

Re-Situating Utopia

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Abstract

This article considers utopian international legal thought. It makes three inter-connected arguments. First, it argues that international law and international legal theory are dominated by a ‘blueprint’ utopianism that presents international law as the means of achieving a better global future. Second, it argues that such blueprintism makes international law into what philosopher Louis Marin describes as a “degenerate utopia” – a fantastical means of trapping thought and practice within contemporary social and political conditions, blocking any possibility that those conditions might be transcended. Third, it argues for an iconoclastic international legal utopianism – Utopia not as a ‘blueprint’ for a better future, operating within the confines of existing social and political reality, but as a means of seeking to negate and exit from that reality – as the only way to maintain the idea that international law offers a path towards a truly better future.

Keywords

Utopianism – international legal theory – iconoclasm – law and literature – law and philosophy – climate change

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Introduction: Blueprints and Iconoclasm

In this article I propose a re-situation of utopia in international legal thinking, a shift in the way that international legal thinking conceptualises utopia. Attempts to use international law to realise an actual utopia – the notion that “utopia can perhaps finally become incarnate” through “[a] new New International Economic Order,”¹ for example – are, I suggest, misconceived.² Such “blueprint” utopianism dominates contemporary international law,³ producing a formal, mythical international law – a “degenerate utopia”⁴ – that sells a dream of itself as *the* path to a better global future.⁵ By deflecting attention away from “the [contemporary] concrete historical situation,”⁶ from the scale, depth and intractability of contemporary inequalities and injustices, that dream offers false hope.

In place of “blueprint” attempts to realise utopia through international law it is, I argue, important to recognise that

utopia is somehow negative ... it is most authentic when we cannot imagine it. Its function lies not in helping us to imagine a better future but rather in demonstrating our utter incapacity to imagine such a future ... reveal[ing in the process] the ideological closure of the system in which we are somehow trapped and confined.⁷

Utopianism is not, then, a means of planning a better future; rather, it charts the limits of contemporary thought and practice. This “iconoclastic utopianism” confronts the challenge of finding a way to overcome the contemporary inability to imagine a future radically different from the present.⁸

¹ Emmanuelle Jouannet, “How to Depart from the Existing Dire Condition of Development” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 392, 393.

² See, for example, Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012).

³ On ‘blueprint’ utopianism see Russell Jacoby, *Picture Imperfect: Utopian Thought for an Anti-Utopian Age* (Columbia University Press, 2005), xiv, commenting on the ‘blueprint’ utopian literature of, for example, Thomas More and Edward Bellamy: “The blueprint utopians map out the future in inches and minutes. From the eating arrangements to the subject of conversation the blueprinters – by far the largest group of utopians – gave precise instructions.”

⁴ “degenerate utopia” – Louis Marin (Robert A. Vollrath tr.), *Utopics: Spatial Play* (Humanities Press, 1984), 239: “A degenerate utopia is ideology changed into the form of myth ... Myth is a narrative that resolves formally a fundamental social contradiction.”

⁵ Walter Benjamin (Howard Eiland and Kevin McLaughlin tr.), *The Arcades Project* (Belknap Press of Harvard University Press, 2002), 4, (quoting Jules Michelet): “Each epoch dreams the one to follow.” Susan Buck Morss, *The Dialectics of Seeing: Walter Benjamin and the Arcades Project* (MIT Press, 1991), 120: “dream symbols are the fetishized desires that advertise commodities.”

⁶ Benjamin, *Arcades* (n 5) 391 (K 2,3).

⁷ Fredric Jameson, “The Politics of Utopia” (2004) 25 *New Left Review* 35, 46.

⁸ Jacoby (n 3) xvii-xviii: “[T]he iconoclastic utopians ... [were] resistan[t] to representing the future. They not only obeyed the taboo on graven images, they teetered on the edge of silence about what could be. If the future defied representation, however, it did not defy hope. The iconoclastic utopians were utopians against the current. They did not surrender to the drumbeat of everyday emergencies. Nor did they paint utopia in glowing colors.” See also Jacoby, *ibid* 85: “The Jewish tradition gave rise to what might be called an iconoclastic utopianism – an anti-utopian utopianism that resisted blueprints. This iconoclastic utopianism was ‘anti-utopian’ to the extent that it refused to map out the future; it was utopian in its commitment to a very different future of harmony and happiness. The iconoclastic utopians inclined toward the future, but unlike the blueprint utopians, they abstained from depicting it.”

The re-situation or shift in international legal thinking I am proposing involves a move from an idea of utopia as a future place planned out in international legal blueprints, to an idea of utopia as a marker of the sense in which international law is “trapped and confined” within contemporary reality. The first part of this article outlines iconoclastic utopianism in more detail. The second part – ‘Blueprints’ – argues that international law maintains an image of itself as a means of planning utopia, a “blueprint” or set of “blueprints” for a better future. I critique the variant forms of this blueprint perspective, focussing on Antonio Cassese’s realistic utopianism,⁹ Martti Koskenniemi’s concern with utopia, particularly in his seminal *From Apology to Utopia*,¹⁰ Philip Allott’s utopian effort to “re-imagine the human world by proposing a new ideal of international society,”¹¹ and Samuel Moyn’s work on utopianism and human rights.¹² Cassese, Koskenniemi, Allott and Moyn are the most significant theorists of utopianism in the international legal literature, hence the analysis of their work that follows.

I argue that contemporary international law serves to “represent ... the imaginary relationship individuals maintain with their real conditions of existence,”¹³ “a stage for ideological representation,”¹⁴ a “[m]yth ... that resolves [but only] formally [the] ... fundamental social contradiction[s]” of life on earth.¹⁵ Characterising international law’s blueprint utopianism in these terms – that is, in terms of ideology, myth and formality – the third part of this article depicts international law as a “degenerate utopia,” a term borrowed from philosopher Louis Marin’s 1982 analysis of Disneyland (California).¹⁶ Connecting international law’s contemporary situation with Marin’s Disneyland analysis, I argue that international law’s representation of itself as a path to a better future blocks awareness of the sense in which it is now both impossible and essential to imagine a genuine future – a future that does not simply reproduce the present.

In opposition to blueprintism and international law’s degenerate utopianism the fourth and final part of the article makes the case for iconoclastic international legal utopianism. Iconoclastic utopianism is, then, the beginning and the end of my argument, the destination I seek to achieve and the foundation for my critique. It makes sense, then, to start by considering iconoclastic utopianism in more detail.

Part 1: Iconoclastic Utopianism, or “Exiting the Series”

Writing about utopianism and climate change, science fiction author Kim Stanley Robinson notes the impossibility of “[i]magineing a positive history that gets us to a better state” whilst

⁹ See Antonio Cassese, “Introduction” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) xvii.

¹⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument – Reissue with New Epilogue* (Cambridge University Press, 2005, first published – without epilogue – in 1989).

¹¹ Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press, 2001 (paperback edition, first published in 1990)) xxvi.

¹² See Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press, 2010), and part 2(4) below.

¹³ Marin, *Utopics* (n 4) 239.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

insisting on the importance of utopianism in “a significantly damaged biosphere.”¹⁷ For Robinson “utopia has gone from being a somewhat minor literary problem to a necessary survival strategy.”¹⁸ In the face of something so all-encompassing as climate change utopia becomes a “game of pure contradiction.”¹⁹ The impossible and the essential become unachievable yet complementary sides of a utopian process that seeks to “neutral[ise]” what is by offering “the signal for exiting the series” – the system, the international legal order – and “entering into a modifiable destiny.”²⁰

Utopia as no-place (*Ou-topia*) becomes the only *Eutopia* the only (available) good place.²¹ The ‘no-place / good place’ dialectic expresses the sense in which “[w]e acknowledge this [utopian] place, rather than have knowledge of it [because] [t]he [utopian] ‘position’ is ... unable to be occupied as such.”²² To think utopia and live with(in) climate change is to pursue the impossible optimistically, accepting the ‘no place’ impossibility of a life beyond “a significantly damaged biosphere” whilst,²³ at the same time, acknowledging the ‘good’ of that life and the need to work for it: “utopia as a form is not the representation of radical alternatives; it is rather simply the imperative to imagine them.”²⁴ Iconoclastic utopianism seeks to negate contemporary life (including contemporary international law), approaching the essentially negative question of why a better future has not been and is not in the process of being realised as the positive foundation for radical changes in contemporary thought and action.²⁵

For sociologist Zygmunt Bauman contemporary ideas of happiness involve the reproduction of the present in place of any attempt to build a genuine future: “happiness means now a different today rather than a more felicitous tomorrow, as it did in the past.”²⁶ The permanence of commodified existence makes fundamental social change unimaginable:

¹⁷ Kim Stanley Robinson, ‘Remarks on Utopia in the Age of Climate Change’ (2016) 27 *Utopian Studies* 2, 9.

¹⁸ *Ibid.*

¹⁹ Marin, *Utopics* (n 4) xxii.

²⁰ *Ibid* xix: “The neutral could be the name given to the signal for exiting the series and for entering into a modifiable destiny, in Bloch’s words. The neutral is the *threshold* limiting the inner and the outer, the place where exit and enter reverse and are fixed in this reversal; it is the name for all limits, provided by the thought of the limit: contradiction itself” (emphasis in original). See also Miguel Abensour, “Persistent Utopia” (2008) 15 *Constellations* 406, 409: “Utopia would ... be the exit, the escape of Being, not as Being, but only insofar as Being has become and is unfinished in its becoming. It is this non-achievement of Being, in its gap in relation to essence, that the persistence of utopia resides, the engine of enigmatic rebirth that all the world’s conservatives try to conceal by invoking an eternal utopia.”

²¹ Abensour (n 20) 406: “Utopia is thus a playful name, fruit of [Thomas] More’s epigrammatic genius, that permanently oscillates between *eu* and *ou*, between the place where everything is good, the place of bliss (*Eutopia*), and the place of nowhere (*Ou-topia*).”

²² Marin, *Utopics* (n 4) xix.

²³ “a significantly damaged biosphere” – see Robinson quotation at n 17.

²⁴ Fredric Jameson, “‘If I Can Find One Good City I Will Spare the Man’: Realism and Utopia in Kim Stanley Robinson’s *Mars* Trilogy” in Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2007) 393, 416.

²⁵ See Jameson, “The Politics of Utopia” (n 7) 46: “utopianism involves a certain distance from the political institutions which encourages an endless play of fantasy around their possible reconstructions and restructurations.”

²⁶ Zygmunt Bauman, “Utopia with No Topos” (2003) 16(1) *History of the Human Sciences* 23, 24 (original in italics), and see 23: “Happiness and more happiness are desired now as they used to be in bygone times of utopia-writing”

The globe is full. There are no as yet undiscovered places left and no place where one could hide from the order (or for that matter disorder) ruling (or for that matter misruling) in places already known and mapped, crisscrossed by beaten tracks, administered and managed. In this world, there is no more ‘outside.’²⁷

If everything and everywhere is inter-connected there can be no no-place:

‘Utopia’ – in its original meaning of a place that does not exist – has become, within the logic of the globalized world, a contradiction in terms. The ‘nowhere’ (the ‘forever nowhere’, the ‘thus-far-nowhere’, and the ‘nowhere-as-yet’ alike) is no more a place.²⁸

To suggest otherwise *via* utopian blueprints dilutes the goodness or *Eutopia* of Utopia because of a failure to recognise the limits that contemporary social, political and economic conditions place on imagination and creativity. Contemporary utopianism must recognise that any blueprint for the future formed in contemporary commodified, consumerist globalised conditions will be determined by those conditions, by “our own absolute limits.”²⁹

Iconoclastic utopianism, in opposition to blueprint utopianism, emphasises the importance of contemporary conditions through a particular understanding of time, and its division into past, present and future. In *The Political Unconscious* cultural and literary theorist Fredric Jameson advocates a method of literary analysis that “foreground[s] the interpretive categories or codes through which we read and receive the text in question.”³⁰ Jameson proposes this method in opposition to a focus on the internal aspects or “structures of a given cultural text.”³¹ For Jameson texts are to be understood in their cultural (including social and political) context, rather than in their own right or on their own terms. Expanding on this theme in his later work, Jameson argues that an understanding of the contemporary condition – the contemporary ‘cultural logic’ – is the foundation for analysis of contemporary conditions and any attempt to change them: “We have to name the system.”³² As parts of “the system,” time and history are culturally conditioned categories or concepts: ‘the past’, ‘the present’ and ‘the future’ do not mean the same thing to all people, in all places, at all times. Those terms are to be understood by reference to the prevailing cultural conditions of any particular time or moment.

Jameson attempts to capture prevailing, contemporary cultural conditions under the label ‘postmodernism’, a famously contested term that he defines as “the consumption of sheer

²⁷ Ibid 22.

²⁸ Ibid.

²⁹ Jameson, “Progress Versus Utopia, Or Can We Imagine the Future?” in Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2007) 281, 288-289: “[Science fiction’s] deepest vocation is over and over again to demonstrate and to dramatize our incapacity to imagine the future, to body forth, through apparently full representations which prove on closer inspection to be structurally and constitutively impoverished, the atrophy in our time of what Marcuse has called the *utopian imagination*, the imagination of otherness and radical difference; to succeed by failure, to serve as unwitting and even unwilling vehicles for a meditation, which, setting forth into the unknown, finds itself irrevocably mired in the all-too-familiar, and thereby becomes unexpectedly transformed into a contemplation of our own absolute limits” (emphasis in original).

³⁰ Fredric Jameson, *The Political Unconscious: Narrative as a socially symbolic act* (Routledge, 1983) ix.

³¹ Ibid.

³² Fredric Jameson, *Postmodernism, or The Cultural Logic of Late Capitalism* (Verso, 1991) 418.

commodification as a process.”³³ Time and history are, on Jameson’s analysis, excluded or marginalised within postmodernism because of “historical deafness.”³⁴ The resulting “crisis in historicity” originates in the cultural supremacy of consumption and commodification.³⁵ That crisis manifests itself in “an increasingly absolute self-reproduction,”³⁶ creating “a new and original historical situation in which we are condemned to seek History by way of our own pop images and simulacra of that history, which itself remains forever out of reach.”³⁷ Engagement with the past functions at the level of “pastiche” – “the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in a dead language”³⁸ – granting access to “a stereotypical past.”³⁹ Rigorous inquiry into the minutiae of what was is sacrificed in pursuit of aesthetic appeal to present day audiences, because history as commodity will only sell if it “trace[s] *our* [present-day] mental images of [the] ... past.”⁴⁰ As a consequence, “the past is dead, transformed into a packet of well-worn and thumbed glossy images.”⁴¹

Within the commodified conditions of the postmodern, the systemic structure of the present is as inaccessible or invisible as the past. The supremacy of aesthetics and the requirement for “absolute self-reproduction” means that “we seem increasingly incapable of fashioning representations of our own current experience.”⁴² Jameson proposes science-fiction (‘SF’) literature as the best available means of representing the present to ourselves:

[T]he apparent realism, of representationality, of SF has concealed another, far more complex temporal structure: not to give us “images” of the future – whatever such images might mean for a reader who will necessarily predecease their “materialization” – but rather to defamiliarize and restructure our experience of our own present, and to do so in specific ways distinct from all other forms of defamiliarization ... [Marcel] Proust was only the most monumental “high” literary expression of this discovery: that the present – in this society, and in the physical and psychic dissociation of the human subjects who inhabit it – is inaccessible directly, is numb, habituated, empty of affect. Elaborate strategies of indirection are therefore necessary if we are somehow to break through our monadic insulation and to “experience”, for some first and real time, this “present”, which is after all all we have.⁴³

³³ Ibid x.

³⁴ Ibid xi.

³⁵ Ibid 25.

³⁶ Ibid 65

³⁷ Ibid 25.

³⁸ Ibid 17.

³⁹ Ibid 21.

⁴⁰ Ibid 25 (emphasis (‘*our*’) added): “[The] historical novel can no longer set out to represent the historical past; it can only ‘represent’ our ideas and stereotypes about that past (which thereby at one becomes ‘pop history’). Cultural production is thereby driven back inside a mental space which is no longer that of the old monadic subject but rather that of some degraded collective ‘objective spirit’: it can no longer gaze directly on some putative real world, at some reconstruction of a past history which was once itself a present; rather, as in Plato’s cave, it must trace our mental images of that past upon its confining walls.”

⁴¹ Jameson, “Progress Versus Utopia” (n 29) 287.

⁴² Jameson, *Postmodernism* (n 32) 21.

⁴³ Jameson, “Progress Versus Utopia” (n 29) 286-287.

If postmodern conditions insulate us from the fundamental nature or systematicity of present reality, they equally make a genuine future – a future fundamentally different from present reality – unimaginable: “the future ... may still be alive in some small heroic collectivities on the Earth’s surface ... [but] is for [most of] us either irrelevant or unthinkable.”⁴⁴ This supposedly “eternal present” is a utopia⁴⁵ – a totalising vision of what exists as *all* there is, “as if the world itself can be the object of a final land survey,”⁴⁶ an “exactly closed totality rigorously coded by all the constraints and obligations of the law binding and closing a place with insuperable frontiers that would guarantee its harmonious functioning.”⁴⁷ In what follows I will argue that international legal utopianism has, to date, chosen to accept the limits of contemporary postmodern conditions, drafting blueprints whose content is (more or less consciously) determined by those conditions. I argue that international legal utopianism should chose the other option, embracing the impossible, iconoclastic “imperative” of imagining “radical alternatives” to contemporary reality.⁴⁸

Costas Douzinas, perhaps the only legal scholar to embrace iconoclastic utopianism, notes the impossibility of a genuine future, and of blueprints that seek to plan it from within present conditions:

We cannot stop criticising the present and we cannot do that without adopting the position of the future; but, similarly, we can never remove ourselves sufficiently from our here and now to adopt the redemptive position. Utopian hope is necessary and impossible; a general utopian plan, if imposed on people, risks becoming a blueprint for worse oppression and domination.⁴⁹

The internal logic of a contemporary present that posits its own permanence makes the future “irrelevant or unthinkable.”⁵⁰ The permanent and total has no concept of what lies beyond it because there is no ‘beyond’. With the fall of communism, the end of the Cold War, and the triumph of “free” markets history has (apparently) ended. Society, politics and human affairs have reached their end state and this, now, is utopia, is all there is.⁵¹ As scholar of utopian thought Ruth Levitas, writing in 2000, puts it: “[C]apitalism is widely held to be the only game in town ... [and] [p]ost-1989, it might be said that we live, in an almost biblical sense, after the fall, but with no hope of redemption.”⁵²

⁴⁴ Ibid 287-288.

⁴⁵ “eternal present” - Fredric Jameson, *The Antinomies of Realism* (Verso, 2013) 24, 26, 28, 39-41.

⁴⁶ Louis Marin, “Frontiers of Utopia: Past and Present” (1993) 19(3) *Critical Inquiry* 397, 399

⁴⁷ Ibid 403-404.

⁴⁸ See Jameson quotation at n 24.

⁴⁹ Costas Douzinas, “Human Rights and Postmodern Utopia” (2000) 11 *Law and Critique* 219, 238.

⁵⁰ “irrelevant or unthinkable” - see Jameson quotation at n 44.

⁵¹ Douzinas, (n 49) 236: “The concept of utopia was dealt the first debilitating blow in the fifties and sixties when the Soviet gulags and mental asylums became widely known. It was deleted from the political dictionary with the collapse of communism. In this anti-utopian climate, Francis Fukuyama earned world-wide fame when he stated that ‘today, we have trouble imagining a world that is radically better than our own, or a future that is not *essentially* democratic and capitalist ... We cannot picture to ourselves a world that is essentially different from the present one, and at the same time better’” (emphasis in original).

⁵² Ruth Levitas, “For Utopia: The (Limits of the) Utopian Function in Late Capitalist Society” (2000) 3(2-3) *Critical Review of International Social and Political Philosophy* 25, 31

Douzinas, writing in 2000, suggests that in postmodern conditions “utopia can be defined as the remembrance of the future.”⁵³ Louis Marin, writing in 1993, anticipates that perspective:

At the end of a millennium ... when singing out loud the end of the ideologies and the end of frontiers seems to be accomplished in a universal totality – when, in recent debates, there is confusedly and loudly forecast ... the end of history ... as the universal mode of high-tech democratic hyperliberalism ... – precisely at this moment it is worthwhile to recall the fiction of an island appearing at the dawn of a period for which the present time would be the twilight.⁵⁴

Echoing Bauman’s phrase – “happiness means now a different today rather than a more felicitous tomorrow, as it did in the past”⁵⁵ – in these anti-utopian times what passes for utopianism is, Levitas maintains, often “pragmatic, limited reformism ... essentially anti-utopian in its rejection of radical utopian otherness or fundamental social transformation.”⁵⁶

I want to suggest that pragmatic, realist anti-utopianism dominates international legal thought in the form of various blueprints for a “different today.” My argument is that international legal thought and scholarship must re-situate its understanding of utopianism by replacing blueprintism with iconoclasm because if that does not happen international law, as a “degenerate utopia” (see the third part of this article) – a utopia that merely reforms, repackages and re-presents what is – will not even begin to be capable of grappling with the existential threat of climate change. Incapacity to engage with climate change is not, of course, the only basis on which international legal blueprintism can be critiqued and a more wide-ranging critique will be developed in what follows. But it is, as Kim Stanley Robinson suggests,⁵⁷ the most compelling and decisive because it demonstrates the absolute, existential imperative of a future that does not continue to reproduce the present.

If the contemporary, postmodern present is an order or system built on the supposed permanence of a commodified, consumerist reality, subordinating everything to processes of commodification and consumption and manifesting a “totalitarian desire for power” over past, present and future realities,⁵⁸ utopia(nism) is a way of insisting on “the limits of any state, any institution.”⁵⁹ For Louis Marin Utopia is “a displaced map displacing all maps and really finding none,”⁶⁰ a “sign of the authentic end [that] opens into emptiness ... [that] does not announce a new series ... [but] leads out of the series ... giv[ing] the signal that we are coming out of the series ... that we are entering into the possible, the unfated ... [or] at least into a fate that can be modified.”⁶¹ Like Marin, critical theorist Theodor Adorno promotes resistance to any order or condition: “An order that shuts itself up in its own meaning will shut itself away

⁵³ Douzinas (n 49) 226.

⁵⁴ Marin, “Frontiers” (n 46) 411-412.

⁵⁵ See Bauman quotation at n 26.

⁵⁶ Levitas (n 52) 31.

⁵⁷ See text at n 17 and n 18.

⁵⁸ Marin, “Frontiers” (n 46) 420.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 417.

⁶¹ *Ibid.* 420 (quoting Ernst Bloch).

from the possibility above order.”⁶² I argue that the international legal order needs to discover and be open to “the possibility above” it. Rather than seeking to contain or repel challenges to its orderliness by insisting on its unity, coherence, and systematicity, challenges to international law's integrity need to be seen as moments of utopian possibility, chances for international law to embrace the possibility of a genuine future. Political philosopher Miguel Abensour captures something of this in his reflections on catastrophe and utopia:

[F]rom catastrophe ... arises a new utopian summation, the “never again” that immediately expresses, beyond the banality of the formulation, the exigency of utopia, as if catastrophe has *a contrario* revealed the necessity of utopia ... The time of history is not homogeneous, empty material; it bears forever inscribed in it, despite forgetting, the wounds of the past, the trace of rupture.⁶³

“[R]upture” expresses the utopian possibility of each event or moment, its capacity to negate what is and open “order” up to “the possibility above” it. Cultural and literary critic Walter Benjamin recognises the potential of the singular moment as a break, rejecting the idea of history as a process of “establishing a causal nexus” – an order, a pattern – “among various moments of history” and the notion of a “homogeneous, empty time.”⁶⁴ He prefers “a conception of the present as now-time shot through with the splinters of messianic time” and the notion that “every second was the small gateway in time through which the Messiah might enter.”⁶⁵ In similar terms, Abensour argues that “once we have drunk from the cup of utopian displacement, any enclosure, any installation in a place would become inconceivable.”⁶⁶ Utopia, for Abensour, is defined by its “persistence,” “its very fluidity and plasticity,” its pursuit of “ephemeral but nevertheless interminable lines of flight that open breaches.”⁶⁷

In promoting an iconoclastic international legal utopianism, in place of the “blueprint” utopianism that I suggest currently dominates international legal thinking, I am arguing that Utopia, *as* a negative no-place (*Ou-topia*), *is* international law’s *Eutopia* (good place). The dialectical relationship between non-existence and good-ness, expressed in ideas of impossibility, imperative, negation, and neutralisation outlined above, offers “ephemeral ... interminable lines of flight” that international legal thought should, I suggest, follow.

Part 2: Blueprints

1 *Being “Within”*: Antonio Cassese, Martti Koskenniemi and *The Utopian Possibility of International Law*

In the introduction to *Realizing Utopia*, his 2012 edited collection, Antonio Cassese considers three attitudes outlined by dystopian author Aldous Huxley.⁶⁸ First, the attitude of “the

⁶² Theodor W. Adorno, *Negative Dialectics* (Continuum, 2007 [1966]) 397.

⁶³ Abensour (n 20) 419.

⁶⁴ Walter Benjamin, “On the Concept of History” in Walter Benjamin (Howard Eiland and Michael W. Jennings eds.), *Selected Writings: Volume 4 1938-1940* (Belknap Press of Harvard University Press, 2006) 389, 397.

⁶⁵ *Ibid.*

⁶⁶ Abensour (n 20) 418.

⁶⁷ *Ibid.*

⁶⁸ See Aldous Huxley, *Brave New World* (Chatto & Windus, 1932).

Technicians, who ... are inclined ‘to accept too complacently the main framework of the structure whose details they are trying to improve’; next, the attitude of “the *Utopians*, who ‘are much too preoccupied with what ought to be to pay any serious attention to what is’; and finally, the attitude of “the *Judicious Reformers*” who, according to Cassese, “[are] ... alert to the present ... suggest[ing] realistic and viable avenues in order to avoid, at least to some extent, those pitfalls encountered when trying to build a better path.”⁶⁹ Cassese prefers the outlook of the judicious reformer, presenting his “realistic utopia[nism]” as “miles away from the traditional conception of utopia,”⁷⁰ and preferring “new avenues for improving the major deficiencies of the current society of states” to utopian ideals of “comity, friendship, and cooperation.”⁷¹ Presented in these terms, Cassese’s project is more concerned with reform than Utopia.

