Section 2 sketches out what one might call the conventional wisdom about utopianism, i.e. the standard view of utopianism adopted within the contemporary international legal culture. My basic argument here can be essentially summed up as the idea that in modern international law the concept of utopianism is generally equated with everything that a serious international lawyer ideally ought to reject, resent, and refrain from.

Building on this insight, Sections 3 and 4 then turn to examine the two main aspects of the anti-utopianist discursive complex in contemporary international law: the internal phenomenology that accompanies its narrative realisation – the view ‘from within’ – and the operative structure of tropes, cultural themes, and assumptions that grounds it and determines the limits of its intelligibility. The essential aim of this part of the exercise is to uncover the basic logic of anti-utopianism as an element of international law’s present-day disciplinary culture. Why do international lawyers tend to resent utopianism? How do they rationalise this resentment? Based on what effective presumptions and subject to what implicit qualifications are these rationalisations offered and constructed? What kind of psycho-social mechanics are we looking at here and what can this tell us about the broader power dynamics underlying the anti-utopianist discourse?

Completing this line of inquiry, Sections 5 and 6 raise, finally, the question of ideological signalling. What is the underlying ideological significance of the anti-utopianist tradition in modern international law? What sort of cultural and political agendas does it help express and enact? And what does all of this tell us about the figure of the utopian international lawyer as a disciplinary ideal type?

### 1. *Utopianism as an Object of Study*

‘The fundamental dynamics of any Utopian politics’, remarks Fredric Jameson at the start of *Archaeologies of the Future*, ‘always lie in the dialectic of Identity and Difference’, inasmuch as all ‘such ... politics [ultimately] aims at imagining, and sometimes even at realizing, a system radically different’ from the one presently in existence.<sup>3</sup>

A brilliant insight, to be sure, and yet for our present purposes it hardly seems very helpful. The main theoretical task that confronts every student of discursive and ideological formations has nothing to do with questions of content or phenomenology. To ask what might be the fundamental aim or ultimate object of ‘any utopian politics’, agenda, or project, is to put the proverbial cart in front of the horse: as any student of critical social theory will be able to tell you, the first focal point in such kind of inquiries should always be the question of form.<sup>4</sup>

In its main contours, the task before us, notes Jameson, seems fairly straightforward. Our first goal here is to learn how to separate the superficial from the invariant, the illustrative from the determinative, the *parole* from the *langue*. This is the basic lesson, if you

---

<sup>3</sup> FREDRIC JAMESON, *ARCHAEOLOGIES OF THE FUTURE: THE DESIRE CALLED UTOPIA AND OTHER SCIENCE FICTIONS* xii (2005).

<sup>4</sup> See *ibid.*, 1.

will, of all critical-theoretic traditions after Marx and Saussure. It is not the immediate ideological, moral, or cultural content that is conveyed by the given statement, act, or practice that ultimately gives it its basic utopian character. If one wants to understand what it is that enables any given text, argument, or construct to be received in the present environment as a specifically utopian act – what gives it, in other words, its capacity to acquire the specific quality of utopianism – one should never look at this particular ‘object’ itself. One must turn, rather, to all those discursive frameworks and mechanisms of cultural production that surround its cultural existence, all those systems of meaning whose coordinated mobilization and deployment created the possibility of there being such a ‘quality’ as utopianism in the first place.

The challenge that confronts us in these pages, in other words, is to learn *how to think structurally*:<sup>5</sup> how to recognise in practice all the various apparatuses of discursive dissemination and social capital-circulation that exist in contemporary international law discourse; how to spot the corresponding arrangements of narrative templates, facilitative discursive devices, and representational relations that are used and relied on by its participants; how to identify the basic system of background epistemic assumptions, imaginal predispositions, and collective fantasy-making practices by means of which the respective ideas, concepts, desires, hopes, and programmatic visions are organized for presentation to their intended audiences in such a way as to be received by them *precisely as utopia* and nothing else; how to act, in other words, at the level of genres, logics, and forms, rather than acts and content.<sup>6</sup>

There are three ways in which this kind of theoretical programme can be enacted and conceptualised in the present context. The first way, essentially, is to make it into an exercise in *discourse archaeology*. Seen from this angle, the main questions that will have to be engaged here are going to be questions like: what are the main defining characteristics of utopia as a form of discourse in modern international law? what is the standard arrangement of representational relations through which the specific experience of international legal utopianism is constructed and actualised in practice? by means of which particular discursive devices is this experience usually expressed and communicated among various international law audiences? what are its tell-tale signs and markers? This *problematique* is developed in greatest detail in Sections 2 and 4.

A second way to understand the essential character of the exercise proposed in these pages would be to think of it as an exercise in *ideology critique*. Every discursive formation presupposes a certain set of enabling conditions which make the emergence of the respective forms of discursive practice possible.<sup>7</sup> If international law’s experience with utopianism were to be understood as an actualisation of a certain kind of discursive practice, what would be the basic institutional, social, and cultural conditions of possibility underpinning that practice? What sort of *basic ideological regime*, in other words, could we say governed the general parameters of international law’s discursive relationship to the idea of international legal utopianism? What form has this relationship taken in recent times and what could this

---

<sup>5</sup> For a general introduction to structuralist methodology, see PETER BARRY, *BEGINNING THEORY* 39-79 (2<sup>nd</sup> edn., 2002).

<sup>6</sup> As Jameson points out, the theoretical consequences of such a methodological shift are of critical importance. ‘It is a proposition which has the merit of shifting the discussion of Utopia from content to representation as such. ... It is not only the raw social and historical materials of the Utopian construct which are of interest from this perspective; but also the representational relations established between them – such as closure, narrative and exclusion or inversion. [Nevertheless, it is also] important to comple[ment] this Utopian formalism with what I hesitate to call a psychology of Utopian production: a study of Utopian fantasy mechanisms, rather, and one which eschews individual biography in favour of historical and collective wish-fulfilment.’ JAMESON, *supra* n.3, xiii.

<sup>7</sup> PIERRE MACHÉREY, *A THEORY OF LITERARY PRODUCTION* 7-8 (1978).

fact tell us about the ultimate limits and promises of utopianism as an international legal category? What could it tell us about the broader character of international law as a cultural artefact? An intellectual landscape? A political project? This line of inquiry is developed most actively in Sections 3, 5, and 6 below.