Various “avenues” are pursued in the book’s forty-seven chapters – explorations of ‘global community’ such as Philip Alston’s proposals for UN reform or Anne Peters review of international legal constitutionalism,⁷² or normative reforms such as Nils Melzer’s proposal to “[bolster] the protection of civilians in armed conflict.”⁷³ Walking down these “avenues” the judicious reformer “moves on the solid ground of ‘critical positivism’,”⁷⁴ “engaging ... in imaginative thinking” whilst “refrain[ing] from chasing unattainable dreams.”⁷⁵

In this determinedly realistic sense Cassese has a “belief in law as a means to realize Utopia,”⁷⁶ and he seems to share that belief with his contributors. Martti Koskenniemi, for example, suggests that as a “realistic utopia ... that begin[s] with the critique of present institutions” international law sustains the possibility of “invit[ing] the widest possible participation by everyone, but especially those in the global South,”⁷⁷ encouraging a Kantian utopianism of “critique and contestation” that “start[s] from here and now ... judg[ing] present institutions in view of the maximization of freedom tomorrow.”⁷⁸ Most of Cassese’s contributors prefer a more practical-doctrinal concept of utopia, however, focussing on institutional or normative reforms – consider Bardo Fassbender’s proposal for a Security Council that “attaches more importance to collective goods and interests of all peoples inhabiting the earth than to the individual goods and interests of the states represented in the Council,”⁷⁹ or Jérôme de

⁶⁹ Cassese, “Introduction” (n.9) xvii-xviii (quoting Huxley).

⁷⁰ Ibid xviii and xxi.

⁷¹ Ibid. xxi.

⁷² Philip Alston, “The United Nations: No Hope for Reform?” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 38; Anne Peters, “Are we Moving towards Constitutionalization of the World Community?” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 118.

⁷³ Nils Melzer, “Bolstering the Protection of Civilians in Armed Conflict” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 508.

⁷⁴ Cassese, “Introduction” (n 9) xvii.

⁷⁵ Ibid, xxi, xxii.

⁷⁶ Isabel Feichtner, “Realizing Utopia through the Practice of International Law” (2012) 23 *European Journal of International Law* 1143, 1144.

⁷⁷ Martti Koskenniemi, “Utopia as Critique” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 3, 12.

⁷⁸ Ibid, 13, 12.

⁷⁹ Bardo Fassbender, “The Security Council: Progress is Possible but Unlikely” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 52, 58

Hemptinne's "Blueprint for Action" on "The Future of International Criminal Justice."⁸⁰ Anxieties about realism – about connections with and plausibility in the context of what is – mean that this is not a project in search of Utopia but a limited "blueprint" for a reformed legal future.

Cassese is not the first international lawyer to attempt a balancing act between Utopia and realism. Martti Koskenniemi's *From Apology to Utopia* charts the opposition between the "concrete" reality of an international law made by states and a strongly "normative" international law built on conceptions of 'the good':⁸¹

A law which would lack distance from State behaviour will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.⁸²

Koskenniemi offers no solution to the oscillation between concreteness (reality) and normativity (utopia) because, on his analysis, international law is defined by "the dynamics of [this] contradiction."⁸³ Whilst Koskenniemi's approach identifies qualifiedly utopian possibilities within the existing international legal structure, Cassese advocates realistically utopian reforms to that structure. Both define their utopianism by reference to the realities of contemporary international law, tacitly rejecting approaches that would pursue a non-existent no-place (*Ou-topia*) or an unqualifiedly good place (*Eutopia*).

Opportunities for the kind of "critique and contestation" that Koskenniemi advocates are to be found in gaps or indeterminacies in international legal discourse.⁸⁴ International legal indeterminacy originates in the opposition between concreteness and normativity,⁸⁵ in the possibility of basing legal arguments on either normative goals or the concretely expressed will of states.⁸⁶ The inherent nature of that indeterminacy – the impossibility of resolving it by preferring either normativity or concreteness – leads Koskenniemi to conclude that "law is incapable of providing convincing justifications to the solution of normative problems."⁸⁷ This

⁸⁰ Jérôme de Hemptinne, "The Future of International Criminal Justice: A Blueprint for Action" in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 585.

⁸¹ Koskenniemi, *From Apology* (n 10) 58: "The requirement of concreteness related to the need to verify the law's content not against some political principles but by reference to the concrete behaviour, will and interest of States. The requirement of normativity related to the capacity of the law to be opposable to State policy ... A doctrine with much concreteness seemed to lose its normative nature and end up in descriptive apology. A truly normative doctrine created a gap between itself and State practice in a manner which made doubtful the objectivity of the method of verifying its norms. It ended up in undemonstrable utopias." I develop a more comprehensive analysis of Koskenniemi's oeuvre – the analysis here being limited to Koskenniemi's engagement with utopia – in Matthew Nicholson, "Psychoanalyzing International Law(yers)" (2017) 18(3) *German Law Journal* 441.

⁸² Koskenniemi, *From Apology* (n 10) 17

⁸³ Ibid 58. See also ibid 65: "[D]octrine is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice-versa* without being able to establish itself permanently in either position" (emphasis in original).

⁸⁴ "critique and contestation" – see Koskenniemi quotation at n 78.

⁸⁵ See Koskenniemi, *From Apology* (n 10) 28-58 and 590-596 on indeterminacy.

⁸⁶ Ibid 63: "International legal discourse is incoherent as it incorporates *contradictory assumptions* about what it is to argue objectively about norms. This gives rise to conflicting legal arguments and the inability to prefer any of them" (emphasis in original).

⁸⁷ Ibid 69.

indeterminacy means that international lawyers have to make choices that are not dictated by the law's content or structure.⁸⁸ In making such choices international lawyers practice hegemony. Hegemony is a particular form of decision-making in circumstances of socio-political incoherence where the supposedly governing texts do not dictate the outcome.⁸⁹ The practice of international legal hegemony expresses the "realistic utopia" of "critique and contestation" that Koskenniemi contemplates in his contribution to Cassese's edited collection,⁹⁰ reflecting the possibility of achieving limited yet positive change within international law's structure.

Koskenniemi characterises his approach as "more [of] ... a critical standpoint from which to attack any present (functional) architecture for falling short of the ideal of freedom than a constructive platform on which to impose any particular blueprint on the world."⁹¹ Whilst he does not offer a detailed, 'build-to-print' utopian plan, Koskenniemi sketches a utopian blueprint: an image of international law as a frame within which Utopia might be built. That frame consists of formal political equality – "the widest possible participation by everyone, but especially those in the global South";⁹² a vague notion of freedom – "judge present institutions in view of the maximization of freedom tomorrow";⁹³ and an image of extant international law as a Utopia of sorts – a good place / no-place that affords something unavailable in the non-legal, 'real' world:

In the absence of agreement over, or knowledge of the "true" objectives of political community – that is to say, in an agnostic world – the pure form of international law provides the shared surface – the *only* such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion – "outlawry" – of the other. In this sense, international law's value and its misery lie in its being the fragile surface of political community among social agents – States, other communities, individuals – who disagree about their preferences but do this *within* a structure that invites them to argue in terms of an assumed universality.⁹⁴

Cassese and Koskenniemi "[shut international law] up in its own [extant] meaning ... away from the possibilit[ies] above [the extant international legal] order" by focussing on the limited

⁸⁸ See *ibid* 69: "I believe that lawyers should admit that if they wish to achieve justifications, they have to take a stand on political issues without assuming that there exists a privileged rationality which solves such issues for them." See also *ibid* 536: "[L]awyers expectations of certainty should be downgraded ... they – as well as States and statesmen – must take seriously the moral-political choices they are faced with when arguing 'within the law' and accept the consequence that in some relevant sense the choices are theirs and that they therefore should be responsible for them."

⁸⁹ See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2nd edition, Verso, 2001). For a detailed exploration of the links between Koskenniemi's and Laclau's and Mouffe's work, and the centrality of hegemony to Koskenniemi's international legal theory, see Nicholson, "Psychoanalyzing" (n 81).

⁹⁰ "critique and contestation" – see Koskenniemi quotation at n 78.

⁹¹ Koskenniemi, "Utopia as Critique" (n 77) 12.

⁹² *Ibid* (also quoted at n 77 above).

⁹³ *Ibid*.

⁹⁴ Martti Koskenniemi, "What is International Law For?" in Malcolm D. Evans (ed.), *International Law* (4th edition, Oxford University Press, 2014) 29, 48 (emphasis – "only" – in third line of quotation in original; emphasis – "within" – in final line added).

utopian possibilities *within* existing international law.⁹⁵ As outlined in the part one, I argue that this is the wrong choice and that it is now vital to investigate the “possibility above [the extant international legal] order.”⁹⁶ That argument is, of course, not fully developed at this point; that will have to wait until the last part of this article. But in this section I have sought to demonstrate that Cassese and Koskenniemi – perhaps the best known international legal utopians in the literature – quite deliberately fit their utopian ambitions into extant international law, remaining “trapped and confined” within “the system” as a result.⁹⁷

Akbar Rasulov, in perhaps the most recent reflection on international legal utopianism in the literature, prefers investment in the extant international legal system to international legal utopianism.⁹⁸ For Rasulov “the single greatest favour one could ever render to the idea of international legal utopianism is to relieve it of any great theoretical duties.”⁹⁹ Rasulov prefers “study [of] the practical givens of law’s social reality” to utopian projects that seek to re-make international law,¹⁰⁰ largely because international law, with its goal of “a single worldwide regime of the rule of law,”¹⁰¹ is and always has been utopian. Consistent with Cassese’s and Koskenniemi’s approach Rasulov invests in such utopianism as exists within international law, excluding the “possibility above [the extant international legal] order” that the argument advanced here invests in.¹⁰²

2 *Fragments of a Legal Utopia*

Consistent with Cassese’s and Koskenniemi’s ‘within’-ness, a number of voices argue that there are aspects or fragments of utopia – limited legal blueprints for a slightly improved future – within international law.

Writing in 1985, Alexandre Kiss suggests a certain utopianism in the “common heritage of mankind” regimes in the Antarctic Treaty, the international legal framework governing activities on the moon, and the United Nations Convention on the Law of the Sea’s framework governing ‘the Area’¹⁰³ – ‘the Area’ being “the seabed and ocean floor and subsoil thereof,

⁹⁵ Adorno, *Negative Dialectics* (n 62) 397 (also quoted at n 62).

⁹⁶ See text at n 62 to n 63.

⁹⁷ “trapped and confined” and “the system” – see Jameson quotation at n 7 above.

⁹⁸ Akbar Rasulov, “The Utopians” in Jean d’Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 879. See *ibid* 899: “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 ... 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.”

⁹⁹ *Ibid* 898-899.

¹⁰⁰ *Ibid* 898.

¹⁰¹ *Ibid* 897: “[I]f 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 in the present, to fantasize 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 false 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?” (emphasis in original).

¹⁰² See text at n 62 to n 63.

¹⁰³ Alexandre Kiss, “The common heritage of mankind: utopia or reality?” (1985) 40(3) *International Journal* 423; Antarctic Treaty, 402 UNTS 71 (no. 5778), as discussed by Kiss, *ibid*, at 428; Agreement Governing the

beyond the limits of national jurisdiction”.¹⁰⁴ The idea that by operation of law the Antarctic, the moon, and ‘the Area’ are placed beyond exclusionary claims of national ownership certainly has a utopian quality in the context of contemporary processes of commodification and consumption. But Kiss is pessimistic about the prospects of realising this “common heritage” Utopia, noting that enforcement of these normative frameworks cannot be guaranteed given the absence of compulsory jurisdiction over states for international courts.¹⁰⁵

Richard Falk, in a 1964 article about “the condition of international legal theory in the United States,”¹⁰⁶ recommends “a discouraging realism and a qualified commitment to utopian objectives” in view of the “tragic paradox” that “effective management of violence in world affairs” is a “necessity” whilst “achieving management by consensual means” is “impossible.”¹⁰⁷ Falk’s qualified utopianism informs his assessment of the UN Charter’s collective security regime: “[C]ompared to the League [of Nations], the United Nations constitutes a more ambitious attempt to create a visible institutional center for international society competent, if not capable, to restrain recourse to violence by nations.”¹⁰⁸ Falk is in search of blueprints, more interested in plans or “techniques for getting from here to there than [in] ... a vision of what it will be like when we get there.”¹⁰⁹ Whilst the UN Charter is not a utopian blueprint, there are faint outlines of a better future, “a model ... a helpful guide.”¹¹⁰

The utopian dimension of the *jus ad bellum* suggested by Falk is widely recognised in the literature. Writing in the pre-Charter days of 1943 Georg Schwarzenberger, for example, notes that perspectives differ as “the emphasis changes from war as the natural state of relations between States to peace as ‘a state most highly agreeable to human nature.’”¹¹¹ If “[r]eality and utopia often are amalgamated in the picture of the state of nature” then Utopia is one component in “a sociological analysis of international law ... as an ideology, reality and utopia.”¹¹²

Marc Weller, writing in 2018, goes beyond Falk’s and Schwarzenberger’s cautious utopianism, concluding that “the legal system on the use of force ... is principally utopian in character, both in terms of its substantive rules and its process requirements.”¹¹³ For Weller “utopia is not an ‘un-place’” because “[t]he League Covenant and its successor, the UN Charter, reflect all the major elements that would ordinarily be characterised as utopian when put forward as a

Activities of States on the Moon and Other Celestial Bodies, 610 UNTS 305 (no. 8843), as discussed by Kiss, *ibid*, at 431; United Nations Convention on the Law of the Sea (‘UNCLOS’), 1833 UNTS 3 (no. 31363), as discussed by Kiss, *ibid*, at 431-433.

¹⁰⁴ UNCLOS, *ibid*, Art. 1.

¹⁰⁵ Kiss (n 103) 440.

¹⁰⁶ Richard Falk, “The Adequacy of Contemporary Theories of international Law – Gaps in Legal Thinking” (1964) 50(2) *Virginia Law Review* 231, 231.

¹⁰⁷ *Ibid* 247-248 (parts of the original text are in italics).

¹⁰⁸ *Ibid* 246.

¹⁰⁹ *Ibid* 249.

¹¹⁰ *Ibid*.

¹¹¹ Georg Schwarzenberger, “Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law” (1943) 37(3) *American Journal of International Law* 460, 460 (quoting Pufendorf).

¹¹² *Ibid* 460, 479.

¹¹³ Marc Weller, “The Real Utopia: International Constitutionalism and The Use of Force” in Robert Schütze (ed.), *Globalization and Governance: International Problems, European Solutions* (Cambridge University Press, 2018) 131, 146.

programmatic proposal.”¹¹⁴ Weller goes so far as to suggest that through the law on the use of force “the international legal system has developed beyond Utopia, in ways Sir Thomas More and his successors would have found difficult to imagine, or perhaps even to endorse.”¹¹⁵ All that remains, according to Weller, is for this utopian legal framework to become “fully effective.”¹¹⁶

Balancing latent utopian potential with a failure to match that potential in implementation – a familiar theme in much of the international legal analysis considered so far, with the notable exception of Weller – Costas Douzinas laments the “conformism which threatens human rights when they become a tool of states, governments and international organisations.”¹¹⁷ Douzinas maintains some hope for Utopia as “the name for the great power of imagination which finds the future latent in every cultural product ... preserv[ing] the kernel of radical enthusiasm in every ideology it criticises.”¹¹⁸

Some see utopian potential in the concept of a universal jurisdiction, permitting all national courts to try international crimes regardless of the nationality of the accused or connection between the offence and the forum state. Lisa Hajjar welcomes the chaos in inter-state relations that such universal jurisdiction would cause,¹¹⁹ whilst Fannie Lafontaine describes universal jurisdiction as “the realistic utopia.”¹²⁰ Darryl Robinson uses Koskenniemi’s apology-utopia dialectic to review criticisms of the International Criminal Court.¹²¹ Noting that the court is critiqued for being too close to the whims of states (apology) and for being too detached from the realities of inter-state relations (utopia),¹²² Robinson concludes that “the impossibility of the [international criminal law] project need not undermine its necessity.”¹²³

Across the literature, from Cassese’s realism, *via* Koskenniemi’s structuralism, to Robinson’s reflections on international criminal law, there is a determination to find and invest in extant international law’s (limited) Utopia. Philip Allott inverts that approach, rejecting the pursuit of the utopian within existing international law as the first step in re-forming international law and building a global, utopian society.

3 On the Outside: Phillip Allott’s Eutopianism

¹¹⁴ Ibid 137.

¹¹⁵ Ibid 146.

¹¹⁶ Ibid 147.

¹¹⁷ Douzinas, (n 49) 226.

¹¹⁸ Ibid 224.

¹¹⁹ Lisa Hajjar, “Chaos as Utopia: International Criminal Prosecutions as a Challenge to State Power” (2004) 31 *Studies in Law, Politics and Society* 3, 9, extolling “the political productivity of legal violence to attack impunity by making the powerful vulnerable, and [the] value of chaos made possible by the threat legal violence poses to public officials responsible for gross violations.”

¹²⁰ Fannie Lafontaine, “Universal Jurisdiction – the Realistic Utopia” (2012) 10 *Journal of International Criminal Justice* 1277.

¹²¹ Darryl Robinson, “Inescapable Dyads: Why the International Criminal Court Cannot Win” (2015) 28 *Leiden Journal of International Law* 323. On Koskenniemi’s apology-utopia dialectic see text at n 82.

¹²² Robinson *ibid* 325-326.

¹²³ Ibid, 347.

Philip Allott works from outside extant international law, challenging it to become more than it is or has been.¹²⁴ In *Eunomia*, first published in 1990, Allott “seeks to invoke the power of the future to re-imagine the human world by proposing a new ideal of international society, the society of all-humanity, the society of all societies.”¹²⁵ The law of this meta-society is, on Allott’s analysis, “an emerging universal legal system, the legal system of all legal systems,”¹²⁶ arising out of post-Cold War processes of globalization and associated changes in the way people think and live.¹²⁷

Allott contrasts “old international law” – “typically the law acknowledged by governments and their advisers and consecrated by the International Court of Justice in The Hague” – with a “new international law ... made in countless international forums, implemented through countless international agencies, interpreted and applied by countless new international courts and tribunals ... re-enacted by national legislatures, implemented by national executive branches of government, [and] enforced in national courts.”¹²⁸ Reflecting on his experience as a legal adviser in the British Foreign and Commonwealth Office, he critiques the sense in which “[t]he masters of the world of tomorrow are the slaves of yesterday’s ideas,”¹²⁹ noting that “the international system itself is nothing other than a structure of ideas.”¹³⁰ “[W]ithdrawing to the cloisters of Cambridge in 1973,”¹³¹ Allott describes his attempt to “understand and then to change the systematic structure of international society” in light of his Foreign Office experience,¹³² having resolved “to create a new total view of society and law”:¹³³

[T]he task always a practical one – to form a view which could become the normal content of consciousness of all those involved, closely or distantly, in national government and in international society, eventually replacing the existing theoretical structures completely.¹³⁴

This, then, is ideational blueprint utopianism: a practical project that seeks to change the “consciousness” of all relevant actors. Allott asserts the distinctive law-ness of international law *and* the necessity of its connection with social reality, valuing Hans Kelsen’s work because it “grounded legal obligation in the coherence of a closed system of obligation,”¹³⁵ whilst praising Myres McDougal’s effort to “integrate the conceptualizing of international society and law into the conceptualizing of social process in general.”¹³⁶ He sets himself the task of

¹²⁴ See Anthony Carty, “Social Theory and the ‘Vanishing’ of International Law: A Review Article” (1992) 41 *International and Comparative Law Quarterly* 939, 939, commenting on Allott’s *Eunomia*: “the discipline [international law] is subsumed under much wider categories ... [Allott] appear[s] to ignore the form-content or procedure-substance distinction in international law”; 940: “Allott presents himself as an *outsider*” (emphasis in original).

¹²⁵ Allott, *Eunomia* (n 11) xxvi.

¹²⁶ *Ibid* xxv

¹²⁷ *Ibid* xiii-xxiv.

¹²⁸ *Ibid* xv.

¹²⁹ *Ibid* xlv.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ *Ibid* xlvi.

¹³⁴ *Ibid*.

¹³⁵ *Ibid* xlvii.

¹³⁶ *Ibid* xlvii.

“providing, in the spirit of Kelsen, a basis of philosophical coherence for international society and law [whilst] ... integrating, in the spirit of McDougal, the international social process into social process more generally.”¹³⁷

Eunomia is written in a didactic, utopian tone and style. It is not an analytical study of thought and scholarship on the nature, theory and history of international law but a utopian blueprint for the “new international law.” Allott declares “[t]he task of humanity now is to take possession of the waste-land of international society in the name of the people and in the name of justice ... redeem[ing] state-societies as systems for organizing the willing and acting of all human beings.”¹³⁸ *Eunomia* includes three utopian draft treaties, each one invoking “We, the people”:¹³⁹ “Treaty on the Constituting of International Society” (declaring “[i]nternational law [to be] ... the law of international society embodying the common interest of all humanity”);¹⁴⁰ “Treaty on the Elimination of War” (“We undertake to do everything possible to eliminate the practice of war”);¹⁴¹ and “Treaty on the Elimination of Force in International Society” (“We undertake not to preach, teach, or otherwise propagate the idea that the use of force in international society is, or may be, politically or morally or legally justifiable, either in general or in particular situations”).¹⁴²

Allott’s concept of law is grounded in the deliberative, democratic participation of individuals, reflecting a classical public-ness that underpins the draft treaties:

In generating the pure theory which contains the idea and the ideal of democracy, a society seeks the means to enable the people, the members of society, to embrace law as their own, not merely because they may conceive of themselves as its authorizing source but because they may will and act the law in their participation in the total social process which forms it.¹⁴³

Allott’s utopian plan is for all individuals to participate in the “self-creating of the people of the world through their own willing,”¹⁴⁴ bringing about “a self-willed change in human consciousness. A revolution, not in the streets but in the mind.”¹⁴⁵ He describes this as “a practical theory of social idealism,”¹⁴⁶ insisting that “social idealism ... must become the basis for a new international law which humanity will construct as the law of a new international society.”¹⁴⁷ Acknowledging that some regard *Eunomia* as “utopian, a dream rather than a prediction” because “it failed to specify the practical steps, especially the institutional changes,

¹³⁷ Ibid xlvi.

¹³⁸ Ibid 254 (paragraph 14.1)

¹³⁹ See opening lines of the three draft treaties at ibid xxxv, xxxvii, and xxxviii.

¹⁴⁰ Ibid xxxv-xxxvii (quotation in brackets from Article 2 at xxxv).

¹⁴¹ Ibid xxxvii-xxxviii (quotation in brackets from Article 2 at xxxvii).

¹⁴² Ibid xxxviii-xl (quotation in brackets from Article 3 at xxxix).

¹⁴³ Ibid 256 (paragraph 14.7).

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 257 (paragraph 14.9).

¹⁴⁶ Ibid 410 (paragraph 19.25 – parts of the original text are in italics).

¹⁴⁷ Ibid 410-411 (paragraph 19.25 – parts of the original text are in italics).

which would allow us to get ... from the actual to the ideal,”¹⁴⁸ Allott insists that “[w]hat we have made by thinking we can make new by new thinking.”¹⁴⁹

Allott’s focus on thought excludes consideration of material circumstances, analysis of extant legal, social, political or economic structures, and historical inquiry. He offers various characterisations of what history is or its function in the ideational recreation of the world – “history is the past studying the past,”¹⁵⁰ “[h]istory is ... the story of a past and a future which are themselves a present-here-and-now,”¹⁵¹ “[h]istory must be seen as the gradual actualizing of the potentiality of some original or pre-historical or putative society”¹⁵² – without actually engaging with the detail of material history. This absence suggests that Allott’s social idealism operates in a temporal vacuum, outside history and the passage of time.¹⁵³

Compounding this sense of detachment from what is and what was, *Eunomia* offers unsupported statements and verdicts in lieu of analysis of extant international law: “International law has been neither very threatening nor very useful to the politicians and the diplomats”,¹⁵⁴ “The legal relations of international law were and are essentially the legal relations necessary to temper the public interactive willing and acting of the governments of statal societies as that willing and acting affects their sovereignty over territory.”¹⁵⁵ No references to or quotations from literature are offered to support these claims – indeed, *Eunomia* contains no footnotes and no bibliography. This is more than a formal or presentational point. The absence of footnotes and a bibliography are, I suggest, a product of Allott’s idealistic, blueprint utopianism. The argument for “self-creating” through thought does not,¹⁵⁶ for Allott, need to be situated in or connected to the world, to literature, or with the detail of what has been thought, what is being thought, or what is happening. Save for some prefatory reflections on globalisation, the professional experience of its author and the post-Cold War global situation,¹⁵⁷ *Eunomia* contains very little about time, place or lived experience, suggesting that such concerns do not arise when the world is viewed from “the cloisters of Cambridge.”¹⁵⁸

Eunomia’s emphasis on thought and idealism and its exclusion of material and temporal concerns permeate Allott’s other work.¹⁵⁹ He insists that “[s]ociety is made in the mind,”¹⁶⁰

¹⁴⁸ Ibid xxvii.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 100 (paragraph 6.37).

¹⁵¹ Ibid 192 (paragraph 12.36).

¹⁵² Ibid 289 (paragraph 15.70).

¹⁵³ See Carty, “Social Theory” (n 124) 945: “The so-called different aspects of society, such as art, history, economics, religion, etc., all *exist* for Allott only as ideas in the mind of society. They do not impact upon reality as concrete or historical” (emphasis in original).

¹⁵⁴ Allott, *Eunomia* (n 11) 297 (paragraph 16.3).

¹⁵⁵ Ibid 296 (paragraph 16.2).

¹⁵⁶ “self-creating” – see Allott quotation at n 144.

¹⁵⁷ See Allott, *Eunomia* (n 11) vii *et seq* (‘Preface to the Paperback Edition’) and xli *et seq* (‘Preface’).

¹⁵⁸ See Allott quotation at n 131.

¹⁵⁹ See Carty, “Social Theory” (n 124) 945: “Allott’s model of idealist subjectivism dwarfs the ethical significance of the actual striving of the State governments of international society. There is a need to escape from the idealist trap of ethical perfectionism into the concrete struggle for ethical achievement.”

¹⁶⁰ Philip Allott, “Globalisation from above: Actualising the ideal through law” in Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002) 70, 70 (original in italics).

that “[l]aw is a special way in which society thinks,”¹⁶¹ and that “the ideal ... enables the human mind and human societies to imagine a better future and to choose to enact a better future.”¹⁶² Allott’s entire approach is defined by an insistence on the human-ness of reality: “Human beings inhabit a *human world*, entirely made by the human mind, a world parallel to the natural world, a self-made second human habitat, a human mind-world with its own *human reality*.”¹⁶³

There is, I suggest, a seamless connection between the didactic-idealist utopianism that drives Allott’s work, the casual treatment of relevant theories and literature, and the absence of any substantive concern with time, place and lived experience. All are the product of an evangelical focus on the human-ness of reality, on human thought as the determinant of what is, what was, and what will be.¹⁶⁴ This suggests a return to the Enlightenment ideal of human thought as the supreme power, something Allott hints at in observing that “*Eunomia* and *Eutopia* simply ignore the End of Philosophy proclaimed in the twentieth century.”¹⁶⁵

Max Horkheimer and Theodor Adorno critique the idealist assumption of human power over reality and nature in *Dialectic of Enlightenment*, defining the aims of the Enlightenment in terms that resonate with Allott’s project: “The program of the Enlightenment was the disenchantment of the world; the dissolution of myths and the substitution of knowledge for fancy.”¹⁶⁶ The Enlightenment, for Horkheimer and Adorno, created a social, political and cultural situation in which “[w]ithout regard to distinctions, the world becomes subject to man”:¹⁶⁷ “Man’s likeness to God consists in sovereignty over existence, in the countenance of the law and master and in command.”¹⁶⁸ By proudly “ignor[ing] the End of Philosophy” – and by “the End of philosophy” Allott seems to mean critical, post-Enlightenment, philosophy of the kind in which Horkheimer and Adorno engage – Allott seeks to wall his project off from critical thinking that contests the totalising supremacy of the human mind. It is difficult to understand why Allott, as a scholar writing in the late twentieth and early twenty-first century, would imagine he can “simply ignore” the development of post-Enlightenment philosophy.

On Horkheimer and Adorno’s interpretation Francis Bacon, to whom Allott refers,¹⁶⁹ advocates a “patriarchal” state of “concordance between the mind and man and the nature of things” in which “the human mind ... overcomes superstition [and] ... hold[s] sway over a disenchanted nature.”¹⁷⁰ This “concordance” means that “[k]nowledge, which is power, knows no obstacles:

¹⁶¹ Ibid (original in italics).

¹⁶² Ibid.

¹⁶³ Ibid 75 (paragraph 3.11, emphasis in original).

¹⁶⁴ See Martti Koskenniemi, “*Eunomia: New Order for a New World*” (review), (1993) 87 *American Journal of International Law* 160, 161: ‘Ultimately, it is not society but human consciousness that is God [in *Eunomia*]; human consciousness projects everything there is, including time and space.’

¹⁶⁵ Philip Allott, *Eutopia* (Edward Elgar, 2016) ix; see also Koskenniemi, “*Eunomia*” (n 164) 162, describing *Eunomia* (n 11) as “unabashedly nonmodern ... [and as reflecting] a sense that modernity has gone astray.”

¹⁶⁶ Theodor W. Adorno and Max Horkheimer, “The Concept of Enlightenment” in Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (Verso, 1997, [1944]) 3, 3.

¹⁶⁷ Ibid 8.

¹⁶⁸ Ibid 9

¹⁶⁹ See text at n 176 below.

¹⁷⁰ Adorno and Horkheimer, “The Concept of Enlightenment” (n 166) 4.

neither in the enslavement of men nor in compliance with the world's rulers."¹⁷¹ Such totalising knowledge originates in a fear of the unknown:

Man imagines himself free from fear when there is no longer anything unknown ... Enlightenment is mythic fear turned radical ... Nothing at all may remain outside, because the mere idea of outsidership is the very source of fear.¹⁷²

Human dominance over nature and reality naturalises itself over time: "The more the machinery of thought subjects existence to itself, the more blind its resignation in reproducing existence. Hence enlightenment returns to mythology, which it never really knew how to elude."¹⁷³ The prevailing logic is one of domination as "men [sic.] distance themselves from nature in order thus imaginatively to present it to themselves – but only in order to determine how it is to be dominated."¹⁷⁴

Allott's attachment to the Enlightenment values of knowledge and rationality critiqued by Horkheimer and Adorno is again on display in *Eutopia*. Published in 2016 as something like a sequel to *Eunomia*, Allott describes the book as "designed to bring the great and ancient existential human debate back to life, before it is too late."¹⁷⁵ Invoking Thomas More's *Utopia* and Francis Bacon – in particular Bacon's insistence that "a revolution in our understanding of the human mind could produce every other kind of revolution"¹⁷⁶ – the book's foreword closes with a quotation from More: "Deservedly ought I to be called by the name of Eutopia or Happy Land."¹⁷⁷

Eutopia claims to offer a "road from Isotopia to Eutopia – from where we are to where we want to be – pass[ing] through Knowtopia."¹⁷⁸ Knowtopia is "the place where we learn about the extraordinary powers of the human mind, the private mind and the public mind, and where we take stock of the human condition ... the bright face and the dark face of human history ... our present troubled situation and our perilous future."¹⁷⁹ In a didactic-idealist tone familiar from *Eunomia*, Allott claims that in *Eutopia* "[w]e have learned that, over the course of millennia and in countless different cultures, the human mind and the human will have been wonderfully creative and ingenious and bold in responding to an unceasing succession of challenges."¹⁸⁰

Allott is unwilling to allow the reader to formulate her own response to the text, preferring to tell us what "[w]e have learned."¹⁸¹ This desire to control the readership is also apparent in

¹⁷¹ Ibid.

¹⁷² Ibid 16.

¹⁷³ Ibid 27.

¹⁷⁴ Ibid 39.

¹⁷⁵ Allott, *Eutopia* (n 165) ix.

¹⁷⁶ Ibid vii-viii.

¹⁷⁷ Ibid ix.

¹⁷⁸ Ibid 289 (paragraph 12.1).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid (paragraph 12.2).

¹⁸¹ Martti Koskenniemi, "International Law as Therapy: Reading the Health of Nations" (2005) 16 *European Journal of International Law* 329, at 331, notes an "aesthetics of grandeur" in Allott's work, suggesting, at 332,

passages unsupported by reasoning and lacking any attempt at persuasion. Consider, for example, this passage on the function of art:

Bad art and popular culture give pleasure to many people, and they make money for those who create and manage and sell them. That is justification enough for bad art and popular culture. And popular culture can sometimes rise to the level of high art.¹⁸²

Employing a similar approach, Allott notes (in a chapter entitled “Paradoxes of Being Human II”) that “[t]here is no agreement among biologists and ethnologists as to the general ‘nature’ of our animal ancestors and hence no agreement as to the instincts that we have inherited.”¹⁸³ No details on the biological and ethnological literature consulted in formulating this view are offered, and this lack of support and reasoning recurs throughout the text – see, for example, the assertion that “[w]hat people most want is to be left in command of a private space in which they and their family can flourish, within a public space designed to deliver, and actually delivering the best possible conditions for personal flourishing.”¹⁸⁴ No empirical support for this assertion is offered, nor does Allott justify his preference for a liberal-capitalist “command of a private space” model over more communal, collectivist forms of living.

Eutopia, like *Eunomia*, has neither footnotes nor bibliography. Instead, each chapter is followed by a list of “other voices” – that is, voices other than Allott’s – including Shakespeare, Rousseau, Machiavelli, Thomas More, Hegel, Nietzsche, Alexander Pope, Einstein, Wikipedia, Freud, Marx, and Kant. Whilst some non-European “other voices” are included – a quotation from Hsun Ch’ing,¹⁸⁵ a reference to Franz Fanon¹⁸⁶ – there is a strong bias towards modern or pre-modern socio-political theory and philosophy written by European men. Allott could have recognised and engaged with the voices and perspectives of others in his text, highlighting sources or influences on his thinking, but he prefers to position “other voices” in lists of quotations that the reader comes to only after reading his text, granting his voice primacy.

Allott’s assertive, even domineering mode of authorship, serves as a means of effecting “[a utopian] revolution ... in the mind” of the reader.¹⁸⁷ This contrasts with more collaborative understandings of the relationship between author and reader, such as that outlined by Walter Benjamin in “The Author as Producer.”¹⁸⁸ Benjamin advocates an authorial style in which “the reader is at all times ready to become a writer – that is, a describer, or even a prescriber.”¹⁸⁹

that “[s]omething more takes place here than mere argument. The style invites the reader to step into the stream of history, something like the Palace of Versailles, to participate in the conversation of humankind that is taking place here.”

¹⁸² Allott, *Eutopia* (n 165) 111 (paragraph 6.52).

¹⁸³ Ibid 53 (paragraph 4.5).

¹⁸⁴ Ibid 83 (paragraph 5.18).

¹⁸⁵ Ibid 198.

¹⁸⁶ Ibid 321.

¹⁸⁷ “revolution ... in the mind” – see Allott quotation at n 145 above.

¹⁸⁸ Walter Benjamin, “The Author as Producer” in Michael W. Jennings, Howard Eiland and Gary Smith (eds.), *Walter Benjamin: Selected Writings, Volume 2, part 2, 1931-1934* (Belknap Press of Harvard University Press, 2005) 768.

¹⁸⁹ Ibid 771.

Authors must “never ... merely work on products but always, at the same time, work on the means of production.”¹⁹⁰ This “*Umfunktionierung*” or “functional transformation” in the production of text means that “the conventional distinction between author and the public ... begins ... to disappear.”¹⁹¹ The point of writing, for Benjamin, is “to induce other producers to produce” and “to put an improved apparatus at their disposal.”¹⁹² The “apparatus” will be “better, the more consumers it is able to turn into producers – that is, readers or spectators into collaborators.”¹⁹³ In promoting “*Umfunktionierung*” Benjamin critiques the alternative perspective of “Activism” whose “demands are summed up ... in plain language” as ““rule of the mind”” or ““rule of the intellectuals.””¹⁹⁴ According to Benjamin the activist “intellectual” is “a type of person defined by his opinions, attitudes or dispositions, but not by his position in the process of production.”¹⁹⁵ Whilst the activist intellectual writes “political manifestos” the practitioner of *Umfunktionierung* “eliminate[s] the antithesis ... between performers and listeners.”¹⁹⁶

Allott’s didactic style positions him as very much the “performer” and he consistently tells his reader or “listener” what is, what ought to be, and what the reader ought to think,¹⁹⁷ claiming the capacity to define *the* human experience of reality,¹⁹⁸ and even “[t]he task of humanity.”¹⁹⁹ He speaks for his readership, for “we” and of “us,”²⁰⁰ denying the reader the space to form her own views as she reads. This is not “*Umfunktionierung*,” not an exchange between author and reader that generates productive capacity in its readership, but a controlling and unpersuasive process of blunt, authoritarian instruction.²⁰¹

¹⁹⁰ Ibid 777.

¹⁹¹ Ibid, at 774 (on “*Umfunktionierung*”), and at 771 (on “conventional distinction”).

¹⁹² Ibid 777.

¹⁹³ Ibid.

¹⁹⁴ Ibid 772

¹⁹⁵ Ibid 773.

¹⁹⁶ Ibid 772, 775.

¹⁹⁷ See Allott, *Eutopia* (n 165), 209: “Law is the anatomy and physiology of a society” (emphasis added).

¹⁹⁸ See Allott, *Eunomia* (n 11), chapter 8 (“The Dimensions of Reality”), 123-132.

¹⁹⁹ Ibid 254: “The task of humanity now is to take possession of the waste-land of international society in the name of the people and in the name of justice, to redeem state-societies as systems for organizing the willing and acting of all human beings.”

²⁰⁰ See, for example, Allott, *Eutopia* (n 165) 149: “We are ruled by the power of memory. We are ruled by the power of imagination. We are ruled by the power of knowledge. And we are ruled by the power of *emotion*” (emphasis in original); ibid 298: “We are worker bees who built the hive we live in, but hardly enjoy the honey that collectively we produce”; ibid 226: “The behaviour of governments in the twentieth century taught us a painful lesson – evolutionary constitutionalism, the Rule of Law, fundamental constitutional rights, and the miracle of law-making in implementation of a society’s high-values were not enough to control gross abuse of power by governments.”

²⁰¹ See Carty “Social Theory” (n 124) 939: “If one cannot identify with or imagine oneself as communicating with a particular audience, it may be understandable that one’s work contains no references. With Allott this means the reader is left guessing what Allott himself has read and even left wondering whether he is ‘supposed’ to be reading the work. However, the confident tone of the oracle runs through *Eunomia*, leaving the reader with the sense that ‘the fault’ must lie with him.” See also Koskenniemi, “International Law as Therapy” (n 181), at 340: “His appeal to us is the same as the appeal of a clergyman showing his congregation how far they have strayed from the good path, who speaks again of sin and redemption and all the horrors of hell and thus makes us feel spiritualized as we leave the church to lead our private and professional lives as we have always done. Of course, this is a valuable service. But it is not a revolutionary service.”

This style of blueprint utopianism has been critiqued for its tendency towards messianism and totalitarianism. Russell Jacoby traces this critique back to Thomas More's original *Utopia*, written in 1515 and 1516.²⁰² Tracking the development of More's life and work in England, from apparently advocating freedom of religion and conscience in *Utopia*, to "hunt[ing] and pursu[ing] Protestants and heretics" and banning books,²⁰³ Jacoby rejects Jasper Ridley's charge that More became "a fanatic determined to crush what he considers to be the forces of evil" on the basis that "[Ridley] uses twentieth-century categories to damn More."²⁰⁴ Whatever the merits of Ridley's charge, there is a troubling connection between More's absolutism and Allott's absolute confidence in human-ness and human thought.

Jacoby's analysis of anti-utopianism extends, beyond critiques of More, to Karl Popper's work.²⁰⁵ Popper critiques the view that "rational political action must be based upon a more or less clear and detailed description or blueprint of our ideal state, and also upon a plan or blueprint of the historical path that leads towards this goal."²⁰⁶ For Popper such blueprint utopianism is "an all too attractive theory ... [that is] dangerous ... pernicious ... [and] self-defeating, and it leads to violence."²⁰⁷ For Popper there is no way to determine the "ideal state" through argumentation, reasoning, or science,²⁰⁸ so arguments about the ideal state "will at least partly have the character of religious differences."²⁰⁹ To achieve his preferred ideal state:

the Utopianist must win over, or else crush ... competitors who do not share his own Utopian aims ... He has to be very thorough in eliminating and stamping out all heretical competing views ... [T]he rationality of his political action demands constancy of aim for a long time ahead; and this can only be achieved if he not merely crushes competing Utopian religions, but as far as possible stamps out all memory of them.²¹⁰

On this basis "Utopian rationalism [h]owever benevolent its ends ... does not bring happiness, but only the familiar misery of being condemned to live under a tyrannical government."²¹¹ Isaiah Berlin is similarly opposed to radical means. According to Jacoby, "Berlin ratifies an inherent and irreducible pluralism that gives the lie to any utopian theorizing,"²¹² opposing ambitious plans on the basis that "[w]e should be wary of 'drastic action, in personal life or in public policy' ... since they may lead to unanticipated suffering."²¹³

²⁰² Jacoby (n 3) 44.

²⁰³ Ibid 44-45.

²⁰⁴ Ibid 48.

²⁰⁵ Ibid 52-58.

²⁰⁶ Karl Popper, "Utopia and Violence" (1986) 149(1) *World Affairs* 3, 5, discussed by Jacoby (n 3) at 56-57.

²⁰⁷ Popper *ibid*.

²⁰⁸ Ibid 6: "Since we cannot determine the ultimate ends of political actions scientifically, or by purely rational methods, differences of opinion concerning what the ideal state should be like cannot always be smoothed out by the method of argument."

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid 7.

²¹² Jacoby (n 3) 67.

²¹³ Ibid 68.

Hannah Arendt is the last in Jacoby's group of 'liberal anti-utopians.'²¹⁴ Jacoby highlights the proximity between Popper's and Arendt's positions, noting Arendt's observation that "[t]he aggressiveness of totalitarianism springs not from the lust for power ... nor for profit, but only for ideological reasons: to make the world consistent, to prove that its respective supersense has been right."²¹⁵ Arendt's, Berlin's and Popper's perspectives are connected by their fear of totalisation. Allott's work simply ignores that well-founded fear, concealing the link between utopianism, totalisation / totalitarianism behind superficially appealing calls for the constitution of a truly inter-national society.²¹⁶

Susan Marks' analysis of "false contingency" offers a corrective to the superficiality of Allott's idealistic utopianism, insisting that "[w]hile current arrangements can indeed be changed, change unfolds within a context that includes systemic constraints and pressures."²¹⁷ Marks explains that she wants to "re-evoke ... the idea that things can be, and quite frequently are, contingent without being random, accidental, or arbitrary,"²¹⁸ "us[ing] the term 'false contingency' to denote the failure to take that idea adequately into account."²¹⁹ Marks does not consider Allott's work in her treatment of international legal "false contingency," but Allott does seem to treat "the injustices of the present order ... as though they were random, accidental and arbitrary,"²²⁰ as though they can simply be thought away.

My critique of Koskenniemi's and Cassese's brand of blueprint utopianism was that they are hidebound by an emphasis on what is that excludes the possibility of what might be and, as a consequence, altogether too much "within" existing international law. My critique of Allott's ideational blueprint utopianism is that it operates too much 'outside' extant international law, material reality and history. For a scholar so attached to Enlightenment ideals,²²¹ Allott's work is surprisingly postmodern. Consistent with what Jameson sees as a postmodern "crisis in historicity,"²²² Allott casts material reality and history aside in order to sell *his* utopian vision of the human-ness of reality in a process of "absolute self-reproduction"²²³ – that is, his own "self-reproduction." Allott sells *his* view of "a human mind-world with its own *human reality*,"²²⁴ as seen "from the cloisters of Cambridge,"²²⁵ *via* a didactic tone and an attempt to control his audience. References and history and literature would only get in the way when the objective is aesthetic appeal to present-day audiences *via* numbered paragraphs (all of *Eunomia*'s and *Eutopia*'s paragraphs are numbered).²²⁶

²¹⁴ Ibid 75.

²¹⁵ Ibid 76.

²¹⁶ See the draft treaties in Allott, *Eunomia* (n 11) xxxv-xl.

²¹⁷ Susan Marks, "False Contingency" (2009) 62 *Current Legal Problems* 1, 2.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid 20.

²²¹ See text at n 165 to n 177.

²²² See text at n 35.

²²³ See text at n 36.

²²⁴ See text at n 163.

²²⁵ See text at n 131.

²²⁶ On "aesthetic appeal" see text (including Jameson quotation) at n 40.

Allott's "human reality" treats all reality, past, present and future, as a postmodern commodity for humans to consume as they re-order global society, locking international law into the "eternal present" of a postmodernity in which commodification and consumption rule.²²⁷ If the lesson of climate change is that humans are only too capable of commodifying and consuming then, if international law is to have any hope of addressing climate change, the absolute commodification of reality entailed by Allott's Eutopianism must be confined to its home in Cambridge.

4 Samuel Moyn's *Blueprint for Human Rights*

Across three books,²²⁸ and in one collection of essays,²²⁹ Samuel Moyn argues that "international human rights ... should find a better compromise between utopianism and realism than has thus far been realized,"²³⁰ insisting that "if the human rights movement does not offer a more realistic and politicized utopia, something else will take its place."²³¹ Moyn argues that human rights "need to descend into the programmatic contest for power" and "become more scientific" because "a politics of human rights ... should engage in the programmatic concern with designing good states, for the sake of global economic welfare."²³² Moyn flirts with iconoclastic utopianism, *via* a "return to the utopian imagination in its pure form, divorced from attempts to institutionalize it,"²³³ contemplating the idea that we should "proceed from the refusal to pay reality the respect of conforming to it."²³⁴ The flirtation is short-lived, however, and Moyn prefers a politicized human rights practice that builds Utopia out of existing reality whilst, at the same time, contesting that reality.²³⁵

Moyn's outline programme for the future of human rights grows out of his critique of contemporary human rights discourse and law:²³⁶ indeed, his critique is developed more extensively, across his three books, than his positive programme. In his first book, *The Last Utopia: Human Rights in History*, Moyn offers "[a]n alternative history of human rights, with

²²⁷ "eternal present" – see text at n 45.

²²⁸ Moyn, *The Last Utopia* (n 12); Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press, 2018).

²²⁹ Samuel Moyn, *Human Rights and the Uses of History* (Verso, 2014).

²³⁰ Samuel Moyn, "Epilogue: The Future of Human Rights" in Moyn, *Human Rights and the Uses of History* (Verso, 2014) 135, 136.

²³¹ *Ibid* 146.

²³² *Ibid* 142, 146

²³³ *Ibid* 135.

²³⁴ *Ibid* 136.

²³⁵ See *ibid* 136: "[M]y worry is that human rights have conformed too much to reality. The utopian challenge presented by human rights has proved so minimal that they easily became neutered, and were even invoked as excuses – for example, in wars serving other interests – for choices their original advocates did not intend." See also *ibid* at 142-143: "[T]hey [human rights] seem often to make little practical difference, amounting to an ornament on a tragic world. Because they are not realistic enough, they end up accommodating reality too much. A better compromise between utopianism and realism is required."

²³⁶ On the outline nature of this programme see *ibid* 143: "A better compromise between utopianism and realism is required. How to find this compromise is anything but obvious. But it may help to conclude with a list of theses that indicate the sort of compromise I have in mind." Moyn's list, at *ibid* 143-147, includes "[a] politics of human rights must transcend judges" and "A politics of human rights must seek power over the real conditions of enjoyment of formal entitlements."

a much more recent timeline” than conventional accounts focussed on the post-World War Two era.²³⁷ Moyn argues that “[o]ver the course of the 1970s, the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before.”²³⁸ Critiquing the “formalism” and “minimalism” of 1970s human rights utopianism,²³⁹ Moyn argues that human rights became extra-political:

One of the distinctive features of human rights consciousness in the crucial years of the 1970s was that appeal to morality could seem pure even where politics had shown itself to be a soiled and impossible domain ... Human rights were preferable because they were strategically necessary and practically feasible, but also because they were morally pure. The disavowal of earlier utopias [of a more overtly political or revolutionary nature] took place in part out of the aspiration to achieve through a moral critique of politics the sense of a pure cause that had once been sought in politics itself.²⁴⁰

I am concerned with Moyn’s blueprint utopianism and not with the accuracy of his historical analysis. The critique in *The Last Utopia* is that post-1970s human rights utopianism is more an outline sketch than a detailed blueprint: “[I]n the confusing tumult of 1970s social movements ... [human rights] became bound up with the widespread desire to drop utopia and have one anyway.”²⁴¹ Moyn’s problem with sketches is that they lack political content and programmatic detail. On his analysis it was the development of a distinctively formal, minimalist human rights culture in the 1970s that made human rights suited to the formalities of law. The alliance between human rights and international law is, on Moyn’s analysis, a story about formalised 1970s human rights coming to international law, rather than international law acquiring a substantive commitment to human rights values.²⁴²

On Moyn’s account “even if their breakthrough [in the 1970s] depended on their antipolitics” in post-1970s cultural and social conditions “partisans of the human rights idea were forced to confront the need for political agenda and programmatic vision – the very things whose absence allowed for their utopia to emerge so spectacularly and discontinuously in the first place.”²⁴³ Certainly by the 1990s, with “revelations of the Cambodian genocide ... [and] the mid-1990s resurgence of ‘ethnic cleansing’,”²⁴⁴ 1970s style formalist-minimalist human rights thinking was (apparently) in trouble: “From having triumphed because it lacked a political blueprint, the human rights movement was forced to draw up plans to remedy a crisis-ridden world.”²⁴⁵

²³⁷ Moyn, *The Last Utopia* (n 12) 7.

²³⁸ Ibid 1.

²³⁹ On formalism and international law see ibid 210, and for a critique of minimalism see ibid 172.

²⁴⁰ Moyn, *The Last Utopia* (n 12) 170-171.

²⁴¹ Ibid 175.

²⁴² See ibid 210: “The turn by dissidents like Aleksandr-Esenin-Volpin and Václav Havel to human rights was also, and explicitly, a revival or the plausibility of abstract norms as a vehicle of moral progress; and though they owed the general intellectual renewal of formalism to arguments by Eastern European dissidents, it was fateful that international lawyers were the existing custodians of international legal forms to which those very figures appealed. The lawyers had husbanded formalism without rights during an era of realist dominance. But they were the natural inheritors of a reactivated formalism revolving around the rights they had earlier marginalized.”

²⁴³ Ibid 213.

²⁴⁴ Ibid 220.

²⁴⁵ Ibid 221.

Having critiqued the sketchy nature of 1970s and post-1970s human rights utopianism for much of the book, Moyn performs a partial *volte-face* towards the end of *The Last Utopia*, asking (and not answering the question of) whether human rights “should restrict themselves to offering minimal constraints on responsible politics, not a new form of maximal politics of their own.”²⁴⁶ Any doubts about Moyn’s commitment to programmatic, blueprint utopianism evaporate by 2012 when – perhaps surprisingly, given the post-9/11 U.S. experience in Afghanistan and Iraq – he calls for human rights to “engage in the programmatic concern with designing good states, for the sake of global economic welfare.”²⁴⁷

Readers have to wait for 2018’s *Not Enough*, however, to get a sense of the blueprint Moyn favours, with his second book – 2015’s *Christian Human Rights* – simply expanding and consolidating the critique. *The Last Utopia* argued that the true origin of human rights’ social and political prominence lay in the 1970s and not the 1940s. In a similar vein *Christian Human Rights* argues that connections between Christianity and human rights, particularly in the 1930s and 1940s, are not a mere aspect of human rights history – as much of the existing scholarship, on Moyn’s analysis, suggests – but central to that history.²⁴⁸

Moyn contests the orthodox idea that liberal democratic values were expressed in and through “the annunciation of human rights in the 1940s,”²⁴⁹ in a manner consistent with a revolutionary tradition stretching back to the French Revolution and “*droits de l’homme*.”²⁵⁰ He argues that “through this lost and misremembered transwar era, it is equally if not more viable to regard human rights as a project of the Christian right, not the secular left.”²⁵¹ Moyn approaches the 1940s as a period in which “the Christian right” succeeded in making a break with an earlier, revolutionary tradition of rights as a challenge to orthodoxy, order and the state. A conservative rights tradition emerged out of that break and for Moyn that tradition “haunts politics to this day, as the deepest aspirations of democracy changed [in the 1940s], prizing moderation against extremes over liberation of human capacity and restoring order to its regrettable if time-honored status as the centrepiece of justice.”²⁵²

Moyn seeks to demonstrate the practicalities of this haunting, arguing that the Christian origins of the European human rights architecture, codified in the European Convention on Human

²⁴⁶ Ibid 227.

²⁴⁷ Moyn, “Epilogue” (n 230) 146.

²⁴⁸ Moyn, *Christian Human Rights* (n 228) 4: “Mainstream observers are generally unaware of – for their secular historians have nervously bypassed – the Christian incarnation of human rights, which interferes with their preferred understandings of today’s highest principles. Meanwhile, those interested in Christian sources, overwhelmingly Christians themselves, are prone to misinterpret them. The proposition that human rights arose with profound connections to Christian contexts is normally defended, in both public discourse and scholarly arguments, in a highly abstract way and about long ago events.”

²⁴⁹ Ibid 8.