To understand the enabling conditions of any given set of social practices inevitably presupposes the examination of the corresponding interpellative apparatus, that is to say, the apparatus of subject-production or subjectivization.<sup>8</sup> Every discourse constructs its own ideological environment; every ideology brings into being a certain set of supporting actor categories to enable its effective enactment and realization. A third way in which one can understand the basic goal pursued in this essay is to view this inquiry as an exploration of *utopianism as a project of identity construction*. What does it mean to be a utopian international lawyer today? What makes somebody into an international law utopian according to the traditional understanding? What does the contemporary international legal culture teach us about this subject? How does it instruct us we should be able to recognise a utopian international lawyer when we see one ‘in the wild’? And what does that tell us about the essential politics at the root of this culture and its various operative contradictions?

## 2. *Utopianism in Modern International Law: The Standard Portrait*

Ever since Martti Koskenniemi’s ground-breaking work on the basic structure of the international legal argument,<sup>9</sup> the concept of utopia in modern international law has been most commonly understood as the description of a certain type of intellectual sensibility that is discernible in practice for the most part through the attachment of its adherents to a certain series of discursive mannerisms but also through their propensity to gravitate towards a fairly distinct position within the internal grid of international law’s professional ideologies.

This position, as Koskenniemi describes it, can be essentially understood as a combination of three fundamental biases:

(i) a strong *political preference* for ‘all things global and international’ that comes into play whenever the conversation turns to deciding between various institutional or procedural solutions;

(ii) a deep-rooted *normative preference* in favour of classical liberal and humanitarian values that comes into play whenever it comes to deciding which political goals and principles international law ought to protect and prioritise; and

(iii) a mostly intuitive *intellectual inclination* in favour of conceptualist jurisprudence and aggressively deductivist reasoning protocols whenever it comes to the construction of any type of international legal argument, doctrine, or statement.

Behind each of these biases, if we consider them genealogically, notes Koskenniemi, hovers the old familiar spectre of *Jus Naturale* with all its usual Enlightenment-period accomplices and accessories at its side: rationalism, constitutionalism, historical teleologism,

---

<sup>8</sup> On the relationship between ideology and the processes of interpellation and subjectivization, see generally LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 171-4 (1971) (‘all ideology has the function (which defines it) of “constituting” concrete individuals as subjects’ in the sense that all ‘ideology “acts” or “functions” in such a way that it “recruits” subjects among the individuals [which it draws into its arena] or “transforms” the individuals into subjects ... by [the] operation [of] interpellation.’). See also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1995); Warren Montag, ‘“The Soul is the Prison of the Body”: Althusser and Foucault, 1970-1975’, in JACQUES LEZRA (ED.), *DEPOSITIONS: ALTHUSSER, BALIBAR, MACHÉREY AND THE LABOR OF READING* 53 (1996).

<sup>9</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989).

ontological transcendentalism, social organicism, and – most important of all – Hegelian idealism.

Why such a specific emphasis on Hegel? If one had to name one single philosopher whose legacy had the strongest influence on the evolution of the utopian sensibility in modern international law, judging from Koskenniemi's portrayal of it, it would almost certainly have to be Hegel. That unique combination of an irrepressible faith in the fundamental rationality of human history, the hearty untroubled confidence about the essential transparency of the universal truths, a firm, unshakeable commitment to an ontology of 'animating ideas', the single-minded resolve always to uncover 'the bigger picture', the constant pre-occupation with identifying 'the spirit of the epoch' – what is this if not a defining formula that describes the essential logic both of the classical Hegelian philosophy and of international legal utopianism *a la* Koskenniemi?<sup>10</sup>

Consider more closely the standard narrative template followed by most utopian projects in the history of modern international law from the international human rights movement to global constitutionalism, the compulsory adjudication tradition to the New International Economic Order initiative. Consider it, if you will, through the lens of Vladimir Propp's morphological theory and the list below as a field-specific example of Proppian functions:<sup>11</sup>

- frequent invocations of the idea that the history of international law follows a rigid pre-established script in which the international legal system continually progresses from a less developed stage of evolution to a more developed one: from bilateralism to multilateralism, from the law of coexistence to the law of cooperation, from war to peace, from sovereignty to community;
- regular assertions to the effect that the basic trajectory of this evolutionary process is both perfectly logical and, in the greater scheme of things, entirely independent of the individual personalities of the respective human agents whose activities help carry it out in practice: 'human rights *is* the idea of our time',<sup>12</sup> the rule of law will rise against empire,<sup>13</sup> the reconstruction of international law *will* be completed, one way or another, sooner or later;<sup>14</sup>
- constant allusions to the idea of some kind of absolute objective criterion – human dignity, rule of law, economic development, the coming-to-consciousness of the all-humanity – in terms of which every proposed reform or development in international law ought to be assessed and criticised, a narrative move that essentially asserts the existence somewhere in the background of an externally established 'objectively verified' hierarchy of values;
- repeated pronouncements to the effect that the main thing which needs to be done in order to improve the international legal system is, firstly, to adopt the bird's-eye-view perspective – 'the new international economic order can be built up only by taking a general view',<sup>15</sup> the future of international law 'is the future of humanity, no less'<sup>16</sup> –

---

<sup>10</sup> For a general introduction to Hegel's philosophy, see further AAKASH SINGH AND RIMINA MOHAPATRA, *READING HEGEL: THE INTRODUCTIONS* 3-19 (2008); PETER SINGER, *HEGEL* (1983). See also LOUIS ALTHUSSER, *THE HUMANIST CONTROVERSY AND OTHER WRITINGS* 221-305 (2003).

<sup>11</sup> 'The names of the *dramatis personae* change (as well as the attributes of each), but neither their actions nor functions change. ... This makes possible the study of the tale according to the functions of its *dramatis personae* [which should be regarded as the] basic components of the tale[,] independent of how and by whom they are fulfilled. ... The number of functions known to [any genre] is limited.' V. PROPP, *MORPHOLOGY OF THE FOLKTALE* 20-1 (2<sup>nd</sup> edn.; 2003) [1928].

<sup>12</sup> Louis Henkin, 'Introduction', in LOUIS HENKIN (ED.), *THE INTERNATIONAL BILL OF RIGHTS* 1, 1 (1981).

<sup>13</sup> AMY BARTHOLOMEW (ED.), *EMPIRE'S LAW* (2006).

<sup>14</sup> Alejandro Alvarez, *The New International Law*, 15 *Trans's Grotius Soc'y* 35 (1929).

<sup>15</sup> MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 243 (1979).

and, secondly, to accept and follow this hierarchy of values, helping it realise itself in the medium of the international legal materials sooner rather than later.

Now, any reference to the idea of an externally derived objective hierarchy of values, observes Koskenniemi, inevitably presupposes having to accept the existence of some kind of universally valid ‘natural morality’ – a higher normative code whose authority and legitimacy are meant to pre-exist and be independent of the individual opinions and wishes of that code’s immediate subjects.<sup>17</sup> During the Enlightenment era, when the vast majority of legal scholars more or less readily accepted the concept of the Divine Will and the notion of a natural order of things, the idea that such a code might not only exist *in abstracto* but also be actively applicable, at the level of concrete everyday legal reality, seemed for the most part culturally uncontroversial. Those times, however, have long since ended. The legal culture of the modern age lacks that kind of naive faith.<sup>18</sup> From its point of view, any allusion to the idea of a natural legal order unfailingly implies some kind of fundamental professional defect or failure: in the worst-case scenario, an attempt ‘to argue on the basis of a natural code’ will be automatically interpreted as a ‘camouflaged attempt to impose the speaker’s subjective, political opinions on others.’<sup>19</sup> In the best-case scenario, it will be perceived as a tell-tale sign that the lawyer in question is either completely unable or unwilling to distinguish reality from fantasy. It is not for nothing, after all, notes Koskenniemi, that one of the most common experiences international lawyers have of the utopian sensibility is that it represents a culture of discourse in which it is considered perfectly normal to put forward daring ‘imaginative and institutional structures’ without paying any regard to their capacity to receive an adequate ‘expression (actual or possible) in [the day-to-day international] routine.’<sup>20</sup>

Naturally, no one who is inclined to trade realism for imagination in such a dubious fashion could be expected to be any good at handling the finer details and mundane practicalities of the day-to-day legal work. If they can’t figure out whether what they are about to propose can fit with the existing international legal givens – the day-to-day international routines – what use is the brilliance of their imagination? Nor, as a rule, can such a person also be expected to be very rigorous in their construction of legal reasoning sequences as well as their use of legal sources: when one already knows how it all ought to turn out in the end, why bother about such mundane formalities?

Note the general theme that begins to emerge at this point: the idea that mastering small details and mundane routines and being able to distinguish applicable legal sources and build rigorously constructed arguments is precisely what defines the lawyer’s craft in modern culture provides an important critical clue to the logic of international law’s treatment of the idea of utopianism. The theme of utopianism in modern international law is essentially associated with everything that a good, reliable legal professional always ought to reject and resist: a systematic propensity for substituting vague abstract generalities for careful rigorous analysis, a fondness for disregarding facts in favour of values, a habit of substituting reality with fantasy.

Put bluntly, the concept of a utopian sensibility in the contemporary mainstream international legal culture is basically a *synonym for the idea of unprofessionalism*.

---

<sup>16</sup> Philip Allot, *The True Function of Law in the International Community*, 5 Ind. J. Glob. Leg. Stud. 391, 391 (1998).

<sup>17</sup> KOSKENNIEMI, *supra* n.9, 29.

<sup>18</sup> *Ibid.*, 18.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, 549.

### 3. *The Anti-Utopianism Narrative: a Snapshot of the General Phenomenology of the Contemporary International Legal Culture*

The traditional list of charges levelled against utopianism in the international legal literature across the years echoes very well the sentiment summarised above. Theories, arguments, and projects that international lawyers have traditionally described as utopian have been labelled this way, it seems, not only in order to help convey the impression that the respective proposals, visions, or insights behind them ultimately lack any real-world applicability, but also to help solidify the assumption that the more competent one is as a legal professional the less likely one would be to take seriously these theories and projects; that one should be very much ‘surprised if practical men, trained in legal history and thought’ ever lent their support to anything as fanciful and ignorant of the ‘essential’ realities of international relations;<sup>21</sup> that the proponents of such theories and ideas, in other words, are only capable of making a fine ‘intellectual point’ and nothing more than that;<sup>22</sup> that their thinking rests on a foundation comprised of highly dubious empirical assumptions and extremely far-fetched conjectures;<sup>23</sup> that the operative concepts on which they rely are ‘so vague as to [be] practically meaningless’;<sup>24</sup> that the normative answers and solutions to which they give support are ill-thought-through not only as a matter of practical reason but also as a matter of formal legal construction<sup>25</sup> and juridical technique,<sup>26</sup> and, thus, even if ‘what is stated in big print’ may somehow still look good, at the level of the ‘small print’ none of it actually makes any sense.<sup>27</sup>

What is more, the narrative continues, in the greater scheme of things, such theories and projects should not be simply dismissed as a species of innocent daydreaming, since they pose, in fact, a very palpable threat to the very fabric of modern international law *as a project*. Far from being ‘merely a delusion of well-meaning optimists’,<sup>28</sup> utopianism – to borrow Evgeny Morozov’s colourful formulation – is actually ‘a highly disorienting drug’, abusing which will not only lead its victims to develop a severe ‘intellectual handicap’ but also propel them into the vicious circle of ‘hubris, arrogance, and a false sense of confidence.’<sup>29</sup>

Consider, by way of illustration, a typical expression of the anti-utopianist narrative – in this case rehearsed by the international human rights law scholar Jack Donnelly:

The right to development often appears, *like the unicorn*, as the embodiment of goodness and purity. [Its] realization ... is often presented as if it would involve ‘peace, domestic and international, and ... the realization of all the purposes and principles of the United Nations.’ But when we look at what advocates of the right to development have brought forward, we find little more than a run-

---

<sup>21</sup> Dean Acheson, *Remarks*, 57 ASIL Proc. 13, 14 (1963).

<sup>22</sup> ROSALYN HIGGINS, PROBLEMS & PROCESS 9 (1994).

<sup>23</sup> ERIC POSNER, THE PERILS OF GLOBAL LEGALISM 9-10 (2009).

<sup>24</sup> GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 16 (6<sup>th</sup> edn.; 1976).

<sup>25</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984).

<sup>26</sup> Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HRQ 160, 162 (1996) (the main problem with collective minority rights is that, simply, in law rights cannot be accorded to nebulous subjects).

<sup>27</sup> Rupert Emerson, *Self-Determination*, 65 AJIL 459 (1971).

<sup>28</sup> Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 Cal. W. Int’l L. J. 473, 478 (1985).