²⁵⁰ Ibid, and see also ibid 9: “This book on the origins of Christian human rights therefore focuses most of all on the extent to which, across the 1930s and 1940s, the language of rights was extricated from the legacy of the French Revolution, the secularist mantle of which the Soviet leaders were now widely seen to have assumed. And thanks to the championship of rights within a new political formation – constitutionally organized religious democracy governed by Christian parties – a compromise between Christianity and democracy became not only palatable but a precious resource for the future of religious values.”

²⁵¹ Ibid 8.

²⁵² Ibid 24.

Rights, are reflected in recent decisions by the European Court of Human Rights endorsing restrictions on the wearing of the burqa and niqab in France, Switzerland and Turkey.²⁵³ For Moyn these cases:

owe part of their doctrinal rationale and perhaps their exclusionary implications not to the secularist associations of religious freedom but to the legacy of the religious struggle against communism once feared as secularism incarnate. The Muslim has taken the place of the communist in the contemporary European imagination.²⁵⁴

He insists that “[i]f the human rights movement does not improve states – or even the hearts of the men and women that Christianity at its most ambitious and inspiring promised to transform – it will demand replacement, in the name of its own ideals or some better ones.”²⁵⁵ This conclusion, like the argument of *The Last Utopia*, is underpinned by a programmatic, utopian desire for tangible progress.

In 2018’s *Not Enough* Moyn moves from arguing, in *The Last Utopia* and *Christian Human Rights*, for the value of pragmatic, blueprint utopianism as a response to the deficiencies and exclusions of extant human rights, to the presentation of an actual blueprint for the future of human rights:

[M]y goal is to stake out a moderate position between those who claim that human rights are unrelated to political economy and distributive injustice (except of course to provide the essential tools for reining them in) and those who think the human rights revolution has been a mere sham masking inhumane domination.²⁵⁶

Moyn opposes an idea of human rights that limits their purpose to the satisfaction of basic needs, advocating the pursuit of true equality: “Human rights, focused on securing enough for everyone, are essential – but they are not enough.”²⁵⁷ His argument develops in stages. First, the reader is invited to consider the France’s 1793-1794 Jacobin state and its management of the economy on the basis (to borrow Moyn’s quotation from Harold Laski) that ““distinctions of wealth are legislative creations, and that, where crisis demands it, egalitarian innovation may be deliberately attempted.””²⁵⁸ Next, Moyn argues for a “reread[ing]” of the Universal Declaration of Human Rights as an instrument “connected with the believable empowerment and intervention of the state” in opposition to free-market, neoliberal readings of the UDHR an instrument supportive of “the prestige of non-governmental action or the cautious reform of judges.”²⁵⁹ Analysis of Franklin Delano Roosevelt’s mid-1940s effort to refocus American

²⁵³ See *Belgin Dogru v France* (2008) 39 EHRR 179; *Dahlab v Switzerland*, Application No 42393/98, unreported, <[Leyla Sahin v Turkey \(2007\) 44 EHRR 99; *SAS v France*, \(2015\) 60 EHRR 244. These cases are analysed by Moyn, *Christian Human Rights* \(n 228\), at 137-138 and 142-145. For my analysis of these cases \(with the exception of *Belgin Dogru*\) see Matthew Nicholson, “Majority Rule and Human Rights: Identity and Non-Identity in *SAS v France*” \(2016\) 67\(2\) *Northern Ireland Legal Quarterly* 115.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643#{\)

²⁵⁴ Moyn, *Christian Human Rights* (n 228) 145.

²⁵⁵ *Ibid* 181.

²⁵⁶ Moyn, *Not Enough* (n 228) xi

²⁵⁷ *Ibid* 8.

²⁵⁸ *Ibid* 23 (quoting Harold Laski).

²⁵⁹ *Ibid* 44.

social policy on socio-economic rights follows,²⁶⁰ with the International Covenant on Economic Social and Cultural Rights ('ICESCR') receiving rather less attention than might be thought necessary in a book about global socio-economic equality.²⁶¹

Moyn considers the New International Economic Order – a 1970s programme of action by newly independent states in the global South, seeking to address global economic imbalances between former imperial states in the global North and newly independent states in the global South – in sections of a chapter that also covers the post-war decolonization and the post-war fortunes of the International Labour Organisation.²⁶² As Julieta Lemaitre observes, the structure of *Not Enough* suggests that for Moyn there is the U.S. and “the rest of the world.”²⁶³ That seems to explain why Moyn covers the NIEO – a collective, collaborative global South effort – in parts of a chapter that comes immediately after an entire chapter on mid-1940s U.S. socio-economic policy.²⁶⁴

Critique of the “turn away from socialism” in Amnesty International’s and Human Rights Watch’s work accompanies a negative review of Robert McNamara’s late-60s / early-70s World Bank presidency and his focus on alleviating “absolute poverty” rather than promoting equality.²⁶⁵ Expressing qualified agreement with Susan Marks and Naomi Klein, Moyn’s final chapter attacks the complicit relationship between human rights and neoliberalism, setting up an epilogue centred on the figure of “a modern Croesus” – the original Croesus being a fabulously wealthy Ancient Greek king – who “insists on a floor of protection, so that everyone living under his benevolent but total ascendancy can escape destitution.”²⁶⁶

For Moyn this “modern Croesus” embodies the situation of contemporary human rights: “We increasingly live in Croesus’s world.”²⁶⁷ The force of this argument is, perhaps, diminished by global financier George Soros’ endorsement on the book’s back cover (“[i]f we don’t address the growing global phenomenon of economic inequality, the human rights movement as we

²⁶⁰ Ibid, chapter three.

²⁶¹ John Finnis, “On Moyn’s Christian Human Rights” (2017) 28(1) *King’s Law Journal* 12, at 13 (footnote 2) critiques Moyn’s lack of attention (in *The Last Utopia* (n 12) and *Christian Human Rights* (n 228)) to the International Covenant on Civil and Political Rights and the ICESCR. Antony Anghie, “Whose Utopia? Human Rights, Development and the Third World” (2013) 22(1) *Qui Parle* 63, 69 notes Moyn’s cursory treatment of the ICCPR and IESCR in *The Last Utopia* (n 12).

²⁶² See Moyn, *Not Enough* (n 228) chapter 4, “Globalizing Welfare after Empire.”

²⁶³ See Julieta Lemaitre, “The View from Somewhere: on Samuel Moyn’s *Not Enough*,” 9th July 2018, *Law and Political Economy* <<https://lpeblog.org/2018/07/09/the-view-from-somewhere-on-samuel-moyns-not-enough/>> (last visited 2nd August 2019), describing *Not Enough* as “deliciously U.S.-centric, in spite of the author’s effort in mentioning ‘the rest of the world’ so obviously excluded from the ‘we’ which sometimes appears. Seen from South America, the effort at inclusion is shockingly thin: only one line about the Mexican constitution in a book on social and economic rights in the world (compare to ten pages on some guy called Beitz) and basically nothing on agrarian reform or on indigenous land rights or the role of the ILO in their defense. The ferocious debates over health rights litigation, or on the real effects of structural litigation on the provision of public good are also largely absent from *Not Enough*.” Lemaitre, *ibid*, also comments: “It would be perhaps too much to ask for the historical to acknowledge the limits of what can be seen from New York, or what can be understood from New York about ‘the rest of the world.’”

²⁶⁴ See Moyn, *Not Enough* (n 228) chapter 3 (“FDR’S Second Bill”).

²⁶⁵ Ibid 122-123, 131-133.

²⁶⁶ Ibid 212.

²⁶⁷ Ibid 212.

know it cannot survive or flourish”) but, nevertheless, the book ends with a call to detach human rights from neoliberalism.²⁶⁸

Pankaj Mishra, reviewing *Not Enough* in the *London Review of Books*, comments that “Moyn wants to reinstate socialism ... as an ethical ideal and political objective.”²⁶⁹ The book starts with reflections on the legacy of Jacobinism – a statist, central-management approach to social and economic affairs – and ends with a George Soros-endorsed indictment of the super-rich, so Mishra seems to be right. Moyn’s blueprint is, ultimately, anti-neoliberalism (formalism and minimalism) and pro-socialism (equality and statism). It is built on a critique of the particularity and biases of extant human rights (the particular targets in *The Last Utopia* and *Not Enough* are formalism and minimalism, and, in *Christian Human Rights*, the *faux*-universalism of a human rights tradition in which Christianity has exerted significant but often overlooked influence).

The charge against Allott, outlined above, is that he secures the coherence and appeal of his utopian blueprint by omitting relevant literature and ignoring history.²⁷⁰ The similar charge against Moyn is that his blueprint for the future of human rights achieves its coherence and contemporary appeal by preferring the *status quo* to radical change, limiting its ambition to what can ‘realistically’ be achieved within the current human rights system and ignoring the detail of the context in which that system operates. Considered together, Allott’s and Moyn’s work illustrate a central tension in blueprint utopianism. The blueprint will always be either too ambitious and consequently unrealistic (Allott), or too realistic and consequently lacking in ambition (Moyn). Equally, to make itself appealing to an audience the blueprint will necessarily omit, to a greater or lesser extent, aspects of the context in which it is situated in the form of relevant literature, significant history, contemporary events, or competing perspectives. There will, then, in the design of a utopian blueprint, always be too much or too little ambition, too much or too little detail. A review of the ambition and detail critiques as applied to Moyn’s work – the focus of the next section – illustrates the necessary limitations of blueprint utopianism in general.

4.1 *Ambition and Detail*

Paul O’Connell, reviewing *Not Enough*, argues in iconoclastic terms that “[t]he fundamental problem ... is not neoliberalism, or poor distributional choices (though of course both matter), but the structural character of the extant social system.”²⁷¹ He is troubled by Moyn’s “resign[ation] to the idea that there is nothing beyond capitalism,”²⁷² claiming that “in continuing to treat capitalism as an unquestioned, perennial premise [Moyn’s] critique is, itself, not enough.”²⁷³ Zak Manfredi makes a similar point, asking whether, “[a]fter nearly four

²⁶⁸ Ibid 220: “Human rights emerged as the highest morality of an unequal world, in a neoliberal circumstance its partisans could struggle to humanize, only to find themselves accused of complicity with it. Human rights activists should not desire that companionship, even if they decide that their role is not to argue for equality ... Human rights will return to their defensible importance only as soon as humanity saves itself from its low ambitions.”

²⁶⁹ Pankaj Mishra, “The Mask It Wears” (2018) 40(12) *London Review of Books* 9, 13.

²⁷⁰ See text at n 226.

²⁷¹ Paul O’Connell, “Capitalism, Inequality and Human Rights,” 4th June 2018, *Law and Political Economy* <<https://lpeblog.org/2018/06/04/capitalism-inequality-and-human-rights/>> (last visited 2nd August 2019).

²⁷² Ibid.

²⁷³ Ibid.

decades of neoliberal hegemony, we might ... pause to ask: is a (re)turn to the welfare state the most left political forces can hope for?”²⁷⁴

Gráinne de Búrca critiques Moyn’s ambition from a different perspective, claiming that it is not – as O’Connell and Manfredi charge – lacking, but mis-directed. For de Búrca Moyn’s pre-occupation with the “human rights movement” is “rather ... odd” because “the system of capitalism” and “its more recent political incarnation in the guise of global and domestic neoliberalism” are, on de Búrca’s analysis, “among the root causes of the material inequality with which [Moyn] is concerned.”²⁷⁵ de Búrca suggests that Moyn ought to make capitalism and neoliberalism “the target of [his] ire,”²⁷⁶ assuming the very separation between neoliberalism and human rights that *Not Enough* seeks to problematize.²⁷⁷ There is, of course, no ‘right’ answer to the question of whether there is a human rights system and a separate capitalist / neoliberal system. That seems to be de Búrca’s view, with O’Connell preferring the notion of one global, capitalist system that has a human rights component. Moyn holds neither of these views:

[M]y goal is to stake out a moderate position between those who claim that human rights are unrelated to political economy and distributive injustice (except of course to provide the essential tools for reining them in) and those who think the human rights revolution has been a mere sham masking inhumane domination.²⁷⁸

O’Connell’s insistence on “the structural character of the extant social system” comes close to the latter view (“the human rights revolution has been a mere sham masking inhumane domination”), and de Búrca’s bifurcated analysis of “the human rights movement” and “the system of capitalism” comes close to “claim[ing] that human rights are unrelated to political economy.” Moyn insists that human rights can and must pursue global equality by challenging capitalism’s distributional effects, perceiving two inter-connected systems – capitalism and human rights – with human rights, at their best, serving as a check on the functioning of the capitalist machine.

O’Connell goes beyond Moyn’s two overlapping systems, insisting that everything in “the extant social system” is capitalism, whilst de Búrca objects to what she sees as Moyn’s attack on human rights because capitalism is, for her, the more appropriate punch bag. Moyn fully appreciates the potency of the conservative (de Búrca) and radical (O’Connell) perspectives – hence his definition of *Not Enough*’s “goal” in terms of a “moderate position” – and, responding to O’Connell, defends his moderation:

Karl Marx’s central mistake ... was his belief [which, Moyn implies, O’Connell shares] in take-it-or-leave-it ‘systems’ of production, exchange, and distribution when political history

²⁷⁴ Zak Manfredi, “Compatibility as Complicity? On Neoliberalism and Human Rights,” 28th May 2018, *Law and Political Economy* <<https://lpeblog.org/2018/05/28/compatibility-as-complicity-on-neoliberalism-and-human-rights/#more-707>> (last visited 2nd August 2019).

²⁷⁵ Gráinne de Búrca, “Samuel Moyn, *Not Enough: Human Rights in an Unequal World*” (review) (2018) 16(4) *International Journal of Constitutional Law* 1347, 1347.

²⁷⁶ *Ibid.*

²⁷⁷ On Moyn’s construction of the relationship between human rights and neoliberalism see quotation in n 268.

²⁷⁸ Moyn, *Not Enough* (n 228) xi (also quoted at n 256).

and legal theory since suggest that what we are really dealing with are makeshift and ramshackle assemblages with radically different outcomes for participants.²⁷⁹

The disagreement between de Búrca, Moyn and O’Connell is a case of the conservative, the radical and the moderate talking past each other because they subscribe to divergent social and political theories. No resolution of the background theoretical tension is possible, but the three perspectives can be evaluated in terms of what they make possible.

de Búrca invokes the ideal of a “revitalized democratic system” and,²⁸⁰ maintaining her insistence on the separateness of systems, claims:

The reality ... is that the human rights system has not succeeded in the promotion of socio-economic rights and justice in large part because political systems – political leaders and parties, as well as financial institutions – in an era of neoliberalism have not been committed to redistribution but instead have willingly facilitated the accumulation of wealth by the wealthy.²⁸¹

What is the value of maintaining this separation between human rights and politics? Perhaps its value lies in allowing those with professional and intellectual attachments to human rights to park responsibility for any failure “in large part” in some other system. Doing so may draw the sting from critiques like Moyn’s but it does nothing to make new and better futures possible. Echoing my critique (above) of Cassese’s and Koskenniemi’s perspectives, de Búrca’s approach “shuts itself up” too much “within” human rights.²⁸²

To the extent that de Búrca offers proposals for a better future they involve “a wholehearted embrace of the indivisibility of civil and political rights and economic social and cultural rights” as favoured by “proponents such as Bernie Sanders and Alexandria Ocasio-Cortez.”²⁸³ If this “wholehearted embrace” fails to deliver, responsibility will, presumably, again be laid “in large part” at the door of the political system, thereby saving human rights from those, like Moyn, who can be dismissed as “advancing provocative but somewhat artificial and exaggerated critiques.”²⁸⁴ If it is a choice between “artificial and exaggerated critiques” that challenge human rights to directly contest material inequality, and cycles of denial driven by an apparent desire to insulate and separate human rights from the ugly realities of political contestation and global capitalism, then I choose critique.

O’Connell’s view offers a third, iconoclastic possibility, beyond critique and denial – namely, that attention should be focussed on “the structural character of the extant social system,”²⁸⁵ which is to say, capitalism. The force of this perspective depends on its analysis of capitalism

²⁷⁹ Sam Moyn, “Bias and Exclusion in Human Rights History,” 13th August 2018, *Law and Political Economy* <<https://lpeblog.org/2018/08/13/bias-and-exclusion-in-human-rights-history/>> (last visited 2nd August 2019).

²⁸⁰ de Búrca (n 275) 1352.

²⁸¹ Ibid.

²⁸² “shuts itself up” – see Adorno quotation at n 62. “within” – see Koskenniemi quotation at n 94, and part 2(1) of this article in general.

²⁸³ de Búrca (n 275) 1351.

²⁸⁴ Ibid 1352.

²⁸⁵ See O’Connell quotation at n 271.

as *the* all-encompassing, global social-economic-political-legal system. On the basis outlined in part one of this article I am sympathetic to O’Connell’s iconoclasm, but his argument as presented does not demonstrate why his “take-it-or-leave it” analysis should prevail over Moyn’s “makeshift and ramshackle” view (and it is, of course, unrealistic to expect something on that scale from O’Connell’s brief review of Moyn’s book).²⁸⁶ The profound and existential threats to the future and future quality of human life posed by climate change – which do not feature in Moyn’s work – demonstrate why, as Kim Stanley Robinson suggests,²⁸⁷ an iconoclastic, utopian perspective, akin to O’Connell’s position, is essential. In the next subsection I seek to explain why the reality of climate change tips the balance in favour of an O’Connell-type, iconoclastic perspective and against the conservative (de Búrca) and moderate (Moyn) views. For present purposes, however, I turn to consider the detail critique of Moyn’s work in more detail.

O’Connell notes that *Not Enough’s* repeated “references to ‘the human rights movement’” treat it “as if it were a singular monolithic entity,” glossing over the divergence between the work of “large human rights multinationals” like Human Rights Watch whom Moyn critiques and the activities of smaller, more radical organisations like Via Campesina that Moyn does not discuss.²⁸⁸ O’Connell’s point is not that Moyn ought to have analysed all human rights organisations, but that Moyn fails to “disaggregate or unpack the complexity of ‘the human rights movement.’”²⁸⁹

A concern about over-inclusiveness – about Moyn’s use of intellectual drift nets that catch more than might have been intended, for all that they yield a saleable, easily packaged, easily communicated argument – also underpins de Búrca’s analysis. She objects to Moyn’s suggestion that “status equality, however honoured in the breach” – ‘status equality’ being, in Moyn’s terms, the basic idea that “[n]o one ought to be treated differently because of the kind of person they are” – “is more accepted than ever before,”²⁹⁰ with a “greater consensus than ever that the high and equal status of human beings entitles them to some basic political freedoms, such as the rights to speak and to be free from torture.”²⁹¹ de Búrca describes this idea of broad consensus as “breathtaking in either its naïveté or disingenuousness” in the context of inequalities in police treatment, incarceration and education affecting African-Americans, “violence against women,” and widespread and persistent discrimination and violence against “lesbian, gay, bisexual and transgender ... people of all ages and in all regions

²⁸⁶ “take-it-or-leave it” / “makeshift and ramshackle” – see Moyn quotation at n 279.

²⁸⁷ See text at n 17 and n 18.

²⁸⁸ O’Connell (n 271). In a similar vein see Elisa Massimo (President and Chief Executive of Human Rights First), “Letter to the Editor of the New York Times,” 29th April 2018, <<https://www.nytimes.com/2018/04/29/opinion/human-rights.html>> (last visited 2nd August 2019): “Professor Moyn’s critique is based on a woefully outdated notion of who human rights activists are and what they actually do ... All over the world activists are organizing and building public support for human rights in their own societies – the Dreamers, Black Lives Matter, #MeToo, the Parkland, Fla., students and Vets for American Ideals – are gaining momentum.”

²⁸⁹ O’Connell (n 271).

²⁹⁰ Moyn, *Not Enough* (n 228) 3.

²⁹¹ *Ibid.*

of the world’.”²⁹² de Búrca also contests the divide Moyn maintains between “the (relatively successful [on Moyn’s analysis]) struggle for status equality” and “the (unsuccessful [on Moyn’s analysis]) struggle for socio-economic justice,”²⁹³ arguing that the divide is not tenable because those “working on issues of racial equality in the USA” or “gender equality” would not see status and identity issues as “meaningfully separate” from the “socio-economic justice and material inequality” challenges facing communities and individuals.²⁹⁴

Commenting on *The Last Utopia*, Antony Anghie notes that “[i]t is a regular technique of Moyn’s to acknowledge important events that might challenge his thesis and yet elide their significance for his argument.”²⁹⁵ Anghie suggests that Moyn has a tendency to over-simplify, noting that whilst “Moyn has an impressive ability to present complex histories and events in succinct and insightful ways ... in trying to demonstrate the distinctiveness of particular models, he may assert ... disjunctures too emphatically.”²⁹⁶ Anghie is concerned with particular aspects of Moyn’s treatment of the history of human rights but his point – that Moyn “assert[s] ... disjunctures too emphatically” and diminishes the significance of evidence that speaks against his argument – maps onto de Búrca’s view that Moyn draws too stark a line between status equality and material equality. Anghie seems to suggest that Moyn’s arguments would not appear so “succinct and insightful” if they engaged with the true complexity of the issues they address.

Perhaps we can go one step further and contemplate the possibility that the issues Moyn chooses to address are pre-determined by his style of analysis and argumentation. Despite its focus on material equality and human wellbeing Moyn’s utopian project does not address climate change, perhaps the most complex and insurmountable challenge to future human wellbeing and material equality. In view of Anghie’s critique, it is tempting to suggest that Moyn fails to address climate change precisely because its complexity makes it an unsuitable subject for “succinct and insightful” treatment; the issue is just too complex and challenging to be addressed in a compelling, coherent and programmatic narrative.

Connecting the two central critiques on which I have focused in this section, I am suggesting that Moyn omits the *detail* of climate change from his blueprint because including that detail would disturb its coherence and appeal. Responding to climate change necessitates, I suggest, high levels of *ambition*: radical proposals capable of overhauling relations between human beings and the planet, not “moderate” proposals of the kind Moyn favours. Moyn is committed to ways of thinking that operate within the existing social and political system, and it is difficult to address climate change from that perspective. Moyn addresses that difficulty, I argue, not by

²⁹² de Búrca (n 275) 1349 (quoting – “lesbian, gay ...” – the UN Office of the High Commissioner for Human Rights).

²⁹³ Ibid 1350.

²⁹⁴ Ibid.

²⁹⁵ Anghie, “Whose Utopia?” (n 261) 70.

²⁹⁶ Ibid 71. Making a similar point in relation to *The Last Utopia* (n 12) see Seyla Benhabib, “Moving beyond False Binarisms: On Samuel Moyn’s *The Last Utopia*” (2013) 22(1) *Qui Parle* 81, 82: “I find problematic and false the philosophical binarisms Moyn sets up between morality and politics, human rights and citizens’ rights, and human rights and democratic sovereignty. Some of these binarisms derive from Moyn’s desire to deconstruct, in the nontechnical sense of taking apart the elements of, a certain teleological way of writing the history of human rights ... But some of his binarisms rest on his own unexamined normative assumptions.”

reformulating his thinking to address the climate change challenge, but by excluding climate change from his thinking.

4.2 *The Changing Climate*

Moyn advocates global material equality without considering environmental and climatic changes that will make a good quality of life impossible to sustain for many, if not most. As Bruno Latour comments:

Without the idea that we have [with climate change] entered into a New Climatic Regime, we cannot understand the explosion of inequalities, the scope of deregulation, the critique of globalization, or, most importantly, the panicky desire to return to the old protections of the nation-state.²⁹⁷

To appreciate the significance of Moyn's failure to address climate change in a book about global equality, and in his work more generally, a brief review of global climate governance and the scale of the climate change threat is necessary.

The 2015 Paris Agreement commits (as of 2nd August 2019) 185 states to a “strengthen[ing of] the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty,” in particular by “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”²⁹⁸ A 2018 IPCC (Intergovernmental Panel on Climate Change) report concluded that “[g]lobal warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.”²⁹⁹ The report also concluded that climate change commitments (in the period up to the report's publication) by Paris Agreement parties covering the period to 2030 “would not limit global warming to 1.5°C even if supplemented by very challenging increases in the scale and ambition of emissions reductions after 2030.”³⁰⁰

The report details the anticipated impacts of a 1.5°C global temperature rise. “Coral reefs ... are projected to decline by a further 70-90% at 1.5°C ([the IPCC has] *high confidence* [in this conclusion])... with larger losses (>99%) at 2°C ([the IPCC has] *very high confidence* [in this conclusion]).”³⁰¹ “[L]imiting global warming to 1.5°C, compared with 2°C, could reduce the

²⁹⁷ Bruno Latour, *Down to Earth* (Polity, 2018) 2.

²⁹⁸ Paris Agreement, Paris, 12th December 2015, available at <<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/Part/I-54113-0800000280458f37.pdf>> (last visited 2nd August 2019), Articles 2(1), 2(1)(a). On the status of ratification of the Paris Agreement see Secretariat of the United Nations Framework Convention on Climate Change, <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> (last visited 2nd August 2019).

²⁹⁹ IPCC, 2018, “Summary for Policymakers” in Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, Maycock, M. Tignor, and T. Waterfield (eds.), “Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty” (World Meteorological Organization), accessible via <<https://www.ipcc.ch/sr15/chapter/spm/>> (last visited 2nd August 2019), paragraph A.1.

³⁰⁰ Ibid, paragraph D.1.

³⁰¹ Ibid, paragraph B.4.2 (*italics in original*).

number of people exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 ([the IPCC has] *medium confidence* [in this conclusion]).³⁰² “[M]odel-based projections of global mean sea level rise (relative to 1986-2005) suggest an indicative range of 0.26 to 0.77 m by 2100 for 1.5°C of global warming, [which is] 0.1 m ... less than for a global warming of 2°C ([the IPCC has] *medium confidence* [in this conclusion])” (and, in terms of that 0.1m difference, it is relevant to note the IPCC’s related conclusion that “[a] reduction of 0.1m in global sea level rise implies that up to 10 million fewer people would be exposed to related risks, based on population in the year 2010 and assuming no adaptation ([the IPCC has] *medium confidence* [in this conclusion])”).³⁰³

Kelly Levin of The World Resources Institute explains that “[t]he world is currently on track to emit more than double [the amount required to limit warming to 1.5°C] by 2030,” adding that to limit warming to 1.5°C global “emissions will need to drop by 40-50 percent.”³⁰⁴ In summary, then, roughly four years on from the conclusion of the Paris Agreement its most ambitious target of limiting temperature increase to 1.5°C looks unachievable and, on the basis of the IPCC’s 2018 report, the consequences of that appear catastrophic.