<sup>29</sup> EVGENY MOROZOV, THE NET DELUSION xvi-xvii (2011).



down horse with a plastic horn glued to its head – or rather, a series of pretenders, one more ludicrous and misshapen than the next.

If this were *a children's book*, or if we could leave things at the level of myth, we could perhaps just [ignore it]. But *we are dealing with charlatans, who would use their hoax to defraud innocent and well-meaning people*. The right to development is *not just a charming delusion, but a threat to human rights, and a particularly insidious threat because it plays upon our fondest hopes and best desires, and diverts attention from more productive ways of linking human rights and development*.<sup>30</sup>

A 'unicorn' from a 'children's book' that in reality is a 'dangerous hoax' designed to 'play upon our fondest hopes', 'defraud the innocent and the well-meaning', and take advantage of our noblest impulses and 'best desires', all the while helping to 'divert' our energy from where its application might have yielded a more 'productive' solution – one would be hard-pressed to find a more instructive illustration of the essential tropology of the anti-utopianist discourse, or, for that matter, a more revealing summary of the essential role contemporary international legal culture assigns to the idea of utopianism as a professional attitude in the broader economy of international law's ideological practices.

It is one thing to study the general make-up of the international legal culture from within its internal, phenomenological perspective. It is a completely different thing to try to uncover the actual operative logic of the underlying episteme behind it – to excavate what in the Foucauldian vocabulary one would call the *archaeology of international law's experience of utopianism*.<sup>31</sup>

#### 4. *The Structure of the Anti-Utopianist Ideology: What Lies Beneath the Surface Narrative*

From Thomas More to Gabriel de Foigny, from Homer to Jules Verne, utopias in the Western culture, writes Umberto Eco, have always been 'found on islands' – the 'inaccessible non-places' 'where you land by chance' and the location of which you can only learn from some fabulous tale.<sup>32</sup> 'Cut off from the rest of the world', notes Eco, it is as though 'only on an island can a perfect civilization be created' – and only through legends and inspired folly can we ever discover the passage there, but never through the regular protocols of science and maritime navigation.<sup>33</sup>

From Saint Brendan to Cyrus Smith, every travelling hero in the Western literature who has looked for the land of perfection, writes Eco, has had to operate on the basis of this peculiar conception of geography, expertise, and knowledge, one in which even if the end destination has 'no real locality' and 'the road to [it] is chimerical', there always remains the promise of finding 'a fantastic, untroubled region[,] where life is easy':<sup>34</sup> for '[t]his is why utopias permit fables ...: they run with the very grain of language and are part of the fundamental dimension of the *fabula*.'<sup>35</sup>

---

<sup>30</sup> Donnelly, *supra* n.28, 508 (italics added).

<sup>31</sup> See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972).

<sup>32</sup> UMBERTO ECO, *INVENTING THE ENEMY* 192-3 (2012).

<sup>33</sup> *Ibid.*, 192.

<sup>34</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS* xix (2002) [1966].

<sup>35</sup> *Ibid.*

Needless to say, the symbolic economy which underpins this age-old convention of fusing the tropology of utopianism with the tropology of mysterious islands extends far beyond the context of literary writing. The fourfold mythology which Eco identifies as the cultural foundation of this fusion – the myth of the ‘island that doesn’t exist, or the myth of absence’, the myth of ‘one island too many, or the myth of excess’, the myth of ‘the undiscovered island, or the myth of inaccuracy’, and the myth of ‘the un-rediscovered island, or the myth of ... the lost [place]’<sup>36</sup> – can essentially be seen as a reflection of one of the most fundamental kinds of existential anxiety recognised historically in Western culture: the anxiety of not knowing what the bigger picture looks like and in which direction we should, therefore, turn, both literally and figuratively.

Anxieties breed fantasies, fantasies stimulate mythologies, mythologies generate tropes. Tropes give expression to and enable the evolution of – but also make it tolerable to live with – the corresponding anxieties, by mediating their pressures and converting them into cultural conventions. Or, at least, that is how things are meant to work in principle. The reality, at least in the present case, seems a great deal more complex. The simultaneous reaffirmation of the promise of a land of ‘perfect civilization’ and ‘fantastic, untroubled ... life’, the acknowledgement of its fundamental inaccessibility to the regular means of travel exploration, and the recognition that the knowledge of such places’ location can only come to us *through the vehicle of legends* suggest both a certain kind of compulsive mysticism and a deeply entrenched antagonism between the act of *being fascinated with utopias* and the culture of Modern Reason. For, after all, is not the tropology of undiscovered places and unknowable mysterious routes a typical product of that intellectual culture which could only have existed *before* the appearance of modern cartography? Is it not – as a sensibility – a typical symptom of that theoretical milieu which could only emerge and come to an end before the rise of modern geographical sciences and the adoption as the governing model for the organisation of standard geographical knowledge-gathering processes of the idea of a *practising geographer*, a professional traveller equipped with a vast reservoir of first-hand knowledge, a wide range of precise, reliable instruments, and a passion for the discovery of scientific facts?

Think of it again: is not the very act of becoming preoccupied with utopias, ultimately, a trait that is expressive as much of the broader anxiety of ‘subjective’ disorientation as it is also of the ‘objective’ state of not having any direct reliable knowledge of the respective segments of reality? Is it not, to put it a little differently, a symptom of a mind that both feels challenged by the rising pressures of new, unfamiliar concerns and is unable to tackle these challenges through a systematic calling-into-question of the immediate ‘hard givens’ of its everyday experience and practice?<sup>37</sup>

To argue that the essential structure that organises the intellectual horizon within which international law’s relationship to the concept of utopianism takes place relies on imaginal preconditions of this pedigree – and this scope – may seem at first glance somewhat far-fetched. And yet the logic of this structure is not, of course, unfamiliar to international lawyers.

The notion that utopianism – considered both as a project and as a social practice – constitutes the ideology of those members of the international legal profession who are both

---

<sup>36</sup> ECO, *supra* n.32, 193.