Fiji is experiencing a rise in sea level and increased sea water flooding that has “made portions of the island nation uninhabitable.”³⁰⁵ The vulnerability of small island developing states (SIDS) like Fiji to climate change impacts – “sea-level rise, changing precipitation patterns, increased frequency and intensity of extreme weather events, ocean acidification and coral bleaching”³⁰⁶ – raises pressing issues of social and material equality. The costs and challenges of adapting to climate change place a burden on SIDS that is often met through donor aid,³⁰⁷ but reliance on donor aid disempowers those directly affected by climate change: “donor funding is available for what donors see as a priority – which does not necessarily reflect communities’ priorities.”³⁰⁸ The impact of climate change on SIDS is wholly unequitable as “[t]hey account for less than 1% of greenhouse gas emissions, but are among the most vulnerable to climate change impacts and sea-level rise.”³⁰⁹

Germanwatch is a non-governmental climate research and policy organisation that produces an annual index analysing data “on the impacts of extreme weather events and associated socio-economic data.”³¹⁰ The Germanwatch Global Climate Risk Index 2019 notes that:

³⁰² Ibid, paragraph B.5.1.

³⁰³ Ibid, paragraph B.2.1.

³⁰⁴ Kelly Levin, World Resources Institute, “Half a Degree and a World Apart: The Difference in Climate Impacts Between 1.5°C and 2°C of Warming,” 7th October 2018, <<https://www.wri.org/blog/2018/10/half-degree-and-world-apart-difference-climate-impacts-between-15-c-and-2-c-warming>> (last visited 2nd August 2019).

³⁰⁵ COP (Conference of the Parties to the United Nations Framework Convention on Climate Change) 23 website, “How Fiji is Affected by Climate Change,” <<https://cop23.com.fj/fiji-and-the-pacific/how-fiji-is-affected-by-climate-change/>> (last visited 2nd August 2019).

³⁰⁶ Carola Betzold, “Adapting to climate change in small island developing states” (2015) 133(3) *Climatic Change* 481, 482.

³⁰⁷ See *ibid*, in particular at 486.

³⁰⁸ *Ibid*. 486.

³⁰⁹ Poh Poh Wong, “Small island developing states” (2011) 2(1) *WIREs Climate Change* 1, 2.

³¹⁰ David Eckstein, Maria-Lena Hutflils and Maik Wings, “Global Climate Risk Index 2019: Who Suffers Most From Extreme Weather Events? Weather-related Loss Events in 2017 and 1998 to 2017”, accessible via

[o]f the ten most affected countries and territories (1998-2017), eight were developing countries in the low income or lower-middle income country group, one was classified as an upper-middle income country (Dominica) and one an advanced economy generating high income (Puerto Rico).³¹¹

The Index “indicates a level of exposure and vulnerability to extreme events, which countries should understand as warnings in order to be prepared for more frequent and/or more severe events in the future.”³¹² Whilst “the link between certain weather events and climate change is still a frontier in science,”³¹³ there is widespread support for the claim that extreme weather events and climate change are linked. The Index notes that “[t]he IPCC has already predicted that risks associated with extreme events will continue to increase as the global mean temperature rises.”³¹⁴

Extreme weather events have a real and current impact on communities and lives, predominantly in developing states. The Index notes that in 2017:

Massive rainfalls have led to floods across Nepal, Bangladesh and India, which affected more than 40 million people. 1 200 people lost their lives in these three countries and millions were displaced throughout the region. The floods spread across the foothills of the Himalayas and brought landslides leaving tens of thousands of houses and vast areas of farmland and roads destroyed ... Nearly 250 people were killed by collapsed buildings or drowning in regions of India, Nepal and Bangladesh. 950 000 houses were damaged or destroyed in the floods.³¹⁵

Moyn’s *Not Enough* is sub-titled *Human Rights in an Unequal World*. The inequalities and threats to wellbeing at the heart of climate change are among the most pressing and consequential in the world today and, as the Germanwatch Index indicates, the impact of climate change is expected to intensify. Moyn has written a book about global material inequalities and pursued a wider utopian project centred on human rights and human welfare. That book and that project omit any discussion of climate change and, in particular, its acute and worsening impact on developing states in the global South. This marks Moyn’s work as a product of the outdated orthodoxy that global social, economic, civil and political affairs can be debated without consideration of the environmental, reflecting a geographical bias towards the global North insofar as his work ignores the widespread, life-changing and present-day impacts of climate change on the global South. Perhaps Moyn would have written a different book had he been working at the Fiji campus of the University of the South Pacific.

A number of voices have challenged a perceived geographical bias in Moyn’s work. Julieta Lemaitre, a Colombian judge, highlights what she sees as *Not Enough*’s U.S.-centrism,³¹⁶ and

<https://www.germanwatch.org/sites/germanwatch.org/files/Global%20Climate%20Risk%20Index%202019_2.pdf> (last visited 2nd August 2019), 3.

³¹¹ Ibid 4.

³¹² Ibid 3-4.

³¹³ Ibid 10.

³¹⁴ Ibid.

³¹⁵ Ibid 7.

³¹⁶ Lemaitre (n 263), and see Lemaitre quotations in n 263.

Karuna Mantena argues that Moyn “subsumes the NIEO [New International Economic Order] under the rubric of western welfarism, as if it were a global extension of the welfare state.”³¹⁷ For Mantena Moyn emphasises the work of “Swedish economist Gunnar Myrdal” without giving the necessary prominence to “the progenitors of the NIEO themselves.”³¹⁸

Moyn notes that in 1958 Myrdal – who, in Moyn’s words, “pioneered a truly global economics”³¹⁹ – “gave the Storrs lectures at Yale Law School, which took up what he cast as the defining challenge of the age: scaling up the welfare state to the world stage.”³²⁰ He also cites the view of “Dutch international lawyer B.V.A. Röling” that the NIEO “meant the universalization of principles that were already applied in the ‘welfare state’” with apparent approval.³²¹ The prominence Moyn gives to lectures at Yale and the views of European international lawyers like Röling suggests a global North perspective, and that suggestion is strengthened by the extensive analysis of U.S.-centred, 1970s global ethics scholarship in *Not Enough*’s final chapter.³²²

Not Enough lacks critical reflection on what is at stake in practices of universalisation. The argument, as presented, fails to foreground the impact of the author’s own perspective on its construction. If viewed from a global South perspective it is, I suggest, inconceivable that Moyn would or could have ignored climate change. Moyn’s method implies that global social reality is graspable, but “[t]he social totality is always unrepresentable.”³²³ “[H]umanity” is invoked on *Not Enough*’s final page but it is not clear what Moyn means by “humanity,”³²⁴ where “humanity” lives, or whose particular interests “humanity” shares or prefers.³²⁵ As Anghie asks, “whose utopia” is Moyn arguing for?³²⁶

Moyn protests against the charge of U.S.-centrism, arguing that whilst “[t]he book inevitably reflects some American assumptions ... it is certainly not legitimate to claim that it is about America from its revolution to the present or defiantly excludes the rest of the world in substance.”³²⁷ Maybe *Not Enough* is not “about America,” and perhaps the exclusion of the

³¹⁷ Karuna Mantena, “Getting the NIEO Right,” 21st May 2018, *Law and Political Economy* <<https://lpeblog.org/2018/05/21/getting-the-nieo-right/#more-701>> (last visited 2nd August 2019).

³¹⁸ *Ibid.*

³¹⁹ Moyn, *Not Enough* (n 228) 104.

³²⁰ *Ibid* 105.

³²¹ *Ibid* 116.

³²² See *ibid* chapter 6, “Global Ethics from Equality to Subsistence” (reviewing the work of John Rawls, Peter Singer, Onora O’Neill, Henru Shue and Charles Beitz).

³²³ Fredric Jameson, “The Utopian Enclave” in Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2007) 10, 14

³²⁴ Moyn, *Not Enough* (n 228) 220: “Human rights will return to their defensible importance only as soon as humanity saves itself from its low ambitions. If it does, for the sake of global and local welfare, sufficiency and equality can again become powerful companions, both in our moral lives and in our political enterprises.”

³²⁵ See Benhabib (n 296) 90, commenting on *The Last Utopia* (n 12): “Samuel Moyn has written a provocative book, and his warnings about the excesses of human rights euphoria need to be taken seriously. Nevertheless, these warnings are based on unexamined binarisms and cannot help in the expansion of a new kind of global politics. They are written not out of a sense of solidarity with, but rather out of a tone of ironic and imperious detachment from, global human rights activism.”

³²⁶ Anghie, “Whose Utopia?” (n 261) (emphasis added).

³²⁷ Moyn, “Bias and Exclusion” (n 290).

“rest of the world” is not total. But it is telling that in *The Last Utopia* Moyn uses this basis to support his claim that “[t]he moral *world* had changed” in 1977:³²⁸

Having been almost never used in English prior to the 1940s, when they experienced only a modest increase, the words “human rights” were printed in 1977 in the *New York Times* nearly five times as often as in any prior year in that publication’s history.³²⁹

Moyn offers a graph that collates the use of “human rights” in the *New York Times* and the *Times* of London between 1785 and 1985.³³⁰ On any view, that graph is evidence of the use of those terms in one U.S. and one U.K. newspaper and not, as Moyn claims, evidence of some evolving global moral consciousness (assuming, in the absence of a definition, that this is what “the moral world” is intended to signify). To suggest, as Moyn does, that a *New York Times* / the *Times* perspective is, in some sense, *the* global perspective gives – to put it mildly – the appearance of U.S.-centrism and anglophone bias.³³¹ Clarity and coherence are, here, achieved at the expense of detail.

Moyn includes another graph in *Not Enough*, this one “generated via Google Books Ngram Viewer” and showing “[t]he comparative prominence of [the terms] human rights and socialism, as reflected by the percentage of English-language books in which the terms appear each year.”³³² The graph’s two lines seem to suggest a rough correlation between a decline in the use of the term “socialism” around 1970 and, at around the same time, an increase in the use of the term “human rights.” It is difficult to know how the author sees this graph – he does not say – but it suggests another false equivalence between an exclusively anglophone evidence base and global social dynamics.

These graphs of a tiny part of anglophone discourse, or the use of editorial practices at *The New York Times* as a means of capturing global social and political dynamics; Moyn’s emphasis on the work of Swedish economist Myrdal and the relative downplaying of the role of NIEO leaders, both noted by Mantena,³³³ alongside Moyn’s focus on anglophone, 1970s global ethics scholarship;³³⁴ his tendency to “assert ... disjunctures too emphatically” and to “elide” counter-arguments;³³⁵ and the omission of climate change, notwithstanding its profound significance for global justice, material equality, and any notion of the future. All of this adds up, in my

³²⁸ Moyn, *The Last Utopia* (n 12) 4 (emphasis – “world” – added).

³²⁹ *Ibid.*

³³⁰ *Ibid* 231 (the page is not numbered as it falls within the ‘Appendixes’ section of the book but comes four pages after 227).

³³¹ See Philip Alston, “Does the Past Matter? On the Origins of Human Rights” (2013) 126 *Harvard Law Review* 2043, reviewing *The Last Utopia* (n 12) and suggesting, at 2073, that Moyn has “an exceptionally America-centric perspective on the world,” at 2070 that Moyn adopts “an excessive and unconvincing focus on the role of a handful of American international law scholars” such as Louis Henkin, and at 2049 – with reference to the *New York Times* example discussed immediately above – that Moyn’s approach suffers from a “pathology ... [that] might be termed a ‘search engine mentality’.”

³³² Moyn, *Not Enough* (n 228) 182.

³³³ See text at n 318.

³³⁴ See text at n 322.

³³⁵ See discussion of Anglie’s critique in text at around n 295.

view, and as Anghie seems to suggest,³³⁶ to a scholarship whose style and clarity of argumentation is bought at the expense of rigour and depth.

The appeal of Moyn's arguments are rooted in their simplicity and clarity. *The Last Utopia* maintains that human rights achieved true global prominence in the 1970s and not in the post-war period. *Christian Human Rights* argues that in the 1930s and 1940s the Christian right established a conservative, depoliticised rights tradition that continues to dominate human rights discourse. *Not Enough* insists that human rights has done little to address material inequality and challenge neoliberalism and that future efforts must focus on this goal, reinventing human rights in essentially socialist terms. Climate change is not suited to clear, simple arguments like these. It raises questions about the historic and contemporary relationship between global North and global South, problematizing Moyn's easy invocation of a global "humanity."³³⁷ The impacts of climate change raise questions about the sustainability of systems that societies employ to extract resources, materials, and wealth from the earth. Such questions cannot be addressed in "moderate" terms and from within the existing system because they *are* questions about the nature and viability of that system.

It is true that climate change arises from the impact on the Earth of a global human population of 7.6 billion people (on 2017 UN data) and,³³⁸ in that sense, climate change is a global problem facing "humanity." Framing the issue in these collective terms, however, misses the vital point that responsibility for climate change is not distributed equally between all states, all individuals currently alive, or all those who have lived. States that industrialised in the early stages of the Industrial Revolution – the U.S.A., for example – bear a historic and much greater responsibility for climate change than many of the states most vulnerable to the impacts of climate change today – SIDS such as Fiji and The Federated States of Micronesia, for example – who have done, and are doing, very little to cause it.³³⁹ States that industrialised at an early stage acquired a global economic advantage by doing so. 'Early adopters' enjoy far greater technical, industrial and financial resources today than states which are not, in any meaningful sense, responsible for climate change despite being most exposed to its impacts (sea level rise, for example). This creates a very real divergence between states' levels of responsibility for climate change and their degree of vulnerability to it.³⁴⁰

³³⁶ See *ibid.*

³³⁷ See text above at around n 324.

³³⁸ United Nations Department of Economic and Social Affairs, "World Population Prospects: The 2017 Revision," 21st June 2017, <<https://www.un.org/development/desa/publications/world-population-prospects-the-2017-revision.html>> (last visited 2nd August 2019).

³³⁹ See Maria Rocha, Mario Krapp, Johannes Guetschow, Louise Jeffery, Bill Hare, Michiel Schaeffer, "Historical Responsibility for Climate Change – from countries emissions to contributions to temperature increase," November 2015, <https://climateanalytics.org/media/historical_responsibility_report_nov_2015.pdf> (last visited 2nd August 2019).

³⁴⁰ See Hans-Martin Füssel, "How inequitable is the global distribution of responsibility, capability, and vulnerability to climate change: A comprehensive indicator-based assessment" (2010) 20(4) *Global Environmental Change* 597, 607: "If vulnerability is interpreted narrowly as a lack of socio-economic capacity and entitlements to cope with the adverse impacts of climate change, the common assertion that those countries least responsible for climate change are most vulnerable to its impacts is clearly true," and at 607-608: "If vulnerability to climate change is interpreted more comprehensively as the expected social impacts of climate change considering current adaptive capacity, the analysis finds a double inequity between countries'

Many states in the global North used violent and exploitative methods, including processes of international legal argumentation, to acquire and extract resources from the global South.³⁴¹ They derived economic advantage from their use of those resources and, through that use, began the process of changing the global climate. The impact of those changes is felt most acutely today by climate-vulnerable states in the global South. In a sense, then, the global North has forced the global South to bear the environmental costs associated with the economic benefit that it (the global North) derived from the forcible seizure of the global South's resources.³⁴² Moyn does not address this meta-level global equity issue in *Not Enough*.

Despite the responsibility of early-industrialising states for climate change, and a sense that developed states' financial support for adaptation to the impacts of climate change in developing states would go some way to recognising that responsibility, global levels of adaptation financing fall far short of what is required. The World Resources Institute reports that "[t]hose in greatest need of assistance – communities hit first and hardest by climate change – still struggle to access funds, receive disproportionately small shares of available finance and have little say in the allocation of such scarce resources."³⁴³

Under President Trump the U.S. has reneged on Obama administration commitments to support the Green Climate Fund – the principal global mechanism for adaptation financing. In a June 2017 statement on U.S. withdrawal from the Paris Agreement President Trump noted that the "Green Climate Fund ... calls for developed countries to send \$100 billion to developing countries all on top of America's existing and massive foreign aid payments," defending the U.S. withdrawal from the Paris Agreement on the basis that it would have required "billions of dollars that ought to be invested right here in America [to] ... be sent to the very countries that have taken our factories and our jobs away from us."³⁴⁴ Trump's populist nationalism makes the result of Moyn's search for a "better compromise between utopianism and realism"³⁴⁵ – *Not Enough's* U.S.-centric call for Jacobin-esque socialism – look more like a fantastical pipedream than a realistic blueprint.

responsibility / capability and vulnerability for food security, human health, and coastal populations. The equity implications of climate change for water supply are more complex ... more uncertain ... and more difficult to express by a single metric."

³⁴¹ See Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities" (2006) 27(5) *Third World Quarterly* 739, 745: "[Nineteenth century] [p]ositivist jurists ... devised a series of formal doctrines that used explicitly racial and cultural criteria to decree certain states civilised, and therefore sovereign, and other states uncivilised and non-sovereign. Thus non-European societies were expelled from the realm of international law. Lacking legal personality, these societies were incapable of advancing any legally cognisable objection to their dispossession, and were thus reduced to objects of conquest and exploitation."

³⁴² See, for example, Leon Sealey-Huggins, "'1.5°C to stay alive': climate change, imperialism and justice for the Caribbean" (2017) 38(11) *Third World Quarterly* 2444, 2445: "In a perverse paradox ... wealth expropriated from the Caribbean during the period of early colonialism was expended on processes of industrialisation, which has in turn contributed significantly to the climate change-inducing emissions that now threaten Caribbean societies."

³⁴³ World Resources Institute, "Adaptation Finance Accountability Initiative," <<https://www.wri.org/our-work/project/adaptation-finance-accountability-initiative>> (last visited 2nd August 2019).

³⁴⁴ The White House, "Statement by President Trump on the Paris Accord," 1st June 2017 <<https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>> (last visited 2nd August 2019).

³⁴⁵ See Moyn quotation at n 230.

An understanding of the colonial exploitation and oppression of the global South by the global North is, for the reasons set out above, central to any understanding of industrialisation. Equally, an understanding of industrialisation (including colonial exploitation and oppression) is central to any understanding of the history of global South and global North socio-economic development. Because processes of industrialisation in large part caused climate change, and because industrialisation is embedded in the colonial exploitation and oppression of the global South, any engagement with questions of global equality is incomplete without analysis of climate change. In that sense, then, Moyn's failure to address climate change in *Not Enough* makes his entire analysis deficient. This reflects U.S.-centrism insofar as a scholar working in a more climate-vulnerable state – Fiji, for example – and writing about global equality would almost certainly find it hard to ignore climate change.

The divide between climate justice and climate governance is well recognised and it would be trite – and, in the face of Trump-style populist nationalism, ineffective – to observe that the global North should do more to mitigate the impact of its present and historic economic and industrial activity on the global climate. Moyn's blueprint-style of utopianism operates by making calls of that kind, calling for socialism at a time when Trump-style self-interest and nationalism seem to be on the rise. However “succinct and insightful” Moyn's approach is,³⁴⁶ and however well his books sell, arguments of that kind offer nothing new.

There is a secondary sense, beyond that concerned with climate change *per se*, in which Moyn's work and *Not Enough* in particular is out-of-step with a changing climate, the relevant climate here being the intellectual climate within utopian scholarship. There is, as we saw in the introduction to this article, a strong trend towards iconoclasm in utopian thinking, reflected in the work of scholars such as Jameson, Abensour and Marin. Moyn rejects iconoclasm, preferring blueprintism – modest correctives to orthodox histories, moderate prescriptions for a “different today.”³⁴⁷ He fails to address iconoclasm in any detail and John Gray critiques his work on that basis, noting “[Moyn's] partial understanding of utopianism” and insisting that “[a] project is utopian when it can be known in advance that its central objectives cannot be realized.”³⁴⁸

Perhaps Moyn prefers blueprintism to iconoclasm because a plan, however outline it may be, appears more “succinct and insightful” than an extended reflection on the necessity *and* impossibility of Utopia in postmodernity.³⁴⁹ Plans outlined in academic texts translate relatively easily into newspaper and magazine columns,³⁵⁰ while explanations of why fundamental change is both necessary and impossible do not. I argue that Moyn's work is, in the final

³⁴⁶ ‘succinct and insightful’ – see Anghie quotation at n 296.

³⁴⁷ “different today” – see Bauman quotation at n 26.

³⁴⁸ John Gray, “What Rawls Hath Wrought” (2011) 111(1) *National Interest* 81, 87.

³⁴⁹ “succinct and insightful” – see Anghie quotation at n 296.

³⁵⁰ See, for example, The Nation <<https://www.thenation.com/authors/samuel-moyn/>> (last visited 2nd August 2019); Samuel Moyn, “How the Human Rights Movement Failed,” 23rd April 2018, *New York Times* <<https://www.nytimes.com/2018/04/23/opinion/human-rights-movement-failed.html>> (last visited 2nd August 2019); Samuel Moyn, “The Alt-Right's Favorite Meme is 100 Years Old,” 13th November 2018, *New York Times* <<https://www.nytimes.com/2018/11/13/opinion/cultural-marxism-anti-semitism.html>> (last visited 2nd August 2019).

analysis, defined by its pursuit of aesthetic appeal to present day audiences,³⁵¹ reflecting the supremacy of commodification and consumption in contemporary postmodernity.³⁵² It seems that history today needs to be presented as “glossy images,”³⁵³ graphs, and easily graspable narratives.

Ben Golder defends Moyn’s utopianism,³⁵⁴ reading *The Last Utopia* as an exercise in Foucauldian genealogy, an “historical exposure of the groundlessness and non-necessity of human rights [that] simultaneously opens the way to a reimagining of their future.”³⁵⁵ He maintains that Moyn’s “genealogy of human rights ... teaches us to be suspicious of claims of historical necessity and progress and to work against them in the present,”³⁵⁶ holding out the hope “of a different present and a possible future.”³⁵⁷ This, on Golder’s analysis:

is a utopianism that is reflective, self-critical and self-aware, one always attuned to the mythic and exclusionary nature of its narratives and the remainders it produces, one that never cedes possibilities to the certitudes of progress or historical reason and that, in spite (or maybe because) of knowing all that it knows of the past, never ceases to hope for a new future.³⁵⁸

Golder’s defence of Moyn’s blueprintism – “another, better world of dignity and respect,”³⁵⁹ “a political vision of a better world in the future (but without committing himself to a classic view that it is literally impossible or unrealisable, a *ou-topos*, as [Thomas] More conceived it)”³⁶⁰ – begs the question of whether a ‘new’ future is possible or imaginable in the contemporary present. Golder maintains that the achievement of Moyn’s genealogical utopianism is to break out of “destiny” so that “the future is (better yet: *futures are*) once again thinkable.”³⁶¹ Like Moyn, Golder seems to prefer blueprintism – the conviction that it is possible to imagine genuinely ‘new’, ‘better’ futures in the contemporary present – to iconoclastic utopianism. But both Golder and Moyn state their preference without seriously considering the iconoclastic alternative and its insistence that contemporary, postmodern conditions make the imagination of genuinely ‘new’ futures impossible.

5 *Cassese and Koskenniemi, Allott and Moyn*

Koskenniemi’s and Cassese’s engagement with utopianism is driven by their desire to stay “within” international law’s boundaries. Their commitment is to international law and not to some utopian social or political project, and that precludes any possibility that, in their hands, utopianism will define international law. For Cassese and Koskenniemi blueprints for Utopia

³⁵¹ See text at n 40 and text at n 226

³⁵² See text at n 33 to n 41.

³⁵³ See Jameson quotation at n 41.

³⁵⁴ Ben Golder, “On the genealogy of human rights: an essay on ~~nostalgia~~-nostalgia” (2016) 22(2) *Australian Journal of Human Rights* 17.

³⁵⁵ *Ibid* 24-25.

³⁵⁶ *Ibid* 33.

³⁵⁷ *Ibid*.

³⁵⁸ *Ibid*.

³⁵⁹ Moyn, *The Last Utopia* (n 12) 4, as quoted by Golder (n 354) at 23.

³⁶⁰ Golder (n 354) 23.

³⁶¹ *Ibid* 25.

are to be found by searching through extant international law – as the contributors to Cassese’s edited collection do – and not by starting with a blank sheet of paper. Philip Allott’s Eutopianism is so idealistic, so much outside of international law, material reality and history, that it becomes vulnerable to the anti-utopian critiques of messianism and a tendency towards totalitarianism framed by Popper, Berlin and Arendt.³⁶² Having started with a blank sheet of paper Allott’s project is so much his own as to be virtually no-one else’s.

Moyn’s project is avowedly utopian in its pursuit of a ‘better’ human rights system, a blueprint for action in the here and now that contrasts with Allott’s ahistorical blueprint for human self-recreating through pure thought. Moyn engages with social, political and legal history far more than Allott, even if he does produce “glossy images,”³⁶³ and, in contrast with Cassese’s and Koskenniemi’s approach, Moyn is not so pre-committed to the structures and practices he considers as to be entirely constrained by them. If Cassese’s and Koskenniemi’s approach involves unambitious inquiry into such limited utopianism as there is within international legal discourse Moyn is, by contrast, open to the possibility that utopianism might re-invent the discourse or system of human rights. Because of its grounding in social, political and legal history, and its lack of the international legal “within”-ness that defines Cassese’s and Koskenniemi’s work, Moyn’s is the most comprehensive vision of utopianism in international legal scholarship to date.

The potential of Moyn’s utopianism is, however, limited by its blueprintism. Those like O’Connell who critique Moyn for a lack of ambition maintain that his reform blueprint cannot meet contemporary social and political challenges because it accepts the basic structure of the extant social and political system. Those like de Búrca who critique Moyn’s mis-directed ambition see the problem as lying elsewhere: in some other system(s) or aspect(s) of social, political and economic life. Those, like Anghie, Lemaitre, and Mantena, who insist that every view comes from somewhere, and that no blueprint has universal application, highlight what can be seen as a parallel between Moyn’s and Allott’s work: the sense in which Moyn’s blueprint, if implemented in places and contexts other than that from which it originates, may tend towards an oppressive violence that overrides the particular.

All these critiques bite. What Moyn offers is not *Ou-topia* (no-place), but a geographically situated, Americanised future, not *Eu-topia* (the good place) but a slightly less bad version of today.³⁶⁴ This is no basis on which to plan a utopian tomorrow because this is not a valid picture of today – it lacks detail (either in general or in some specific regard), or it underestimates the importance of identity, race, and gender.³⁶⁵

Versions of these critiques could be applied to any utopian blueprint and the only way around them is to retreat to somewhere that has some limited utopian potential for a particular community. For Cassese and Koskenniemi that somewhere is the internal structure of international law with its appeal to international lawyers. For Allott that somewhere is “the

³⁶² See text at n 202 to n 216.

³⁶³ See text at n 353.

³⁶⁴ See Bauman quotation at n 26 (“different today”).

³⁶⁵ See text at n 290 to n 294.

cloisters of Cambridge,”³⁶⁶ the utopian ideals of one’s own mind, and their supposed appeal for a nebulous “humanity.” Moyn’s somewhere is a place made in and by his own texts, a place where the picture of the world in the *New York Times* can be presented as global, where plans to “reinstate socialism” can be made to appear credible.³⁶⁷

A somewhere to retreat to offers a (temporary) hideout from the deficiencies of any plan for a ‘better’ future and the impossibility of overcoming those deficiencies. The only logical alternative to retreat into some intellectual structure (international law), oneself (Allott), or text itself (Moyn), is to remain rooted in the complexity and insurmountability of contemporary reality. Doing that entails acceptance of the iconoclastic view that any plan for a better future will be deficient in ambition and / or detail and, in that sense, that the very idea of a ‘plan’ for a better future is impossible, for all that plans for a better future are essential: “utopia is somehow negative ... it is most authentic when we cannot imagine it.”³⁶⁸

The very possibility of an iconoclastic approach, grounded in the notion that answers have not been arrived at because they are not available within existing paradigms of thought and practice, requires a turn away from blueprintism. To critique an iconoclastic posture on the basis that it does not have the answers is to assume that blueprints are the only form in which utopia can exist. It is also to miss the very point of the iconoclastic perspective: that moving beyond can only happen if there is recognition of the need for something beyond what is, rather than ‘new’ thinking within the confines of what is.

The reality of climate change concretises the need for something beyond what is. There is a gap between current commitments to reduce emissions by parties to the Paris Agreement and the scale of action necessary to limit global temperature rise to 1.5°C above pre-industrial levels.³⁶⁹ If, thanks to the work of organisations such as the IPCC, we have an acutely developed understanding of the climate impact that “the consumption of sheer commodification as a process” has had and is having,³⁷⁰ we have no idea of how to change that process, how to break-out of the legacies of modernity, industrialisation, and colonialism that coalesce in postmodernity.

International climate governance, in the form of the Paris Agreement, perpetuates the dream of international law as a discourse or collection of symbols or forms that offers *the* path to a better global future – indeed, the Paris Agreement seeks to define a future in which “the increase in the global average temperature [has been limited] to well below 2°C above pre-industrial levels.”³⁷¹ It is time to wake up from this dream, time to cast off the notion that the Paris Agreement and other utopian blueprints like it – the Charter of the United Nations,³⁷² the Rome

³⁶⁶ See Allott quotation at n 131.

³⁶⁷ “reinstate socialism” – see Mishra quotation at n 269.

³⁶⁸ Jameson, “The Politics of Utopia” (n 7) 46 (also quoted at n 7).

³⁶⁹ See text at n 304.

³⁷⁰ “the consumption of sheer commodification as a process” – see Jameson quotation at n 33.

³⁷¹ See text at n 298.

³⁷² Charter of the United Nations, San Francisco, 26th June 1945, available at <<https://www.un.org/en/charter-united-nations/>> (last visited 2nd August 2019).

Statute of the International Criminal Court,³⁷³ the Universal Declaration of Human Rights³⁷⁴ – map the path to a truly ‘better’ future. Equally, it is time to reject scholarship that promotes an image of international law as a utopian blueprint, whether in limited and conservative (Cassese and Koskeniemi), moderate and pragmatic (Moyn) or totalising and idealistic (Allott) form. Contemporary international law is, at best, a “degenerate utopia” – a means of effecting “the ideological closure of the system in which we are somehow trapped and confined,”³⁷⁵ of sustaining the idea of the future as “a different today rather than a more felicitous tomorrow”³⁷⁶ – and I turn now to that aspect of my argument.

Part 3: Utopia, “Degenerate Utopia,” and Disneyland

Philosopher Louis Marin develops the concept of a “degenerate utopia” in his analysis of Disneyland (California), the original Disney theme park that first opened in 1955.³⁷⁷ That theme park may seem far removed from the terrain of international law but, in what follows, I aim to show that international law is, like Disneyland, a “degenerate utopia.”³⁷⁸ To do that I offer an account of Marin’s theory of utopia, connecting it with Fredric Jameson’s Marin-informed analysis of Ursula Le Guin’s and Kim Stanley Robinson’s science fiction and contemporary evidence of Utopia’s social and political relevance. I then consider Marin’s theory of “degenerate utopia”, comparing and contrasting it with his theory of utopia, to produce an account of contemporary international law as a Disneyland-esque “degenerate utopia.”

1. *Neutralisation: Marin’s Utopia*

For Marin Utopia is a concept of the limit, a way of thinking the attempt to move beyond what is, “the neutral name, the name of the ‘neutral.’”³⁷⁹ “[T]he ‘netural’” – *the* key concept for Marin – “names the limit, the gap between two frontiers or two continents, the old and the new worlds.”³⁸⁰ Utopia “does not mean a place that is nowhere ... an island that exists only in [Thomas] More’s imagination or a place that does not exist,”³⁸¹ but “designates a no-place ... *another* referent, the ‘other’ of any place.”³⁸²

Utopia exists as potentiality rather than actuality. “It stands as a perfect idea above any limit,”³⁸³ “the plural figure of the infinite work of the limit or frontier or difference in

³⁷³ Rome Statute of the International Criminal Court, Rome, 17th July 1998, 2187 UNTS 3, available at <<https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>> (last visited 2nd August 2019).

³⁷⁴ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A, 10th December 1948, available at <<https://www.un.org/en/universal-declaration-human-rights/>> (last visited 2nd August 2019).

³⁷⁵ See Jameson quotation at n 7.

³⁷⁶ See Bauman quotation at n 26.

³⁷⁷ Marin, *Utopics* (n 4) 239.

³⁷⁸ *Ibid.*

³⁷⁹ Marin, “Frontiers” (n 46) 411.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.* 413. For an outline of a theory of international law grounded, in a sense, in the notion of “a perfect idea above any limit” see Matthew Nicholson, “Walter Benjamin and the Re-Imagination of International Law” (2016) 27 *Law and Critique* 103, in particular at 106 and 123-124.

history.”³⁸⁴ It is not to be captured in a plan or blueprint because the attempt at containment tends towards authoritarianism: “Utopia as ideology is a totality; and when political power seizes it, it becomes a totalitarian whole.”³⁸⁵ As Jameson, analysing Marin’s work, explains:

To understand Utopian discourse in terms of neutralization is ... to propose to grasp it as a process, as *energeia*, enunciation, productivity, and implicitly or explicitly to repudiate that more traditional and conventional [blueprint] view of Utopia as sheer representation, as the ‘realized’ vision of this or that ideal society or social ideal.³⁸⁶

Any utopian text – such as Thomas More’s original *Utopia* – serves a neutralizing function.³⁸⁷ More’s text is not a blueprint for the construction of a future society nor a mere critique of sixteenth-century England.³⁸⁸ On Marin’s analysis – which Jameson endorses – it is an exercise in neutralization, “‘neither anti-World, nor New World, but simply World other’”:³⁸⁹ “More’s *Utopia* is neither England nor America, neither the Old nor the New World; it is the in-between of the contradiction at the beginning of the sixteenth century of the Old and New Worlds.”³⁹⁰ This is Utopia as “the third term, neither positive nor negative, of each group of categories.”³⁹¹

“Utopic practice” – the practice of writing “World other” – is “an ideological critique of the dominant ideology.”³⁹² Ideology, here, designates *the* mode of speaking, thinking and acting, as Terry Eagleton explains:

[T]he concept of ideology aims to disclose something of the relation between an utterance and its material conditions of possibility, when those conditions of possibility are viewed in the light of certain power-struggles central to the reproduction (or also, for some theories, contestation) of a whole form of social life.³⁹³

Ideology is the production of “whole form[s] of social life” through processes (“power-struggles,” “material conditions of possibility”) which constrain what can be said or represented (“utterance”). As Marin puts it, “ideological discourse ... expresses reality by way of a closed conceptual system whose aim is to provide a legitimizing or justificatory representation of the world.”³⁹⁴ Utopic practice, as “an ideological critique of the dominant ideology,”³⁹⁵ seeks to neutralise a “whole form of social life” – in More’s case, early sixteenth

³⁸⁴ Marin *ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ Fredric Jameson, “Of Islands and Trenches: Naturalization and the Production of Utopian Discourse” (1977) 7(2) *Diacritics* 2, 6.

³⁸⁷ *Ibid* 9: “[T]he basic relationship of the Utopian text to what we have been calling its referential sub-text is one of neutralization; or, in terms of More’s *Utopia*, that the island of that name functions as a point-by-point negation or cancelling of the historical England itself” (England, here, being the “referential sub-text”).

³⁸⁸ See quotation in n 387

³⁸⁹ Jameson, “Of Islands and Trenches” (n 386) 11 (quoting Marin).

³⁹⁰ Marin, *Utopics* (n 4) xiii.

³⁹¹ *Ibid*

³⁹² *Ibid* xiv.

³⁹³ Terry Eagleton, *Ideology: An Introduction* (Verso, 2007 [1991]), 223.

³⁹⁴ Louis Marin (Fredric Jameson trans.), “Theses on Ideology and Utopia” (1976) 6 *Minnesota Review* 71, 71.

³⁹⁵ See Marin quotation at n 392.

century England – by performing “World other,” “subvert[ing] the picture of reality given by ideological discourse” in the process.³⁹⁶

Utopic practice is not, then, an exercise in drawing up blueprints for an alternative future.³⁹⁷ It is a process of writing texts that neutralise what is, texts that “give the signal that we are coming out of the series ... entering into the possible, the unfated ... at least into a fate that can [by reaching beyond the confines of “the dominant ideology”] be modified.”³⁹⁸ Consistent with this understanding of “Utopic practice,” Fredric Jameson promotes the utopic practice of science fiction authors Ursula Le Guin and Kim Stanley Robinson.³⁹⁹

For Jameson, “Utopian space is an imaginary enclave within real social space.”⁴⁰⁰ “[R]eal social space” in postmodernity, according to Jameson, involves the bureaucratisation of life and reality by ever-more specialised disciplines, systems, and forms of knowledge.⁴⁰¹ Jameson evokes something of Cassese’s and Koskenniemi’s “within”-ness, referring to “jurists, who become a separate profession governed by a distinct field of knowledge in its own right” as an example of bureaucratised specialisation.⁴⁰² Each discipline or system carves out a distinct and sealed domain of conduct, process and behaviour for itself, fragmenting the “real social space” by doing so.⁴⁰³ “Utopian space”, by contrast, is a “pocket of stasis within the ferment and rushing forces of social change [that] may be thought of as a kind of enclave within which Utopian fantasy can operate.”⁴⁰⁴ Against the bureaucratisation, sub-division, and specialization of life in postmodernity, the Utopian “imaginary enclave” is “a zone of the social totality which seems eternal and unchangeable.”⁴⁰⁵

Utopia, then, offers an image of the whole, and the “fictive” possibility of re-constructing life and reality.⁴⁰⁶ Utopia is not concerned with the representation of “contemporary social reality” *per se* because it is “the *other* or negative of contemporary social reality [that] appears” through Utopia’s “fictive construction.”⁴⁰⁷ The problem, in a sense, then, with Samuel Moyn’s blueprint for human rights, or Philip Allott’s Eutopian plan for international law – to take two examples from the first part of this article – is that they are presented as real(istic) and achievable when they are, in the context of postmodern, “contemporary social reality,” fantastical. Moyn and

³⁹⁶ Marin, “Theses” (n 394) 71.

³⁹⁷ See *ibid.*, 72: “[U]topia, as discourse, does not contain the method which allows it to take place, nor the methodology which would legitimate it: does not, in other words, contain the theory of its own production.”

³⁹⁸ Marin, “Frontiers” (n 46) 420 (quoting Ernst Bloch).

³⁹⁹ On Le Guin see Jameson, “The Politics of Utopia” (n 7), 53; Fredric Jameson, “World Reduction in Le Guin” in Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2007) 267. On Robinson see Jameson, “If I Can Find” (n 24).

⁴⁰⁰ Jameson, “The Utopian Enclave” (n 323) 15.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ See *ibid.* 14-15, discussing Niklas Luhmann’s “systems theory,” and concluding (at 15): “Luhmann defines modernity by way of the onset of this process [of specialization and stratification]; postmodernity could then be seen as a dialectical saturation in which the hitherto semi-autonomous sub-systems of these various social levels threaten to become autonomous *tout court*, and generate a very different ideological picture of complexity as dispersed multiplicity and infinite fission than the progressive one afforded by the preceding stage of modernity.”

⁴⁰⁴ *Ibid.* 15.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Marin, “Theses” (n 394) 72: “Utopia is a fictive construction.”

⁴⁰⁷ *Ibid.* 72.

Allott approach utopianism as though it is a pragmatic exercise in re-orienting thought, practice, theory, doctrine, or discourse when – as Marin’s and Jameson’s analysis reveals – Utopia, as a literary practice with roots stretching back to Thomas More, is a “fictive” exercise in creating “the *other* or negative” of the context in which it is written.

If we are, then, to understand the present-day value and potential of utopianism we need to consider the contemporary “fictive” literature.

2. “*Our constitutional inability to imagine Utopia*”: *Le Guin, Robinson, and Jameson*

Through analysis of Le Guin’s and Robinson’s works Jameson develops his thesis that “the political function of the utopian genre” and of science fiction in general “is to bring home, in local and determinate ways and with a fullness of concrete detail, our constitutional inability to imagine Utopia itself ... as a result of the systemic, cultural and ideological closure of which we are all in one way or another prisoners.”⁴⁰⁸

In *The Lathe of Heaven* Le Guin tells the story of a “hapless young man ... tormented by the unwanted power to dream ‘effective dreams’ ... which ... change external reality itself ... reconstruct[ing] the ... historical past in such a way that the previous ‘reality’ disappears without a trace.”⁴⁰⁹ He seeks the help of “an ambitious psychiatrist” who harnesses this power “to change the world for the benefit of mankind.”⁴¹⁰ The dreamer’s dreams, each designed to make the world a better place, change reality again and again, with a range of unintended consequences (mass deaths and alien invasion, for example).⁴¹¹

Whilst *Lathe*’s narrative might be read “either as [a manifestation of] the liberal’s anxiety in the face of a genuinely revolutionary transformation of society” – the capacity to dream a new world into being – “or as the expression of more conservative misgivings about the New Deal-type reformism and do-goodism of the welfare state,”⁴¹² for Jameson “the deeper subject of this fascinating work can only be the dangers of imagining Utopia and more specifically of writing the utopian text itself.”⁴¹³ On Jameson’s analysis the book “is ‘about’ its own process of production.”⁴¹⁴ Whilst the dreamer “cannot dream Utopia” into being, however much the psychiatrist wants him do so, “in the very process of exploring the contradictions of [the attempt to produce Utopia that the novel narrates], the narrative gets written, and ‘Utopia’ is ‘produced’.”⁴¹⁵

The point is that Le Guin’s text *is* a negative, dialectical iconoclastic Utopia because “we are shown that an ‘achieved’ Utopia – a full representation – is a contradiction in terms.”⁴¹⁶ By narrating the contemporary un-dreamability of utopia Le Guin’s text stages the reality of

⁴⁰⁸ Jameson, “Progress Versus Utopia” (n 29) 289.

⁴⁰⁹ Ibid 293; Ursula Le Guin, *The Lathe of Heaven* (Gollancz, 2001 [1971]).

⁴¹⁰ Jameson, “Progress Versus Utopia” (n 29) 293.

⁴¹¹ Le Guin, *Lathe* (n 409).

⁴¹² Jameson, “Progress Versus Utopia” (n 29) 293.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid 294.

⁴¹⁶ Ibid.

Utopia's unreality in contemporary cultural conditions. If Philip Allott was to re-visit his Eutopianism on the basis of *Lathe*, perhaps he would caveat his declaration that “[h]uman beings inhabit a *human world*, entirely made by the human mind.”⁴¹⁷ If Samuel Moyn was to read *Lathe* into his work, perhaps he would rethink his call for human rights to “become more scientific” by “engag[ing] in the programmatic concern with designing good states, for the sake of global economic welfare.”⁴¹⁸

Another of Le Guin's novels, *Left Hand of Darkness*, is set on the frozen planet of Gethen / Winter, “an inimical world; its punishment for doing things wrong is sure and prompt; death from cold or death from hunger.”⁴¹⁹ In this “utopian enclave” a drama of gender and androgyny,⁴²⁰ conflict, mediation, love and loss plays out. The two central characters are Genly Ai, a representative of the Ekumen – “a kind of galactic United Nations,”⁴²¹ “a clearing-house for trade and knowledge” that ensures “communication between the worlds of men”⁴²² – and Estraven, a politician in Karhide, a nation on Gethen. Genly Ai is male and Estraven, like everyone on Gethen, is androgynous. Notes prepared by Ekumen ‘Investigators’ – an advance party who surveyed Gethen in preparation for Genly Ai's visit – explain that the absence of gender on Gethen changes not only sex but social interaction:

The First Mobile [Genly Ai is the ‘First Mobile’ or envoy from Ekumen], if one is sent, must be warned that unless he is very self-assured, or senile, his pride will suffer. A man wants his virility regarded, a woman wants her femininity appreciated, however indirect and subtle the indications of regard and appreciation. On Winter [Gethen] they will not exist. One is respected and judged only as a human being. It is an appalling experience.⁴²³

“Gethenian sexual physiology” involves processes of “somer” and “kemmer,” somer being the non-sexually active phase of Gethenian life lasting “[f]or 21 or 22 days,”⁴²⁴ and Kemmer “averag[ing] 26 to 28 days” and involving the development of sex organs:⁴²⁵ “Normal individuals have no predisposition to either sexual role in kemmer; they do not know whether they will be the male or the female, and have no choice in the matter.”⁴²⁶

Androgynous Gethenians are “not neuters” but “potentials, or integrals.”⁴²⁷ The Investigator concludes “I must say ‘he’ [to refer to a Gethenian], for the same reasons as we used the masculine pronoun in referring to a transcendent god: it is less defined, less than the neuter or

⁴¹⁷ See text above at n 163.

⁴¹⁸ See text above at n 232 and n 247.

⁴¹⁹ Ursula Le Guin, *The Left Hand of Darkness* (Orbit, 1981 [1969]) 88.

⁴²⁰ “utopian enclave” – Jameson, “The Utopian Enclave” (n 323).

⁴²¹ Jameson, “World Reduction” (n 399) 280.

⁴²² Le Guin, *The Left Hand* (n 419) 36.

⁴²³ *Ibid* 86.

⁴²⁴ *Ibid* 82.

⁴²⁵ *Ibid* 81.

⁴²⁶ *Ibid* 82.

⁴²⁷ *Ibid* 85.

the feminine,”⁴²⁸ but recognises that “the very use of the pronoun in my thoughts leads me continually to forget that the Karhider I am with is not a man, but a manwoman.”⁴²⁹

Genly Ai seeks to make “an alliance with the nations of Gethen” in the interests of “[m]aterial profit. Increase of knowledge. The augmentation of the complexity and intensity of the field of intelligent life. The enrichment of harmony and the greater glory of God. Curiosity, Enrichment, Delight.”⁴³⁰ Just before Genly Ai’s meeting with the king of Karhide Estraven is branded a traitor and banished. Karhide and Orgoreyn, another nation on Gethen, are enemies and when he travels to Orgoreyn Genly Ai is surprised to meet the newly banished Estraven. Events lead Genly Ai and Estraven to make an almost impossible journey across icy wastelands, discovering their love for each other as they travel. Out “[o]n the [i]ce” (the title of the chapter in which Genly Ai discovers his love for Estraven), having left the social and political complexities of Karhide and Orgoreyn behind, Genly Ai forgets his blueprints for intergalactic order, peace, and trade: “Estraven and I ... simply arrived at the point where we shared whatever we had worth sharing.”⁴³¹ For this to happen Genly Ai has to overcome his binary understanding of gender:

And I saw then again, and for good, what I had always been afraid to see, and had pretended not to see in him: that he was a woman as well as a man ... Until then I had rejected him, refused him his own reality. ... [H]e was the only one who had entirely accepted me as a human being: who had liked me personally and given me entire personal loyalty: and who therefore had demanded of me an equal degree of recognition, of acceptance. I had not been willing to give it. I had been afraid to give it. I had not wanted to give my trust, my friendship to a man who was a woman, a woman who was a man.⁴³²

The Left Hand ends with the violent death of Estraven, Genly Ai’s return to Karhide, and the ultimate success of his mission as an Ekumen spaceship arrives in Karhide and contact is established with the nations of Gethen. For Jameson a sense of “the Ekumen as a kind of galactic United Nations” permeates the “liberal ‘solution’” of the book’s conclusion.⁴³³ Genly Ai claims, in discussions with the king of Karhide, that he and the dead Estraven served “[m]ankind” in their efforts to establish contact between Gethen and the Ekumen.⁴³⁴ Privately, to the reader, however, Genly Ai notes that this was only “an aspect of the truth” for “[i]t would be no less true to say that Estraven’s acts had arisen out of pure personal loyalty” to him.⁴³⁵

Genly Ai admits that he summoned the Ekumen spaceship that is on its way as he meets with the king “[t]o force [the king’s] hand,” invoking his “duty towards Gethen and the Ekumen” as justification.⁴³⁶ This sense of knowing better – of gently *and* forcibly bringing about

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid 35.

⁴³¹ Ibid 209

⁴³² Ibid 210.

⁴³³ Jameson, “World Reduction” (n 399) 280.

⁴³⁴ Le Guin, *The Left Hand* (n 419) 246.

⁴³⁵ Ibid 246-247.

⁴³⁶ Ibid 247.

socialisation between Karhide and the Ekumen – has overtones of the colonial “civilising mission.”⁴³⁷ For an international legal readership *The Left Hand* might evoke memories of de Vitoria’s *On the Indians Lately Discovered*, a sixteenth century text on the legal aspect of Spanish conquests in the ‘new world.’⁴³⁸ According to Antony Anghie:

Vitoria argues that all peoples, including the Indians, were governed by a basic “natural law”. While others characterised the Indians as heathens, and animals, lacking any cognisable rights, Vitoria instead humanely asserts of the Indians that “the true state of the case is that they are not of unsound mind, but have according to their kind, the use of reason ...” [I]t is precisely because they possess reason that the Indians are bound by a universal natural law.⁴³⁹

On this basis Anghie maintains that the people of the New World, held to the standards of European natural law, would “by their very existence and their own unique identity and cultural practices, violate this law.”⁴⁴⁰ Vitoria, Anghie argues, maintained that the Spanish had a right to travel to and trade with the New World, and that “any Indian resistance to Spanish incursions would amount to an act of aggression by the Indians that justified the Spanish in using force in self-defence – and, in doing so, in endlessly expanding their territory, conquering the native rulers in the process.”⁴⁴¹ What starts with contact, trade and universality – with “mankind,” communication, trade and knowledge – ends with wars for control of the New World, with the landing of spaceships.

According to Jameson, “the deepest subject of [*The Left Hand*] ... would not be utopia as such, but rather our own incapacity to conceive it in the first place.”⁴⁴² In reaching this view he attaches particular importance to this line from a chapter ‘written’ by Estraven:⁴⁴³ “To learn which questions are unanswerable, and *not to answer them*: this skill is most needful in times of stress and darkness.”⁴⁴⁴ This sense of remaining neutral recurs elsewhere in the chapter. Estraven tells the reader that “[t]o oppose something is to maintain it,”⁴⁴⁵ that “[t]o be an atheist is to maintain God.”⁴⁴⁶ We need new ways of doing things, not mere opposition to what is. We need something other than one of the two options constructed by the binary-ness of existing debates:

To oppose vulgarity is inevitably to be vulgar. You must go somewhere else; you must have another goal; then you walk a different road ... Orgoreyn and Karhide both must stop

⁴³⁷ On the history and continuing relevance of the “civilising mission” in international law see Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, 2008).

⁴³⁸ See Francisci de Vitoria (Ernest Nys ed.), *De Indis et De ivre belli relectiones being parts of Reflectiones Theologicae XII* (The Carnegie Institution of Washington, 1917). As Anghie, “The Evolution of International Law” (n 341) 752 (endnote 7) notes, “Victoria is more usually referred to as ‘Vitoria’.”

⁴³⁹ Anghie, “The Evolution of International Law” (n 341) 742-743 (quoting Vitoria).

⁴⁴⁰ *Ibid* 743.

⁴⁴¹ *Ibid*.

⁴⁴² Jameson, “World Reduction” (n 399) 280.

⁴⁴³ *Ibid* 279.

⁴⁴⁴ Le Guin, *The Left Hand* (n 419) 132 (emphasis in original).

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Ibid*.

following the road they're on, in either direction; they must go somewhere else, and break the circle.⁴⁴⁷

The challenge of “break[ing] the circle” permeates *The Left Hand*, for all that Genly Ai's resolution of the narrative *via* the arrival of a spaceship involves a closure of, rather than a break in, the circle. That closure takes the form of the arrival of the Ekumen, and the initiation of a process through which, as Genly Ai tells the king of Karhide, “you [the people of Gethen] find unity.”⁴⁴⁸ The desire for a break, “the desire called utopia,”⁴⁴⁹ permeates the book but – of course – it goes unrealised and, in that sense, Estraven, as the voice of utopian desire – the narrative personification not of Utopia *per se* but of the desire for it – had to die.

The book ends with Estraven's son taking on his parent's role as the voice of utopian desire, asking Genly Ai “[w]ill you tell us about the other worlds out among the stars – the other kinds of men, the other lives?”⁴⁵⁰ The child asks to be told stories about the ‘other,’ perhaps in the hope that through such stories we, as readers, might learn to “break the circle.” Le Guin spends more than two hundred pages telling a story of the ‘other,’ of Gethen, offering a non-answer to the “unanswerable” question of how in this time of “stress and darkness” we might imagine a Utopian ‘other.’⁴⁵¹ Fittingly, the book ends with a child's request for more such stories, a request that seems to break down the wall between writer and reader, effecting something like an *Umfunktionierung*.⁴⁵²

As with *Lathe of Heaven*, in and through Le Guin's text “‘Utopia’ is ‘produced’” by a staging of the dialectical impossibility of / imperative for Utopia in contemporary human reality,⁴⁵³ transposed from Earth to the “utopian enclave” of Gethen.⁴⁵⁴ A dialectical sensibility infuses the whole book, expressed most clearly in lines invoking the book's title: “Light is the left hand of darkness, and darkness the right hand of light. Two are one, life and death, lying together like lovers in kemmer, like hands joined together, like the end and the way.”⁴⁵⁵ On Gethen the “circle” of gender is broken and neutralised in androgyny but, as the child's question at the end of the book demonstrates, a wider, more complete breaking of the circle that defines contemporary social, political and economic reality is not achieved.

Le Guin's staging of Utopia as an impossibility / imperative in *Lathe* and *The Left Hand* can be read together and in harmony with Theodor Adorno's seminal work of critical philosophy, *Negative Dialectics*, published in 1966 (*The Left Hand* was published in 1969, *Lathe* was published in 1971). Adorno, like Estraven, opposes binary choices within the limits of existing options because “[w]hat is must be changeable if it is not to be all,”⁴⁵⁶ because “the conceptual

⁴⁴⁷ Ibid 132, quoted in part by Jameson, “World Reduction” (n 399) 279.