<sup>37</sup>‘The important point is that a science, far from reflecting the immediate givens of everyday experience and practice, is constituted only on the condition of calling them into question, and breaking with them, to the extent that its results, once achieved, appear indeed as the contrary of the obvious facts of practical everyday experience, rather than as their reflection. “Scientific truth,” Marx writes, “is always paradoxical, if judged by everyday experience, which captures only the delusive appearance of things.”’ LOUIS ALTHUSSER, *PHILOSOPHY AND THE SPONTANEOUS PHILOSOPHY OF THE SCIENTISTS* 15 (1990).

fundamentally under-informed in disciplinary and intellectual terms and fundamentally immature in professional and career-trajectory terms, as we have already seen earlier, has become so deeply ingrained in the collective psyche of the international legal profession that it may well be considered one of its most enduring and defining themes. Whatever manifestation the phenomenon of international legal utopianism may assume today, the basic reaction its expression triggers in the collective mind of the international legal profession, it seems, always unfolds according to the same general master-script: every move in the utopian direction, every act which implies an interest in ‘those’ kinds of theoretical pursuits are treated by the international legal culture as a symptom of a deep-seated vice – that most dangerous of all afflictions that could strike an international legal professional, the fondness for *impotent fantasising*.

In a community whose essential demographics for most of its conscious history has been characterised by a widespread pattern of gender- and class-imbalances, a community whose culture to this day is still openly predicated on the self-appointment of its ideal carrier as simultaneously the wise, prudent adviser to the Prince and the ever-proficient expert problem-solver, the idea of *impotence*, inevitably, provides one of the most important interpellational reference points. Its structural recruitment into the anti-utopianism narrative complex reveals an insight into the workings of the underlying collective psychology that in many ways can be considered even more illuminating than that revealed earlier by the compulsive deployment of the language of hubris, incompetence, and dangerous hoaxes.

##### 5. *Anti-Utopianism as a Morality of Fear, or Who Is Afraid of Left-Wing Infantilism?*

In an essay dedicated to the study of Marxist philosophy, Terry Eagleton offers the following commentary regarding Marxism’s legendary aversion towards utopian socialism.<sup>38</sup> The main problem with utopian socialism from the traditional Marxist point of view, writes Eagleton, consists in the fact that it tries to

grab[] instantly for *a future*, projecting itself by an act of will or imagination beyond the compromised *political structures of the present*. By *failing to attend* to those forces or fault-lines within the present which, developed or prised open in particular ways, might induce that condition to surpass itself into a future, such *utopianism is in danger of persuading us to desire uselessly rather than feasibly*, and so, like the neurotic, to *fall ill with longing*.<sup>39</sup>

The interesting thing about Eagleton’s explanation, of course, is that, even though he developed it with a completely different set of ideological constructs in mind, it could as easily be extended to the case of international legal utopianism. Note the choice of language: ‘failing to attend to the political structures of the present’ because of wanting to be instantaneously transported into the ‘imaginary future’ – what trait could be more typical of the international legal utopian, that hubristic charlatan (as Donnelly calls him) whose meaningless search for a non-existent unicorn threatens to divert the international law project from putting the international legal platform to a more productive use? And what trait has

---

<sup>38</sup> For classical illustrations, see Frederick Engels, ‘Socialism: Utopian and Scientific’, in KARL MARX AND FREDERICK ENGELS, *SELECTED WORKS*, VOL. 3 95 (1970) [1880]; V. I. LENIN, “LEFT-WING” COMMUNISM: AN INFANTILE DISORDER (1934) [1920].

<sup>39</sup> TERRY EAGLETON, *THE IDEOLOGY OF THE AESTHETIC* 229 (1990)(italics added).

been also more frequently associated in popular imagination with the idea of the *neurotic man-child* – compulsively escapist, unrealistic in his assessment of life, fickle and constantly ‘ill with longing’, fundamentally unable to grasp his surroundings, to act decisively towards his goal?

Consider the parallels between Eagleton’s diagnosis and Donnelly’s dictum: utopianism is not just a charming delusion for the international legal profession – it is a genuine threat. Like in traditional Marxism, in the contemporary mainstream international legal culture utopianism is regarded with a sense of abhorrence that is at once intense and unusually nuanced. In both cases, utopianism is seen as a dangerous ideology that is deeply hostile to the design of the respective project. But it is not seen to be dangerous in the same way in which a full-blown market fundamentalism or a Morgenthau-style legal nihilism is. Utopianism’s greatest danger comes not from its categorical opposition or ‘metaphysical animosity’ towards the established tradition, be it Marxism or international law, but rather from its ability to undermine and diminish that tradition’s essential *virility*. It is its capacity to nurture the fondness for impotent fantasising that makes utopianism such a reprehensible creature in the eyes of the established tradition: the threat that it will ‘persuade us to desire uselessly rather than feasibly’.

Note the highly revealing combination of tropes – ‘danger’, ‘desire’, ‘useless waste’, ‘feasible results’ – and the strange overtones of Old Testament-style sexual morality that come with it. Behind all that relentless disdain which the mainstream international legal culture sanctions its performers to administer in the direction of any utopianist reflex, the psychological lineaments that come out most clearly and most consistently are those which in other walks of life one would most commonly associate with the figure of a harried, ill-tempered middle-aged man sucked against his will into a history he can neither understand nor control: a flannel-suited office-worker caught up in the midst of a 1960s civil rights movement, a Don Draper at a beatnik poetry reading, a card-carrying Soviet communist at the height of the Gorbachev era. Consider once more the essential figure at the heart of the anti-utopianism narrative complex: what sort of character would typically be so readily inclined to resent so passionately the very thought of *being persuaded* to do something irresponsible, to ‘desire uselessly’, to swap the ability to pay ‘attention to the present’ for the power of childlike imagination, to risk ‘falling ill with longing’? What sort of ascetic will<sup>40</sup> – what dynamics of fear, the desire to get rid of what kind of burden – can we uncover behind this sort of façade?<sup>41</sup> What sort of moralism?<sup>42</sup>

Seen in its historical dimension, the basic structure which has conditioned and shaped the development of the anti-utopianist sensibility in modern international law cannot be explained simply as a direct logical outgrowth of the broader cultural trend triggered by the rise of Modernity which has impelled the international law profession to begin to revere the spirit of scientism, empiricism, cool-headed rationalism, and professionalism. Its underlying dynamic has an ideological configuration that seems to extend far past the classical territory of objectivism, rationalism, and prudent pragmatism. The exact shape of this configuration

---

<sup>40</sup> On the concept of the ascetic will, see Essay Three (‘What Do Ascetic Ideals Mean?’) in FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* (1994) [1887].

<sup>41</sup> Cf. Chapter 5 (‘Mechanisms of Escape’) in ERICH FROMM, *THE FEAR OF FREEDOM* (2002) [1942].

<sup>42</sup> It may be useful at this point to recall Erich Auerbach’s observation about the symptomatology of moralising the process of the rise and fall of cultural sensibilities. Behind every attempt to portray the emergence of a certain professional ideology as a movement of vice and virtue – as opposed to the product of social forces – lies, ultimately, an ‘aristocratic reluctance to become involved with the [respective] growth processes’ constituted by the activation of these forces. What feeds this reluctance, according to Auerbach, is a fundamental inability to comprehend and narrativise the dynamicity of social life, or, in other words, to grasp and accept the irreversibility of historical change. See ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* 38 (1953).

may not always be easy to reconstruct, but its general contours can certainly be traced quite easily. One only needs to look a little more closely at that basic arrangement of qualities which international law's anti-utopianism narrative complex traditionally assigns to the utopian villain – childlike naivety, emotional impulsiveness, lack of rigour and discipline – or, alternatively, at that general formula around which it typically seeks to articulate the corresponding figure of the ideal hero – a disciplined realist, a rational, cool-headed practically-minded lawyer whose counsel is valued as much for its unfailing practicality as for its superior mastery of the everyday routine and fine details. Whichever angle one chooses to go for here, the fundamental logic which underlies both of these image-projection exercises seems to be the same: the principal function of the anti-utopianism narrative complex in modern international law is to celebrate and legitimise the ideological life-world of a *passive-aggressive middle-aged bourgeois male* caught up on the wrong side of an inter-generational divide.

Why such an emphasis on bringing out the elements of anxiety and passive aggression? As Adam Phillips notes, there exist, ultimately, only two kinds of moralising sensibilities: a morality of desire and a morality of fear. The main defining feature of the latter is that the way it organizes its production of normativity – that is to say, its system for formulating and encoding the concepts of right and wrong – is essentially built on the idea of cowardice. 'The coward', writes Phillips, 'always thinks he knows what he fears'; he also 'knows that he doesn't have the wherewithal to deal with' the ultimate object of his fears. In this sense, one might say, 'the coward is too knowing': he is 'like a person who must not have a new experience', because any such experience is more than likely going to bring him closer to that which he fears and knows he cannot confront.<sup>43</sup>

Every morality of fear is essentially built on the idea of self-cultivation. The particular kind of self-cultivation that it aims for, however, has nothing in common with the classical Greek ideals that Nietzsche and Foucault had written about: the central themes here are not *parrhesia* and ethical self-production,<sup>44</sup> but compulsive self-denial and self-reproach, or, as a Freudian might say, the worship of a *particularly austere super-ego*.<sup>45</sup> The axiological structure at the heart of international law's attitude towards utopianism offers a prime example of this kind of psycho-social agenda.

## 6. *The Empty Incoherence of Anti-Utopianism, or What Lies Beneath the Conservative Reflex*

But perhaps there is something else at play here too, something that goes beyond the passive-aggressive anxieties concerning the mainstream's cultural and ideological virility, something which Eagleton's brilliant summary may have left out but which is still absolutely central to the way international law's experience with utopianism has developed and the way in which it organises itself today. For there definitely does seem to exist also another quite plausible explanation for the long-standing culture of distrust and resentment which characterises international law's relationship with utopian politics. The clue to what that might be can be found in the idea of vested interests.

To 'prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, ... the convenient to the perfect, present laughter to utopian bliss',

---

<sup>43</sup> Adam Phillips, *Against Self-Criticism*, 37/5 London Review of Books 13, 14 (2015).

<sup>44</sup> See generally MICHEL FOUCAULT, *THE HERMENEUTICS OF THE SUBJECT* (2005); MICHEL FOUCAULT, *THE COURAGE OF TRUTH* (2008); FRIEDRICH NIETZSCHE, *THE TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* (2003).

<sup>45</sup> Phillips, *supra* n.43, 13.

wrote Michael Oakshott famously, is the defining feature of the conservative way of life.<sup>46</sup> What gives conservatism its basic essence, looking from this angle, is not any particular set of views concerning the relationship between the public and the private, immigration, multiculturalism, or sexual mores. The central structure around which the conservative sensibility is organised comes rather from the fact that, at its root, it essentially functions as the life-philosophy of a ‘man who is acutely aware of having something to lose which he has learned to care for.’<sup>47</sup> And what that ‘something’ is, in the final analysis, almost always has something to do with *restricting someone else’s access to good life*.

At the heart of every conservative reflex, writes Corey Robin, lies a principled commitment to the refusal of emancipation of one or another group of pre-marginalised others from the oppressive limitations of the established status quo. ‘No simple defence of one’s own place and privileges [,] the conservative position’, explains Robin, ultimately, ‘stems from the genuine conviction that a world thus emancipated will be ugly, brutish, base, and dull.’<sup>48</sup> What moves the conservative mind in its hostility towards every form of radicalism, thus, is not just a preference for the preservation of a certain set of existing power structures, but the much more global anxiety about the possible disintegration of the various scales of distinction these structures bring to the society and the resulting hierarchies of assets, lifestyles, values, and beliefs legitimated on that basis.

Looking from this angle, one might say it is not really so much the modernist or the professionalist impulse which supplies the main momentum for the anti-utopianist ideology in the contemporary international legal culture, but rather the common predilection shared across a certain segment of the international legal profession for the reproduction within its professional life-world of an essentially conservative way of life. Behind all that endless talk extolling the virtues of prudent pragmatism and technocratic professionalism and the ability to develop practice-oriented, expertise-driven solutions, there is to be found, ultimately, nothing more than a standard reactionary world-outlook – reactionary with regard to the general organisation of international law’s professional social space, the internal distribution of power, the basic shape of international law’s relationship with the world outside itself.

And therein lies the ultimate clue about international law’s anti-utopianist culture: in the final analysis, it seems to have almost nothing to do with the latter’s alleged lack of intellectual rigour, its dreaminess, or its apparent failure to be ‘realistic’ or ‘practical’.

‘Conservatives’, notes Robin, always ‘style themselves as chastened skeptics holding the line against political enthusiasm’: ‘where radicals tilt towards the utopian, conservatives settle for world-weary realism.’<sup>49</sup> In reality, however, this is often nothing more than self-serving fiction: conservative discourses, theories, and ideologies are, in fact, as likely to come imbued with all kinds of magic-thinking, unrealistic assumptions, and unicorn-hunting schemes as those propounded by the radical utopians whom they resent and mock. ‘Ever since Edmund Burke, thinkers from Samuel Taylor Coleridge to Martin Heidegger have sought a more intense, almost ecstatic mode of experience in the spheres of religion, culture, and even the economy – all of which, they believe, are *repositories of the mysterious and the ineffable*.’<sup>50</sup>

And, indeed, what intellectual current in the history of the international legal discipline has cultivated a greater sense of mysticism and has been fuller of dangerous

---

<sup>46</sup> As cited in COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* 21 (2011).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 16.