⁴⁴⁸ Le Guin, *The Left Hand* (n 419) 246.

⁴⁴⁹ See Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso, 2007) ix (title page of part one of the book).

⁴⁵⁰ Le Guin, *The Left Hand* (n 419) 253.

⁴⁵¹ “unanswerable,” “stress and darkness” – see Le Guin quotation at n 444.

⁴⁵² On “Umfunktionierung” see text at n 190 to n 196.

⁴⁵³ “‘Utopia’ is ‘produced’” – see Jameson quotation at n 415.

⁴⁵⁴ “utopian enclave” – Jameson, “The Utopian Enclave” (n 323).

⁴⁵⁵ Le Guin, *The Left Hand* (n 419) 199.

⁴⁵⁶ Adorno, *Negative Dialectics* (n 62) 398.

totality is mere appearance.”⁴⁵⁷ In terms that seem to speak to Genly Ai’s initial rejection of androgyny on Gethen, and his attempt to bring Gethen into a unified Ekumen, Adorno observes that “[w]hat we differentiate will appear divergent, dissonant, negative for just as long as the structure of our consciousness obliges it to strive for unity: as long as its demand for totality will be its measure for whatever is not identical with it.”⁴⁵⁸

Against the maintenance or defence of what is, Adorno insists that the focus must be on what lies beyond the extant totality: “An order that shuts itself up in its own meaning will shut itself away from the possibility above order”;⁴⁵⁹ “[t]he whole is the false;”⁴⁶⁰ “[t]rue thought is thought that has no wish to insist on being in the right.”⁴⁶¹

An attempt to reach for something ‘other’ underpins Kim Stanley Robinson’s *Mars* trilogy. The “conditions of Being” are transformed in Robinson’s dramatization of the human colonisation of Mars *via* terraforming, “the process of creating an Earth-like or habitable environment on another planet.”⁴⁶² For Jameson, Robinson’s narrative sits on “the fault line between realism and something else, which [Jameson] ... call[s] ontology.”⁴⁶³ Whilst there are realist elements in Robinson’s narrative – extensive detail on the science of terraforming,⁴⁶⁴ an “inventory” of the “variety of tools and materials” required⁴⁶⁵ – to describe this as realist literature is, for Jameson, to miss its true significance:

“Terraforming” ... retroactively includes all those implements, all those receptacles of human value [tools, materials, science, data, facts], and it becomes the fundamental dividing line between realism as the narrative of human praxis and ontology as the traces of Being itself: two formal or generic possibilities, which thereby reinforce each other, insofar as production requires some pre-existent being on which to do its work, while Being itself can be detected only in the spaces that human praxis spares, in the evanescent chance at origins that time and history inexorably efface.⁴⁶⁶

The Mars trilogy dramatizes the (fictive) science and politics of terraforming and the Being created *and* destroyed by terraforming: “[T]he hard SF content [the ‘science’] stands revealed as socio-political – that is to say, as utopian.”⁴⁶⁷ The point, here, is that the Earthly, familiar divide between science and politics falls away as Martian colonisers grapple with questions about what can and what should be done on and to this ‘new’ planet.

⁴⁵⁷ Ibid 5.

⁴⁵⁸ Ibid 5-6.

⁴⁵⁹ Ibid 397 (also quoted at n 62 and n 95).

⁴⁶⁰ Theodor Adorno, *Minima Moralia: Reflections from Damaged Life* (Verso, 2005 [1951]) 50.

⁴⁶¹ Theodor Adorno and Max Horkheimer, *Towards a New Manifesto* (Verso 2011) 71.

⁴⁶² NASA, “Mars Terraforming Not Possible Using Present-Day Technology,” 30th July 2018, <<https://www.nasa.gov/press-release/goddard/2018/mars-terraforming>> (last visited 2nd August 2019).

⁴⁶³ Jameson, “If I Can Find” (n 24) 402.

⁴⁶⁴ Ibid 393-394.

⁴⁶⁵ Ibid 403.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid 396.

A drama of ecological, planetary politics plays out across the trilogy and its relevance for Earth is staged through “the obligatory return tourist trip to Earth itself.”⁴⁶⁸ During that trip one of the central characters “address[es] ... the Terran [i.e. Earth-based] welcomers,”⁴⁶⁹ telling them:

‘The move to Mars was a purifying voyage, stripping away all but the most important of things. What happened in the end was Terran through and through ... we can most help the home planet by serving as a way for you to see yourselves. As a way to map out an unimaginable immensity.’⁴⁷⁰

In this way Robinson’s text “inscribe[s] the structural condition of [its] possibility within the narrative itself.”⁴⁷¹ Robinson’s trilogy does not “dramatize a single utopian possibility” but is “‘polymorphic’ ... [in its] inclu[sion] of the struggle between a whole range of utopian alternatives, about which it deliberately fails to conclude.”⁴⁷² From this, Jameson extracts these lessons:

The utopian text is not supposed to produce th[e] synthesis [, the solution,] all by itself or to represent it; that is a matter for human history and for collective praxis. It is supposed only to produce the requirement of the synthesis, to open the space into which it is to be imagined.⁴⁷³

[U]topia as a form is not the representation of radical alternatives; it is rather simply the imperative to imagine them.⁴⁷⁴

It is of course possible to dismiss Le Guin’s and Robinson’s work as mere fiction, just as the word ‘Utopia’ can be used to dismiss ambitions for something other than what is. Such responses miss the point of the “fictive,”⁴⁷⁵ the utopian, and the ‘other’ however. Jameson’s analysis of Le Guin’s and Robinson’s work, and that work in its own right, posits the necessity of something that synthesizes discordant elements of contemporary reality into something other than what is.

To gain some sense of the contemporary necessity of a new “synthesis,” inquiry into discordant elements in contemporary society, into whatever evidence there might be of the existence of a desire to “break the circle,” is necessary.

3. *Finding the Exit: Brexit, Theranos, Fyre, Bolsanaro ...*

⁴⁶⁸ Ibid 410.

⁴⁶⁹ Ibid 411.

⁴⁷⁰ Ibid. (quoting Robinson).

⁴⁷¹ Ibid 403.

⁴⁷² Ibid 410.

⁴⁷³ Ibid 409.

⁴⁷⁴ Ibid 416 (also quoted at n 24).

⁴⁷⁵ “fictive” – see text at / Marin quotation in n 406.

Some readings of the contemporary social and political situation suggest that the utopian “imperative” is only too well understood,⁴⁷⁶ that there is a real “desire called utopia,”⁴⁷⁷ and that the absence of a systemic alternative to what is makes that desire stronger.

William Davies, writing in February 2019, interprets the UK’s decision to leave the European Union – ‘Brexit’ – as the manifestation of “a deep, generalised urge to depart” in “British political culture,”⁴⁷⁸ in a way that seems to exemplify the disconnect between utopian desire and the realisation of utopian blueprints. Davies presents Brexit as an exercise in “the ideology – or the fantasy – of exit” from consumer markets.⁴⁷⁹ In theory, if a consumer is dissatisfied with a product or service they “exit” by withdrawing their custom, but “markets never quite match up to this ideal” because people rarely “exit” in this way, preferring instead to “make a fuss.”⁴⁸⁰ On Davies’ reading Brexit “isn’t so much a celebration of sovereignty or democracy, as a new frontier in the marketisation of politics” driven by the illusion of the consumer’s “exit” sanction.⁴⁸¹ Nothing, for Davies, shows the consumer logic of Brexit better than the Brexiteer mantra that “you don’t get a good deal on anything unless you’re willing to walk away.”⁴⁸² It is, then, one thing to want to leave the European Union and an altogether ‘other’ (i.e. other worldly) thing to realise that desire.

Brexit is not the only contemporary example of a utopian desire for something beyond what is *and* the impossibility of translating that desire into a blueprint. Take, as another example, the recent revelations about US biotech firm Theranos and its founder Elizabeth Holmes.⁴⁸³ By revolutionising medical testing with their blood testing device Theranos offered “accurate results from just a few drops of blood ... us[ing] the same blood sample to test for hundreds of different conditions simultaneously.”⁴⁸⁴ Holmes promised “[a] world in which no one ever has to say goodbye too soon,”⁴⁸⁵ a Utopia in which people can buy control over their medical future.

The Theranos story was not true:

[T]he company had been running most of its blood samples through the standard large commercial analysers made by the German conglomerate Siemens. Theranos had to dilute their tiny samples so that they could run through the machines ... [and] the results couldn’t be trusted. Holmes’s device, the Edison, could only run a few tests, and its “results were no better than guesswork.” When employees ran their own blood through it, 20 per cent of them tested positive for syphilis. ... When she sought investors, [Holmes] avoided the biotech

⁴⁷⁶ See Jameson quotation at n 474.

⁴⁷⁷ Jameson, *Archaeologies* (n 449) ix (title page of part one of the book).

⁴⁷⁸ William Davies, “Leave, and Leave Again” (2019) 41(3) *London Review of Books* 9, 9.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Deborah Friedell, “A chemistry is performed” (2019) 41(3) *London Review of Books* 33.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

venture capital firms that would have demanded due diligence in favour of the charmable global rich.⁴⁸⁶

Theranos' Utopia was sustained by the widely held desire for what Holmes was selling. Rupert Murdoch, the family behind Walmart, and Betsy DeVos (current US secretary of education) invested.⁴⁸⁷ In 2014 *Fortune* magazine published a hagiographic article about Theranos and Holmes, extolling the efficiency and affordability of Theranos's testing methods.⁴⁸⁸ When the truth about Theranos began to come out in 2015, after a pathologist in Missouri called a journalist at the *Wall Street Journal* because he did not believe the Theranos story could be true,⁴⁸⁹ the *Fortune* journalist who wrote the 2014 article published "a protracted correction:"⁴⁹⁰ "As much as I'd like to say that Holmes lied to me, I don't think she did. I do believe I was misled – intentionally – but I was also culpable, in that I failed to probe certain exasperatingly opaque answers that I repeatedly received."⁴⁹¹ US supermarket Walgreens allowed Theranos to set up shop in a number of their stores, as did their rival Safeway.⁴⁹² "Walgreens executives had feared that if they hesitated to go into partnership with Theranos, they would lose out to their rivals."⁴⁹³ Utopia seems to sell – to supermarkets, to journalists, to "the charmable global rich" – but everybody buying it pays to forget that Utopia is, in one of its senses, 'no-place.'

The story of 2017's Fyre festival seems to transplant the essence of the Theranos story into an entertainment and tourism setting. The plan, developed by entrepreneur Billy McFarland and rapper Ja Rule, was to hold a luxury music festival on a private island in the Bahamas.⁴⁹⁴ The plan failed, the festival was cancelled, festival-goers were temporarily stranded in the Bahamas,⁴⁹⁵ McFarland has been jailed for fraud,⁴⁹⁶ and festival goers are suing the organisers.⁴⁹⁷ Fyre was announced online in a video that opens with a voiceover insisting "all these things that may seem big and impossible are not," featuring "supermodels," jet skis, beaches, crashing waves, and a deep-blue ocean.⁴⁹⁸ The imagery and the sales pitch involve an

⁴⁸⁶ Ibid 34 (paragraph breaks suppressed).

⁴⁸⁷ Ibid 33.

⁴⁸⁸ Roger Parloff, "This CEO is out for blood" *Fortune*, 12th June 2014 <<http://fortune.com/2014/06/12/theranos-blood-holmes/>> (last visited 2nd August 2019).

⁴⁸⁹ Friedell (n 483) 34.

⁴⁹⁰ Parloff, "This CEO" (n 488) - see the note at the top of the article: "Author's note: On December 17, 2015, I published a protracted correction to this article."

⁴⁹¹ Roger Parloff, "How Theranos Misled Me" *Fortune*, 17th December 2015 <<http://fortune.com/2015/12/17/how-theranos-misled-me-elizabeth-holmes/>> (last visited 2nd August 2019).

⁴⁹² Friedell (n 483) 33.

⁴⁹³ Ibid 34.

⁴⁹⁴ See Joe Coscarelli and Melna Ryzik, "Fyre Festival, a Luxury Music Weekend, Crumbles in the Bahamas" *New York Times*, 28th April 2017 <<https://www.nytimes.com/2017/04/28/arts/music/fyre-festival-ja-rule-bahamas.html>> (last visited 2nd August 2019).

⁴⁹⁵ Ibid.

⁴⁹⁶ The Guardian, "Fyre festival: creator of disastrous event sentenced on fraud charges," 11th October 2018, <<https://www.theguardian.com/us-news/2018/oct/11/fyre-festival-billy-mcfarland-sentenced-prison-fraud>> (last visited 2nd August 2019).

⁴⁹⁷ See Leigh Blickley, "'Hell Has No Wrath Like a Millennial Scorned': Lawyer Suing Fyre Festival Gives Updates on Case" *Huffington Post*, 17th January 2019, <https://www.huffingtonpost.co.uk/entry/fyre-festival-documentaries-lawyer_us_5c3e5d70e4b0922a21d9984d?ec_carp=7365817290276570262&guccounter=1> (last visited 2nd August 2019).

⁴⁹⁸ See Fyre Festival, "Announcing Fyre Festival" <<https://www.youtube.com/watch?v=mz5kY3RsmK0>> (last visited 2nd August 2019).

exit from the norm, a departure from what is through travel to a private island:⁴⁹⁹ Thomas More's *Utopia* for Millennials.

Fyre invoked a sense of transgression, of pushing back against the orthodox – the island venue was, according to the promotional video's text, "once owned by [drug baron] Pablo Escobar."⁵⁰⁰ Social media 'influencers' were paid to promote Fyre on Instagram – Kendall Jenner was reportedly paid \$250,000 for one post.⁵⁰¹ Fyre's 'good' place – "supermodels," the best of everything, a private, luxury island – existed only in social media's no place, and even there Fyre was a meaningless orange tile tweeted, and re-tweeted, and re-tweeted: "A couple of powerful models posting an orange tile is what essentially built this entire festival' ... says Mick Purzycki, one of the men behind Fyre Festival, in a new Netflix documentary."⁵⁰² The non-existence and impossibility of this festival was Fyre's 'unique selling point.' "Fyre was basically like Instagram coming to life" says DJ Jillionaire in the Fyre Netflix documentary,⁵⁰³ his hyperbolically exaggerated name only too appropriate for this non-event.

Heightening the parallel with Thomas More's *Utopia*, the venue featured in the marketing material for Fyre was not the actual festival venue. McFarland and his associates forfeited the lease on the intended island venue after violating its terms – the lease prohibited any mention of Pablo Escobar but they mentioned the name in marketing material anyway – and had to relocate to a patch of land on a neighbouring island.⁵⁰⁴ Nothing about this Instagram Utopia is certain or fixed. Two competing documentary films, one made by Netflix, the other by Hulu, offer competing narratives about culpability for the festival's failure amid claims that the festival's marketing firm exerted too much influence over the Netflix film.⁵⁰⁵ Fyre's exit from what is turned out to be non-existent, and nobody can agree why. This is Utopia as negation, as neutralisation; as a representation of the contemporary impossibility of exiting or escaping from what is even when you have the money for the ticket.

Much of contemporary politics seems, like Brexit, to be driven by the desire for something 'other,' by a search for an exit from what is. In 2018 Brazil elected Jair Bolsonaro as its president. Offering something like an alternative to Brazil's recent history of corruption and political intrigue,⁵⁰⁶ Bolsonaro's political career involves flirtation with an end to the liberal democratic orthodoxy *via* "military dictatorship ... the death penalty ... easier access to guns...

⁴⁹⁹ See Hunter Harris, "Fyre Festival Was Terrible Before it Even Began" *Vulture*, 5th May 2017 <<https://www.vulture.com/2017/05/fyre-festival-fiasco-the-complete-timeline.html>> (last visited 2nd August 2019), outlining a timeline of Fyre Festival's development and failure.

⁵⁰⁰ Fyre Festival, "Announcing Fyre Festival" (n 498).

⁵⁰¹ See Harris (n 499).

⁵⁰² Olivia Ovenden, "Fyre Festival Was An Even Bigger Shitshow Than We Thought" *Esquire*, <<https://www.esquire.com/uk/culture/a25854517/fyre-festival-was-an-even-bigger-shitshow-than-we-thought/>> (last visited 2nd August 2019).

⁵⁰³ Zoe Kleinman, "Has Fyre Festival burned influencers?" *BBC News*, 22nd January 2019 <<https://www.bbc.co.uk/news/46945662>> (last visited 2nd August 2019).

⁵⁰⁴ See the Netflix documentary, "Fyre: The Greatest Party that Never Happened", <<https://www.netflix.com/gb/title/81035279>> (last visited 2nd August 2019).

⁵⁰⁵ See Josephine Livingstone, "Fyre Festival Was a Huge Scam. Is Netflix's Fyre Documentary a Scam, Too?" *The New Republic*, 12th February 2019 <<https://newrepublic.com/article/153095/fyre-festival-huge-scam-netflixs-fyre-documentary-scam-too>> (last visited 2nd August 2019).

⁵⁰⁶ On that recent history see Perry Anderson, "Bolsanaro's Brazil" (2019) 41(3) *London Review of Books* 11.

[and attacks on] leftists, homosexuals and other [perceived] enemies of society.”⁵⁰⁷ Brazil seems to prefer (perceived) authoritarian order, personified by a Twitter-campaigning strongman, to the continuing complexity and incoherence of democratic politics.⁵⁰⁸ This might seem more Dystopia than Utopia but it is worth remembering, as Juliette Werlin points out, that in More’s original text “rules operate seamlessly, with a uniform predictability that extends across every inch of territory and to every citizen living within its borders” within a rigid order of “[n]umbers:”⁵⁰⁹

The 54 cities of Utopia each contain 6,000 households, governed by 200 lower magistrates who are themselves supervised by 20 higher officials. Utopian citizens adhere to a fixed schedule: “dividing the day into twenty-four hours, appoint six of these for work, three of which are before dinner and three after; they then sup, and at eight o’clock counting from non, go to bed and sleep eight hours.” Outside the cities, utopians serve rotating two-year shifts working on farms, where they live in households of at least 40 men and women, plus two slaves.⁵¹⁰

Utopia as a highly structured, authoritarian society where order matters more than equality (noting the reference to “slaves”) – perhaps Bolsanaro would approve.

Turkey, under Recep Tayyip Erdoğan, is widely regarded as an authoritarian state. Ella George tells a tale of exit, after exit, after exit in recent Turkish history, interpreting Erdoğan’s agenda as a “counter-revolution,”⁵¹¹ an exercise in “setting the clock back not to the moment of the republic’s founding [in 1923] but a century earlier, before the modernising and Westernising reforms of the 19th century.”⁵¹² According to George, Erdoğan has a “fascination with the Ottomans” and with “Abdul Hamid II, the last sultan who had real control over the Ottoman Empire” in particular.⁵¹³ Whilst Erdoğan apparently regards Hamid as “a far-sighted reformer who would have modernised the state in ways consistent with indigenous Turkish traditions had he not been undermined by a Westernising clique,”⁵¹⁴ for George “Erdoğan’s Hamidian myths sanitise history” because:⁵¹⁵

Hamid was responsible for a period of unprecedented repression, suspending the constitution and dissolving parliament ... establish[ing] a network of informants and adopt[ing] a paranoid style of government that made him deeply unpopular... [in a] dark chapter of Ottoman history, known as the *istibdat* (“tyranny”) period.⁵¹⁶

⁵⁰⁷ Ibid 19.

⁵⁰⁸ See Anderson (n 506).

⁵⁰⁹ Juliette Werlin, “Nowhere Now: Thomas More’s “Utopia” at 500” *Los Angeles Review of Books*, <<https://lareviewofbooks.org/article/nowhere-now-thomas-mores-utopia-at-500/>> (last visited 2nd August 2019).

⁵¹⁰ Ibid.

⁵¹¹ Ella George, “Purges and Paranoia” (2018) 40(10) *London Review of Books* 22, 22

⁵¹² Ibid.

⁵¹³ Ibid 32.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

First comes an exit from the Ottoman period with the formation of the secular Republic in 1923.⁵¹⁷ After a few false starts, as challenges to Turkey's secularism were repressed in the late-1990s, comes the rise of the AKP – Erdoğan's political party – in the early 2000s and an attempt at Turkey's re-Ottomanisation.⁵¹⁸ George's account ends with the suggestion that opposition to Erdoğan is on the rise,⁵¹⁹ the negativity of anti-Erdoğanism seemingly overriding any sense of a positive next step. Flawed attempts to satisfy desires *via* blueprints generate disaffection, which leads to calls for an exit, which forms into a blueprint that fails to satisfy the exit-desire out of which it arose, which, in turn, inspires a desire for an exit from the most recent blueprint ...

The now-ness of a pervasive “desire called utopia”,⁵²⁰ of a groundswell of support “for exiting the series,”⁵²¹ is easily narrated. Take the Utopian negativity of Brexit and add one false revolution in medical testing (Theranos), a sprinkling of flawed attempt to create an island ‘paradise’ for millennials (Fyre), widespread public support for *and* opposition to the authoritarian pursuit of ‘order’, ‘stability’ and ‘progress’ (Bolsanaro, Erdoğan) and you have a sense (and only a sense) of contemporary negativity, of now's utopian anti-ness. This is a narrative – the global, collective truth is not available, not representable.⁵²² As a narrative this account self-consciously admits its failure to represent the lives, realities, and experiences of billions of people it unforgivably, yet unavoidably, fails to engage with. That does not make this narrative a mere fiction (which does not, of course, mean that it is a ‘fact’), just as Le Guin's and Robinson's science fiction is “fictive” without being mere fiction.⁵²³

Contemporary Utopian possibility lies in the attempt to maintain negativity and anti-ness, to move into and stay in a space or moment that calls for the creation of something else, something ‘next,’ even though its form and content are unimaginable. Despite their failure, hopelessness, and deceptiveness, in their sheer anti-ness Brexit, Theranos, Fyre, Bolsanaro's Brazil and Erdoğan's Turkey manifest a negative, iconoclastic utopianism. International law rejects such

⁵¹⁷ See *ibid* at 22.

⁵¹⁸ See *ibid* at 23 and generally.

⁵¹⁹ See *ibid* at 32.

⁵²⁰ Jameson, *Archaeologies* (n 449) ix (title page of part one of the book).

⁵²¹ “for exiting the series” – see Marin quotation at n 20.

⁵²² See Fredric Jameson, “War and Representation” in Fredric Jameson, *The Antinomies of Realism* (Verso, 2013) 232, 257: “The language of the existential individual already possesses an elaborate history with all kinds of stereotypes that it can be the task of representation to correct, disrupt, undermine or metaphysically challenge. That of the collective does not yet exist. Group, nation, clan, class, general will, multitude – all these remain so many linguistic experiments for designating an impossible collective totality, a manifold of consciousnesses as unimaginable as it is real.”

⁵²³ “fictive” – see text at n 406 to n 407 / Marin quotation in n 406. See Fredric Jameson, “The Historical Novel Today, Or, Is It Still Possible?” in Fredric Jameson, *The Antinomies of Realism* (Verso, 2013) 259, at 298: “[T]he historical novel of the future (which is to say of our own present) will necessarily be Science-Fictional inasmuch as it will have to include questions about the fate of our social system, which has become a second nature.” See also Fredric Jameson, “Coda: Kluge, or, Realism After Affect” in Fredric Jameson, *The Antinomies of Realism* (Verso, 2013) 187, at 189, noting “the impending crisis of the fictional” with reference to Thomas Mann's *Doktor Faustus*, this line having particular significance: “‘Only the non-fictional is still permissible, the unplayed, the undisguised and untransfigured expression of suffering in its actual moment.’” And see *ibid* at 190: “[T]he weakening of the fictional also tends to undermine its opposite number, the category of the factual.”

utopianism, preferring to neutralise attempts to neutralise what is by staying within its / the existing form(s), and it is in this sense that international law is a “degenerate utopia.”

4. *International Law and Louis Marin’s “Degenerate Utopia”*

If Utopia is “the name of the ‘neutral,’”⁵²⁴ and if “utopic practice ...[is] an ideological critique of the dominant ideology,”⁵²⁵ then “a degenerate utopia is ideology changed into the form of a myth.”⁵²⁶

A “degenerate utopia” counteracts the neutralising efforts of utopic practice by stabilising ideology in fixed, mythical form. International law, as an “ideological discourse,”⁵²⁷ is “a closed conceptual system” – treaties, state practice, *opinio juris*, *jus cogens*, obligations *erga omnes*, concepts of territory, statehood, jurisdiction – “[that] provid[es] a legitimizing ... justificatory representation of the world.”⁵²⁸ This is an image of legal texts, norms, institutions and processes as guarantors of order and harmony, as effective means of controlling and stabilising lives, realities, and events.

Under the banner of a “culture of formalism” Martti Koskenniemi’s work on international legal history and theory amounts to an “ideological discourse”-type understanding of international law.⁵²⁹ Formalism’s value, according to Koskenniemi, lies in its openness, its status as “a practice that builds on formal arguments that are available to all under conditions of equality.”⁵³⁰ Koskenniemi’s “culture of formalism” serves as a code of professional ethics, expressing the conviction that:

when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.⁵³¹

At its core, formalism means that “whether we like it or not, law is based on words, words formulated in statutes, in treaties, in conventions, in customary law.”⁵³² Those “words” create the structure within which legal practice operates, generating a sense of international law as a practice of “being ‘within’.”⁵³³ Koskenniemi’s approach seeks to discover qualifiedly utopian possibilities within the existing international legal structure.⁵³⁴

⁵²⁴ Marin, “Frontiers” (n 46) 411.

⁵²⁵ Marin, *Utopics* (n 4), xiv.

⁵²⁶ *Ibid* 239.

⁵²⁷ Marin, “Theses” (n 394) 71.

⁵²⁸ *Ibid*.

⁵²⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001) - see 494-509 on the “culture of formalism.” For my thoughts on Koskenniemi’s *oeuvre* more generally see Nicholson, “Psychoanalyzing” (n 81).

⁵³⁰ Koskenniemi *ibid* 501.

⁵³¹ *Ibid* 502.

⁵³² *Ibid* 498 (quoting Wolfgang Friedmann).

⁵³³ See the title of part 2(1) of this article, and Koskenniemi quotation (“within”) at n 94.

⁵³⁴ See text at n 83 and n 85.