<sup>49</sup> *Ibid.*, 113.

<sup>50</sup> *Ibid.* (italics added).

hoaxes, intellectual charlatanry, and conceptual frameworks so vague as to be practically meaningless than the mainstream tradition of ‘enlightened’<sup>51</sup> voluntarist positivism?

Take, for example, the standard positivist account of international custom. Consider what its infamous ‘chronological paradox’ has to say about its theoretical coherence, its practicality as a legal construct, or its ability to find an adequate expressing within the existing routines of international legal practice.<sup>52</sup> Consider also what conclusions one should draw with regard to all these questions when one contemplates the traditional test the mainstream positivist tradition uses to distinguish between ‘mere usages’ and ‘custom’:

The growth of usage and its development into custom may be likened to the formation of a path across a common. At first each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernible but not as yet well defined, from which deviation, however, now becomes more rare; whilst in its final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path.<sup>53</sup>

If the defining feature of legal utopianism is supposed to be that it can only result in the production of ‘intellectual points’ that lack any applicability in practice, how can the positivist account of customary international law not be considered an incorrigibly utopian construct? Imagine you are a real-world lawyer advising a real-world client on whether or not a rule that purports to remove immunity from prosecution from the sitting heads of state has now become a part of customary international law. How useful is the test of ‘a path across a common’ going to seem to you?

Or take the concept of *opinio juris*: what cruder and more ineffable construct can one imagine than this fantastic concoction whose essential condition of intelligibility requires one to believe that an inanimate institutional network such as a nation-state not only can have a ‘mind’ in which it can experience ‘feelings’ and form ‘convictions’,<sup>54</sup> but that at any given point in time the multitude of the various institutional elements which make up this network should also be expected collectively to express only one line of ‘thought’ on any given issue of international relations? Clearly, the notion of taking seriously the mountains of empirical evidence collected by modern political sciences concerning the practical workings of the administrative state does not belong in contemporary international law.<sup>55</sup>

Of course, one may protest at this point that it is not really fair to criticise the mainstream tradition for dropping the ball so quickly when it comes to the question of custom, since everyone knows that custom is supposed to be positivism’s weakest point. But the same inexorable tendency to slip into mysticism and to sacrifice analytical rigour for some fuzzy notion about how everything ought to hang together ‘in the larger scheme of

---

<sup>51</sup> For a classical introduction to ‘enlightened positivism’, see Bruno Simma and Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 302-8 (1999).

<sup>52</sup> See MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES 130-1 (1999).

<sup>53</sup> HUGH BELLOT (ED.), PITT COBBETT’S LEADING CASES ON INTERNATIONAL LAW 5 (4<sup>th</sup> edn.; 1922).

<sup>54</sup> *North Sea Continental Shelf* (1969), ICJ Reports 3, at 44, §77.

<sup>55</sup> When was the last time the State Department, the CIA, and the Pentagon agreed on every question relating to *jus ad bellum*?

things' can also be detected in any number of other areas of the mainstream positivist theory. Consider, for instance, the traditional positivist account of treaty interpretation. Recall the two principal presumptions which are meant to apply in the case of multilingual treaties: 'When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language.' And: '[t]he terms of the treaty are presumed to have the same meaning in each authentic text.'<sup>56</sup> Pause for a moment now and think about this again: where the text of a legal document has been drafted in more than one language, so long as all the different versions thus produced are considered equally 'authentic', this document will have the exact same meaning even if in practice completely different formulations may have been used. A document that has more than one correct wording is still presumed to have only one correct meaning – and all the different wordings at the same time still remain valid. How can this be possible? How can the phrase 'sans distinction aucune' in the French version of Article 14 of the European Convention of Human Rights have the exact same meaning as 'discrimination' in the English version?<sup>57</sup> How much magical thinking – or as Donnelly would say, charlatanry – does it take to pull this argument off?

Or take the law of reservations and think just how much magical thinking must have gone into the so-called 'compatibility test', or how much of a hoax it is to pretend that the idea of checking a reservation against the 'object and purpose' of a treaty as complex and multi-layered as, say, the International Covenant on Civil and Political Rights actually makes sense.<sup>58</sup>

Moving beyond the law of sources, things hardly seem to look any better. Consider the traditional mainstream account of the law of extraterritorial jurisdiction. How much more unreal and detached from legal practice can international law become than when a leading international tribunal starts to assert, as a matter of stating a truth-claim, that while a state's power to enforce its laws outside its national territory can only be exercised in a limited number of cases, this does not at all vitiate or render meaningless the idea that it also has the power to prescribe the same laws extraterritorially howsoever it wishes so long as there exists no rule prohibiting that in a given specific context?<sup>59</sup> Is it not the most basic definition of what makes one a realist lawyer that one should never allow oneself to think of the question of legal prescriptions separately from the question of their enforceability? (What was that line from Holmes and Llewellyn about the rules that are not backed up by remedies?) Or take the law of statehood: the standard positivist account holds that the existence of states should always be seen as 'a pure question of fact'<sup>60</sup> and not of other states' opinion, or in other words that the so-called declaratory theory of recognition trumps the constitutive theory.<sup>61</sup> Forget for a moment the obvious challenges raised against this argument by recent history from Kosovo to Abkhazia. Ask yourself instead: how can this idea ever make sense as a matter of elementary logic, considering that all legal facts are socially constructed realities, i.e. products of a collective decision-making process that unfolds within the respective social; setting<sup>62</sup> – in this case a setting which is predominantly comprised of *other states*? If the classical positivist theory of statehood does not qualify as a textbook example of a Donnelian 'hoax', I cannot begin to guess what might.

---

<sup>56</sup> Article 33 of the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

<sup>57</sup> *Belgian Linguistics Case*, [1968] 1 EHRR 252, §10.

<sup>58</sup> See on this further Akbar Rasulov, *The Life and Times of the Modern Law of Reservations: The Doctrinal Genealogy of General Comment No. 24*, 14 ARIEL 103, 147-55, 174-99 (2009).

<sup>59</sup> Cf. *SS Lotus* (1927), PCIJ Series A, No. 10, at 18-9; Van den Wyngaert (diss. op.), *Arrest Warrant of 11 April 2000* (2002), ICJ Reports 3, 137.

<sup>60</sup> J. L. BRIERLY, *THE LAW OF NATIONS* 122 (4<sup>th</sup> edn.; 1949).

<sup>61</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 87-8 (6<sup>th</sup> edn.; 2003).

<sup>62</sup> JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).



Last but not least: if the ultimate hallmark of the utopian approach is that its proponents always tend to go off on a quest for some non-existent unicorn, to grab for the future instead of working for it patiently, to fantasise impotently, and to fall ill with longing, then the ultimate question that ought to confront every international lawyer at this point, surely, must be: Has there ever been an enterprise that was more utopian – more hubristic, more delusional, a product of greater infantilism and a falser sense of confidence – than the *very project of modern international law itself*, with its naïve plans to replace the ‘political’ with the ‘international’, to bring into existence a single worldwide regime of the rule of law without creating a corresponding system of enforcement institutions, a global legal order without a world government?<sup>63</sup>

### *Conclusion*

It should not be difficult to see where this argument goes next.

A large segment of the contemporary international legal culture, including the broader ideational framework which underpins its interpellational machinery, has been built around the ideology of anti-utopianism: a mixture of mythologizing and moralising discourses whose politics is dominated by a deep-seated commitment to turning international law into an amalgam of technocracy, pragmatism, and mid-level managerialism. The narrative complex which sustains and expresses this ideology in practice derives most of its positive content from an ideal typology of practices at whose root lie the ideas of expertise, wishful thinking, practical reliability, idealism, infantilism, and professional maturity. The theoretical framework that underpins this typology, however, appears to have no stable core or structure. The operative distinctions on which it relies on closer examination appear to be unexpectedly fuzzy and difficult to apply in practice. The principal analytical categories which inform the thought-process accompanying them seem for the most part just an assortment of empty signifiers, and the foundational truth-claims that are supposed to give substance to these categories themselves seem to be neither sustainable as a matter of logic nor defensible as a matter of empirical evidence.

As a matter of day-to-day cultural processes, the anti-utopianist ideology still seems to be as dominant as ever. But the basic structures of signification that underpins its master-narrative have long since collapsed and dissolved. The essential conceptual construct that is meant to provide its central structuring point – the idea that the utopian and the pragmatic/technocratic styles of international legal practice are, in fact, fundamentally dissimilar from one another – has irreversibly disintegrated. This event, whenever it may have taken place, has since left the discourse of international legal anti-utopianism not only essentially *object-less*, i.e. without a meaningful point of reference, but also – and far more importantly – insurmountably ‘weightless’. It turned it, as a student of Baudrillard might have put it, into a ‘process operating in a void’, a practice ‘which merely plays at obeying the old logic’, ‘an economy devoid of Economics and given over to pure speculation’.<sup>64</sup>

Radical as this idea may seem to some, there is, of course, in the end, nothing particularly scandalous or frightening about this. Just as most visual arts under the conditions of postmodern cultural production inexorably tend to move beyond the old ‘modernist’ categories of representation, aesthetics, signification, and so on; so, too, one might say, the basic conceptual frameworks that structure the international legal profession’s *internal*

---

<sup>63</sup> On international law’s aspiration to escape the political by turning to the international, see generally Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MLR 1 (2007).

<sup>64</sup> JEAN BAUDRILLARD, THE TRANSPARENCY OF EVIL 31-5 (1993).

*discourses* – the organisation of its intra-disciplinary ideological landscape, the hierarchical arrangements of those forms of knowledge and professional practices which it recognises as admissible within its horizon – inexorably seek to transcend the traditional categories of Reason and Unreason, Meaning and Un-Meaning.<sup>65</sup>

A sombre conclusion, to be sure, and not one that is likely to be accepted by all. But consider now some of its possible implications: reflect on what may happen if we agree to free ourselves from the duty to look at such theoretical frameworks as if they had some kind of immanent meaning or had been created through some kind of internal necessity. When the natural law sensibility dies, the only way that is left forward for jurisprudence is to study the practical givens of law's social reality. When the idea that the theoretical framework structuring the legal profession's discourses about itself must be somehow immanently meaningful dissolves into thin air, the only intelligent question that can be asked of such frameworks is what exactly they therefore must represent.

If we look at it sociologically, the concept of utopianism in international law has never really been 'only' a construct or a discursive artefact, but a field of intense (even if carefully mediated) contestation. And, in the end, this is probably the most important thing we can recognise about it. *This* is how we should understand and account for it: not as something that has been 'simply' constructed or articulated, but something that has been constructed-and-articulated-precisely-so-as-to-be-fought-over-and-worked-upon.

Extending the logic of this argument further, it follows then that the single greatest favour one could ever render to the idea of international legal utopianism is to relieve it of any great theoretical duties, to re-conceptualise it, in other words, as nothing more than just a symptom.<sup>66</sup> A symptom of what, one might ask? Of international law's general structure and present configuration as an ideological *Kampflatz*; of the international legal profession's age-long struggle to comprehend and articulate its various conflicting anxieties, aspirations, and ambivalences; above all, of all the various conflicts waged within the profession's social field over the (re-)distribution of international law's intra-disciplinary resources.<sup>67</sup>

There is no theoretical value – nor, indeed, should there be any political reason – in continuing any form of investment, discursive or otherwise, in that synthetic abstraction that we described at the start of this essay: the utopian international lawyer as a (purported) disciplinary ideal type. Let the empty chimeras stay where they belong – outside our system of operative analytical categories.

---

<sup>65</sup> *Ibid.*, 19.

<sup>66</sup> On reading concepts symptomatically, see LOUIS ALTHUSSER AND ETIENNE BALIBAR, *READING CAPITAL* 14-30 (1970); COLIN DAVIS, *AFTER POSTSTRUCTURALISM* 103-28 (2004).

<sup>67</sup> On reading the evolution of international law's internal discursive field as a process driven by the struggle over resources, see further Akbar Rasulov, 'What Is Critique? Towards a Sociology of Disciplinary Heterodoxy in Contemporary International Law', in JEAN D'ASPREMONT ET AL. (EDS), *INTERNATIONAL LAW AS PROFESSION* 189 (2017).