Formalism's utopian moment lies in its resistance towards being reduced to structure (which is anyway indeterminate) or pure subjectivity ([Carl] Schmitt's "decision"), and in its identifying itself as a practice of decision-making that persists in time and through which the aspirations of self-determining communities remain alive – even as (or perhaps precisely because) the universal they embody remains only a "horizon."⁵³⁵

Whilst formalism may have some measure of "resistance" to "structure" it remains fundamentally structural; there is no form without structure, without *the* "words." Indeterminacies in international law's structure make international law "a practice of decision-making," and there are opportunities for "critique and contestation" within the gaps in the structure,⁵³⁶ but the structure fixes the scope of any decision and the limits of critique. There is nothing utopian, in Marin's and Jameson's sense, in this position. Implicitly opposing iconoclastic efforts to neutralise, negate, and write "World other," Koskenniemi understands Utopia as a limited opportunity for legal-professional creativity within what is, in the same way that visitors to Disneyland can only discover "Disney's utopia":

Disney's utopia really is not a utopia. ... [T]he visitors to Disneyland are put in the place of the ceremonial storyteller. They recite the mythic narrative of the antagonistic origins of society. Their path through the park is the narrative, recounted umpteen times, of the deceptive harmonization of contrary elements, of the fictional solution to conflicting tensions. By "acting out" Disney's utopia, the visitor "realizes" the ideology of America's dominant groups as the mythic founding narrative of their own society.⁵³⁷

Eugene D. Hill, commenting on Marin's Disneyland analysis, observes that "Disneyland ... [is] immobiliz[ed] in ideology ... function[ing] more like a myth: it papers over the contradictions instead of allowing them to 'play'."⁵³⁸ On Marin's analysis, play, movement, and the absence of fixity or form are central to Utopia.⁵³⁹ In international law the scope for such play and movement are heavily constrained by structures of "words," making international law a structured, ordered space of stabilisation, rather than a utopian space of neutralisation, negation and possibility.

Disneyland and international law appear utopian to their visitors by re-presenting extant reality in mythical form,⁵⁴⁰ "immobiliz[ing it] in ideology ... [and] paper[ing] over the contradictions."⁵⁴¹ Visitors are pulled into this ideology and reality's "contradictions" disappear from their view as they play a part in the presentation of the ideology they have paid to consume. "Disneyland is," according to Marin, "the representation of the makeup of

⁵³⁵ Koskenniemi, *Gentle Civilizer* (n 529) 508 (citing Ernesto Laclau).

⁵³⁶ "critique and contestation" – see Koskenniemi quotation at n 78.

⁵³⁷ Marin, *Utopics* (n 4) 240-241.

⁵³⁸ Eugene D. Hill, "The Place of the Future: Louis Marin and His 'Utopiques'" (1982) 9(2) *Science Fiction Studies* 167, 176.

⁵³⁹ Marin, *Utopics* (n 4) 246: "One of the essential functions of the utopic image is to make apparent a wish in a *free* image of itself, in an image that can play in opposition to the fantasy, which is an inert, blocked, and recurrent image."

⁵⁴⁰ *Ibid* 245: "[T]he visitor who has left reality outside finds it again, but as a real 'imaginary': a fixed, stereotyped, powerful fantasy."

⁵⁴¹ See Hill quotation at n 538.

contemporary American ideology” and that representation is “put into play” in the theme park as “‘stage’.”⁵⁴² “[T]his ‘stage’ ... is really not a stage” however, because “[t]he visitors to Disneyland” and to international law – those who invest international law with a supposed capacity to secure Utopia, who look to international law to address conflict, human rights abuse, or climate change, in a spirit much like that of the visitors who come to Disneyland in an effort to escape from external, non-Disney reality – “are on stage themselves ... actors in the performance in which they act ... captured, like a rat in a maze, and ... alienated by their part without being aware of performing a part.”⁵⁴³

The visitor becomes an actor in Disney’s show, passing through a series of limits that the theme park imposes on the world’s external reality. The first limit is the “parking lot” that symbolises “the visitor’s adjustment to a certain system of signs and behaviour, the system of playful symbols, the free field of consumption for nothing, the *passeist* and aleatory tour *in* the show.”⁵⁴⁴ Next comes the “ticket booths” where the visitor buys “Disneyland money, with which they can take part in ‘utopian’ life.”⁵⁴⁵ Visitors are divorced from the real world, “leaving behind the car ... [and] abandon[ing] their money,”⁵⁴⁶ in a process that “[n]eutraliz[es] both the car and money,”⁵⁴⁷ just as the student of international law leaves the ‘real’ world behind as she learns the language of consistent and uniform state practice and *uti possidetis juris*.

The centre of Disneyland, Main Street USA, is “the locus of [Disneyland’s] ... societal truth – consumption,”⁵⁴⁸ somewhere to “buy, in a nineteenth-century American decor, actual and real commodities with ... real, actual money.”⁵⁴⁹ Main Street USA leads visitors into Fantasyland where visitors encounter “images, characters, and animals of the tales illustrated by Disney in his animated films,”⁵⁵⁰ many “made living by their transformation into real materials ... and through their animation by men and women disguised as movie or storybook characters.”⁵⁵¹ In Fantasyland “[i]mage ... becomes real, but ... reality is [also] changed into image” so that “the visitor who .. left reality outside finds it again ... as a real ‘imaginary’: a fixed, stereotyped, powerful fantasy.”⁵⁵² Here the visitor’s Utopian “wish is caught in [fantasy’s] ...snare” as “[t]he other side of reality is presented ... in the form of banal, routine images of Disney’s films ... the bankrupt signs of an imagination homegenized by the mass media.”⁵⁵³ Marin defines “the fantasy” at work here as “an inert, blocked, and recurrent image” associated with “the collective, totalitarian form taken by the ‘imaginary’ of a society, blocked by its specular [mirror-like] self-image.”⁵⁵⁴

⁵⁴² Marin, *Utopics* (n 4) 240.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid 242 (emphasis in original).

⁵⁴⁵ Ibid 242-243.

⁵⁴⁶ Ibid 243.

⁵⁴⁷ Ibid 244.

⁵⁴⁸ Ibid 247.

⁵⁴⁹ Ibid 247.

⁵⁵⁰ Ibid 245.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ Ibid 246.

⁵⁵⁴ Ibid 246.

“Disneyland is on the side of the fantasy and not on that of a free or utopic representation.”⁵⁵⁵ There is nothing negative – nothing that negates – in Disneyland. Visitors are offered a fantastical representation of reality, an image of America’s industrial-technological society, a quasi-religious celebration of reality’s human-ness. Frontierland, with its “mule-train mines of precious metals and steamboats on the Mississippi,”⁵⁵⁶ celebrates “penetration into and victory over the lands of the first inhabitants,”⁵⁵⁷ a monument to “the ever-increasing American appropriation of land and resource.”⁵⁵⁸ Adventureland represents “the outside geographical world” with “primitive cannibals rising on the riverbanks [who] seem to repeat the gestures that Indians made in Frontierland.”⁵⁵⁹ America’s history, as represented in Frontierland, and the geography of places beyond America, as represented in Adventureland, are “assimilated” and “neutralized” by their fantastical representation to Disneyland’s visitors;⁵⁶⁰ history and geography are brought within and made subject to human cognition and control as aspects of “a *human world*, entirely made by the human mind.”⁵⁶¹

In the final stage of Disneyfication, Tomorrowland offers the visitor an image of the future centred on “the Carousel of Progress, a gift of the General Electric Corporation”.⁵⁶²

[T]he visitor becomes a spectator, immobilized and passive, seated in front of a circular and moving stage that shows successive scenes taken from family life in the nineteenth century, in the beginning of the twentieth century, today, and tomorrow. It is the *same* family that is presented in these different historical periods; the story of this “permanent” family is told to visitors, who no longer narrate their own story. History is neutralized; the scenes only change in relation to the increasing quantity of electric implements, the increasing sophistication of the utensil-dominated human environment. ... Men and women adapt perfectly to this environment and “act” mechanically.⁵⁶³

Disneyland enacts “[t]he Myth of Technological Progress.”⁵⁶⁴ The frontier is overcome, the outside is brought inside, and the future is mapped through technologies that guarantee the human-ness of all reality, securing “a [past, present and future] *human world* [that is] entirely made by the human mind.”⁵⁶⁵

Like Disneyland, international law offers “the fictional solution to conflicting tensions”.⁵⁶⁶

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid 250.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid 250: “These two districts represent the distances of history and geography, the distance represented inside America in the first [Frontierland], and the distance represented outside in the second [Adventureland]. They are both assimilated because they are shown on the same stage, so to speak; they are thereby neutralized.”

⁵⁶¹ See Allott quotation at n 163.

⁵⁶² Marin, *Utopics* (n 4) 251.

⁵⁶³ Ibid 255.

⁵⁶⁴ Ibid 254.

⁵⁶⁵ See Allott quotation at n 163.

⁵⁶⁶ See Marin quotation at n 537.

[I]nternational law's value and its misery lie in its being the fragile surface of political community among social agents – States, other communities, individuals – who disagree about their preferences but do this *within a structure* that invites them to argue in terms of an assumed universality.⁵⁶⁷

The assumption of this “universality” means that an international legal “Utopia is perfectly present, but ... only as a representation ... [whose] harmony exists only on [international law's] ... [Disney-like] stage,”⁵⁶⁸ on its “fragile surface.” “[T]he work of utopic fiction” – the utopian aspirations for “World other” illustrated in the work of authors like Le Guin and Robinson – “is embedded and immobilized in an ideological figure” – in the formal structure of international law – “restrict[ing utopia's] ... play so that it no longer represents the true conflicts men and women imagine themselves having.”⁵⁶⁹

In international law's formal structure, as in Disneyland's theme park, the possibility of a utopian neutralisation of what is in pursuit of “World other” is neutralised by fantastical, degenerate representations of contemporary reality as Utopia. The UN Charter offers the fantasy of a unified global community – “We the peoples of the United Nations”⁵⁷⁰ – neutralising the possibility of a truly utopian response to inter-national conflict, grounded in the history of the “true conflicts” between peoples. Despite the probability of global temperature rises in excess of 1.5°C in the relatively short term (2030 to 2052) and the catastrophic consequences that will result,⁵⁷¹ the UNFCCC system – the United Nations Framework Convention on Climate Change (1992),⁵⁷² the Kyoto Protocol (1997),⁵⁷³ and the Paris Agreement (2015)⁵⁷⁴ – continues to pursue the objective of “prevent[ing] dangerous anthropogenic interference with the climate system.”⁵⁷⁵ In doing so the UNFCCC system, like Disneyland, operates “on the side of the fantasy and not on that of a free or utopic representation” of extant reality and the imperative for “World other.”⁵⁷⁶

The same can be said of the Convention on Biological Diversity (‘CBD’).⁵⁷⁷ The CBD's preamble affirms 196 states parties’ “[d]etermin[ation] to conserve and sustainably use biological diversity for the benefit of present and future generations.”⁵⁷⁸ In 2010 parties to the

⁵⁶⁷ Koskenniemi, “What is International Law For?” (n 94) 48 (also quoted at n 94) (emphasis added).

⁵⁶⁸ Marin, *Utopics* (n 4) 248.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Charter of the United Nations (n 372), preamble.

⁵⁷¹ See part 2, section 4.2 (“The Changing Climate”) above.

⁵⁷² United Nations Framework Convention on Climate Change (‘UNFCCC’), New York, 9th May 1992, 1771 UNTS 107, available at <<https://unfccc.int/resource/docs/convkp/conveng.pdf>> (last visited 2nd August 2019).

⁵⁷³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11th December 1997, 2303 UNTS 162, available at <<https://unfccc.int/resource/docs/convkp/kpeng.pdf>> (last visited 2nd August 2019).

⁵⁷⁴ Paris Agreement, (n 298).

⁵⁷⁵ UNFCCC (n 572), Article 2.

⁵⁷⁶ “on the side of the fantasy ...” – see Marin quotation at n 555. I have addressed the viability of the UNFCCC system in previous work, developing a similar analysis to that offered here in Nicholson, “Walter Benjamin” (n 383) 113-114.

⁵⁷⁷ Convention on Biological Diversity (‘CBD’), Rio de Janeiro, 5th June 1992, 1760 UNTS 79.

⁵⁷⁸ *Ibid.*, preamble. On the number of state parties see Secretariat of the Convention on Biological Diversity, <<https://www.cbd.int/information/parties.shtml>> (last visited 2nd August 2019, and number of states parties quoted (196) accurate at that date).

CBD adopted a set of targets – the “Aichi Biodiversity Targets”⁵⁷⁹ – designed to address ongoing global biodiversity loss. The approach taken is illustrated in these two targets:

Target 5: By 2020, the rate of loss of all natural habitats, including forests, is at least halved and where possible brought close to zero, and degradation and fragmentation is significantly reduced.⁵⁸⁰

Target 11: By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.⁵⁸¹

A 2014 assessment of progress towards the Aichi targets in the journal *Science* was pessimistic: “[D]espite accelerating policy and management responses to the biodiversity crisis, the impacts of these efforts are unlikely to be reflected in improved trends in the state of biodiversity by 2020.”⁵⁸² The authors’ “projections indicate[d] no significant improvement or a worsening situation by 2020, relative to 2010,”⁵⁸³ and they concluded that “efforts need to be redoubled to positively affect trajectories of change and enable global biodiversity goals to be met by the end of the current decade.”⁵⁸⁴ This 2014 conclusion is all the more negative when seen in the context of the CBD parties’ failure to achieve their previous 2002 target of a significant reduction in the rate of biodiversity loss by 2010.⁵⁸⁵

Notwithstanding past and (in 2014) projected future failure to meet global biodiversity targets, a May 2018 paper in *Science* calls for another set of global biodiversity targets, using the Paris Climate Change Agreement as a template for a new “global deal.”⁵⁸⁶ The IPCC’s report on the impacts of global warming above 1.5°C, discussed above,⁵⁸⁷ was released in October 2018, approximately five months after this *Science* paper’s publication. The October report makes the improbability of achieving the Paris climate targets, and the inadequacy of those targets even if they are achieved, clear.⁵⁸⁸ And yet, at around the same time, the May 2018 *Science*

⁵⁷⁹ Aichi Biodiversity Targets, <<https://www.cbd.int/sp/targets/>> (last visited 2nd August 2019). The targets were adopted in Convention on Biological Diversity “COP [Conference of the Parties] 10 Decision X/2,” <<https://www.cbd.int/decision/cop/?id=12268>> (last visited 2nd August 2019).

⁵⁸⁰ Aichi Biodiversity Targets, *ibid.*

⁵⁸¹ *Ibid.*

⁵⁸² Derek P. Tittensor, Matt Walpole, Samantha L. L. Hill, Daniel G. Boyce *et. al.*, “A mid-term analysis of progress toward international biodiversity targets” (2014) 346 (6206) *Science* 241, 241.

⁵⁸³ *Ibid.* 242.

⁵⁸⁴ *Ibid.* 244.

⁵⁸⁵ Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (Montreal, 2010), <<https://www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf>> (last visited 2nd August 2019), at 5 (“Foreword by the United Nations Secretary-General”): “In 2002, the world’s leaders agreed to achieve a significant reduction in the rate of biodiversity loss by 2010. Having reviewed all available evidence, including national reports submitted by Parties, this third edition of the *Global Biodiversity Outlook* concludes that the target has not been met.”

⁵⁸⁶ Edward B. Barbier, Joanne C. Burgess, and Thomas J. Dean, “How to pay for saving biodiversity: Can private sector involvement in a global agreement help to conserve global biodiversity?” (2018) 360 (6388) *Science* 486.

⁵⁸⁷ See text at n 298 to n 303.

⁵⁸⁸ See *ibid.*

paper is optimistic about the “flexible architecture” of the Paris Agreement and the possibility of combining that architecture with an enhanced contribution from the private sector:⁵⁸⁹

[I]f they join the [new global biodiversity] accord [that the 2018 paper calls for], leading corporations and associations in the sea-food, forestry, agricultural, and insurance industries should be involved in establishing the targets for marine, terrestrial, and coastal habitat and biodiversity conservation. ... [A]s part of the global agreement for biodiversity, individual companies should pledge their own business targets, policies, and timelines for attaining the overall industry goal.⁵⁹⁰

Thought and action have become so insulated from the fundamental, systemic nature of present reality, so dominated by postmodern consumption and commodification,⁵⁹¹ that even in the face of an inescapably systemic environmental crisis and a failure to achieve past global biodiversity targets an extension of the extant system’s consumptive, commodified, corporate logic is seen, in this May 2018 paper, as the appropriate response. The reality of a future which does not involve ever increasing rates of biodiversity loss is represented, formalised and institutionalised in the CBD’s texts, processes, and secretariat so that it “becomes real, but ... [in the process] reality is [also] changed into image”;⁵⁹² so that global social and political engagement with biodiversity loss becomes a formal, legal, technical exercise of targets, targets, and more targets. In this way the CBD operates “on the side of the [stultifying, self-perpetuating] fantasy” that global biodiversity loss can be addressed in ways that do not involve direct confrontation with *the* system of commodification and consumption.⁵⁹³ In this way, like the UN Charter and the UNFCCC system, the CBD is “an inert, blocked and recurrent image,”⁵⁹⁴ a “degenerate utopia.”

The UN’s Sustainable Development Goals (‘SDGs’) are perhaps the most compelling example of international legal governance and norm-setting as a Disney-esque “degenerate utopia.” Reviving the UN Charter’s “[w]e the peoples” for the twenty-first century – despite being authored by “the Heads of State and Government and High Representatives, meeting at the United Nations Headquarters in New York from 25 to 27 September 2015”⁵⁹⁵ – the SDGs insist that “it is ‘we the peoples’ who are embarking ... on the road to 2030” through “an Agenda of the people, by the people and for the people.”⁵⁹⁶ Promising a utopia of “‘win-win’ cooperation which can bring huge gains to all countries and all parts of the world,”⁵⁹⁷ this is a “Tomorrowland” of unprecedented global co-operation and progress across the full range of

⁵⁸⁹ Barbier *et. al.*, (n 586) 487.

⁵⁹⁰ *Ibid* 488.

⁵⁹¹ On the “fundamental, systemic nature of present reality” and “postmodern consumption and commodification” see text at n 33 to n 43.

⁵⁹² “becomes real ...” – see Marin quotation at n 552.

⁵⁹³ “on the side ...” – see Marin quotation at n 555.

⁵⁹⁴ Marin, *Utopics* (n 4) 246.

⁵⁹⁵ United Nations General Assembly Resolution 70/1, “Transforming our world: the 2030 Agenda for Sustainable Development,” UN Doc A/Res/70/1, available at <<http://research.un.org/en/docs/ga/quick/regular/70>> (last visited 2nd August 2019), paragraph 1.

⁵⁹⁶ *Ibid*, paragraph 52.

⁵⁹⁷ *Ibid*, paragraph 18.

governance issues (poverty, food security, gender equality, access to water, energy security, and climate change, to name just some).⁵⁹⁸

The SDGs commit the “peoples” of the world to, for example, “[e]nd[ing] poverty in all its forms everywhere” / “[b]y 2030, eradicat[ing] extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.”⁵⁹⁹ The two versions of the goal – one without the qualifier “extreme” and the quantifier “\$1.25 a day,” the other with – reflect the need for a poster version, on sale in something like the Main Street USA gift shop,⁶⁰⁰ and a policy-speak version for implementation and verification. After all, outright opposition to “poverty” *per se* sells better than mere qualified opposition to “extreme poverty.”

The SDGs respond indirectly to Philip Allott’s call for a “re-imagin[ation of] the human world.”⁶⁰¹ They are a programme, akin to Allott’s draft treaties in *Eunomia*,⁶⁰² based on the assumption that reality is human and that a better world can be built through the codification of collective intentions.⁶⁰³ Allott’s faith in a unified global community is more strident than the SDGs’ – he prefers “we, the people” to the UN Charter’s and SDGs’ “we the peoples” because,⁶⁰⁴ in his view, “[i]nternational society is the society of the whole human race and the society of all societies.”⁶⁰⁵ But the phrasing in his 1990 draft treaties (“[w]e undertake to do everything possible to eliminate the practice of war”) anticipates the tone and style of the SDGs (“[w]e are determined to end poverty and hunger, in all their forms and dimensions”).⁶⁰⁶

Like Disneyland, the SDGs re-present extant reality as a fantasy of ongoing human progress: “Within the past generation, hundreds of millions of people have emerged from extreme poverty ... The spread of information and communications technology and global interconnectedness has great potential to accelerate human progress.”⁶⁰⁷ In the SDGs there is no sense that the causes of poverty, environmental degradation, or food shortages are systemic; that the conditions in which human beings live are, ultimately, the product of processes of industrialisation, production and commodification that might be bound together under the label ‘capitalism.’ The SDG’s fantasy is sustained and promoted by Project Everyone, “a team of communications and campaigns specialists” founded by film director Richard Curtis (*Four Weddings and A Funeral*, *Love Actually*), “who sit at the heart of a global network of campaigning organisations, private sector partners, brands, governments, UN agencies, public figures, and social influencers.”⁶⁰⁸

⁵⁹⁸ “Tomorrowland” – see text at n 562 to n 563.

⁵⁹⁹ United Nations General Assembly Resolution 70/1 (n 595), “Goal 1” at 12.

⁶⁰⁰ “Main Street USA” – see text at n 548 to n 549.

⁶⁰¹ See Allott quotation at n 125.

⁶⁰² See text at n 140, n 141 and n 142.

⁶⁰³ See Allott quotation at n 163.

⁶⁰⁴ “we, the people” – see Allott quotation at n 139.

⁶⁰⁵ Allott, *Eunomia* (n 11) 411 (paragraph 19.27, original in italics).

⁶⁰⁶ “We undertake to do everything possible...” – see Allott quotation at n 141; “We are determined to end poverty ... – United Nations General Assembly Resolution 70/1 (n 595) (‘Preamble,’ under ‘People’).

⁶⁰⁷ United Nations General Assembly Resolution 70/1 (n 595), paragraph 15.

⁶⁰⁸ See Project Everyone, <<http://www.project-everyone.org/>> (last visited 2nd August 2019).

The Global Goals website, constructed by Project Everyone, features one brightly coloured square for each SDG in a format similar, in style and presentation, to Fyre festival’s orange tile.⁶⁰⁹ Each square contains a few words for each SDG – “No Poverty,” “Zero Hunger,” “Good Health and Well-Being,” “Quality Education,” “Gender Equality.”⁶¹⁰ The website lists “Bill and Melinda Gates Foundation Goalkeepers” – Ed Sheeran (musician), Emmanuel Macron (President of France), Erna Solberg (Prime Minister of Norway), Melinda Gates (“global advocate for women and girls”).⁶¹¹ Results are measured in the fantastical reality of metrics and “top-tier media” engagement, rather than through peoples’ lived experiences:

Impact and Results: This year [2018] more than 80 journalists from around the world participated in the events and awards, with 300 original stories and opinion pieces written. The event and report were covered by top-tier media titles such as CNN, Vox, Quartz, The Financial Times, The New York Times, National Geographic, Elle, NPR and many more. In addition, over 859k digital engagements with the report content were tracked, 25 million engagements with content from the event, and 530 meaningful actions taken by the Goalkeepers to progress the Goals [the term “meaningful actions” is not defined].⁶¹²

As “on [Disney’s] Main Street USA ... reality reemerges in a mediated system of collective representations and figures.”⁶¹³ In Disneyland, “as the cartoons become real, they also deform and disguise reality,”⁶¹⁴ and the same can be said of the SDGs, with their reduction of reality to metrics, “digital engagements” and “meaningful actions.”

In March 2019 it was reported that students on the ‘Internet and New Media’ course at China’s Henan University were required to make at least one thousand new friends on Chinese social media app WeChat in order to pass an assignment.⁶¹⁵ The thinking behind that assignment echoes Project Everyone’s media(ted), metricised logic. Distinguishing lived experience from metrics, a student on the course reportedly commented “WeChat friends are not equal to real friends. Is this not just malicious marketing?”⁶¹⁶ Even if it is there is a very real market for this unreality, as the South China Morning Post reports:

Some people ... have bought the accounts of WeChat users to mine for data and to use as part of click farms to inflate traffic ... [with] a one month-old WeChat account [selling] for

⁶⁰⁹ See text at n 502.

⁶¹⁰ See Global Goals, <<https://www.globalgoals.org/>> (last visited 2nd August 2019).

⁶¹¹ See Gates Foundation, <<https://www.gatesfoundation.org/goalkeepers/>> (last visited 2nd August 2019).

⁶¹² Project Everyone, <<http://www.project-everyone.org/case-studies/goalkeepers-2018/>> (last visited 2nd August 2019).

⁶¹³ Marin, *Utopics* (n 4) 248.

⁶¹⁴ Ibid.

⁶¹⁵ Sarah Jenkins and Kerry Allen, “Chinese students graded on number of WeChat friends,” 13th March 2019, *BBC Trending*, <<https://www.bbc.co.uk/news/blogs-trending-47554676>> (last visited 2nd August 2019); Lee Jeong-ho, “Chinese university puts students to WeChat test to pass social media course,” 17th March 2019, *South China Morning Post*, <<https://www.scmp.com/news/china/society/article/3002055/chinese-university-puts-students-wechat-test-pass-social-media>> (last visited 2nd August 2019).

⁶¹⁶ Jenkins and Allen, n 615.

around 55 yuan (US\$8.19) but a two year-old WeChat account with real-name registration ... [potentially] cost[ing] around 230 yuan.⁶¹⁷

Borrowing language from Susan Marks' analysis of the human rights movement – and, to be clear, Marks is not discussing the SDGs here – the SDGs, like the CBD and the UNFCCC system, “keep the focus fixed on individual decisions, policies and behaviours ... [becoming] bound up with the processes of systemic self-reproduction.”⁶¹⁸ As Marks notes “change unfolds within a context that includes systematic constraints and pressures,”⁶¹⁹ and yet the SDGs maintain that with sufficient will and cooperation “the journey [will be] ... successful and its gains irreversible.”⁶²⁰ Such “voluntarist modes of thought ... mask the systematicity, and in that sense necessity, of existing configurations of forces and relations”⁶²¹ – the systemic causes of poverty, exclusion, domination, environmental degradation, and inequality – creating a “degenerate utopia,” a fantastical, theme park re-presentation of reality that neutralises utopian efforts to negate the extant system.

Part 4: Towards “World other”

1. *Exiting International Law's Series*

Thomas Skouteris highlights the structural importance of progressive rhetoric in international law, in an effort to “begin a debate about how [international law's] ... professional community constructs / is constructed by progress narratives.”⁶²² Skouteris considers notions of progress in the interwar work of Greek international lawyer Stelios Seferiades, international law's doctrine of sources, and recent growth in the number of international courts and tribunals. He concludes that by “[r]evealing the exclusions of progress narratives and contesting their exclusive right to speak the world ‘as it is’” discourse analysis, of the kind undertaken in his book, is a valuable form of “action.”⁶²³ His analysis operates “within” international law's structure,⁶²⁴ reflecting Koskenniemi's call for “critique and contestation” by opening that structure up to debate and challenge.⁶²⁵

The “degenerate utopia” perspective presented here is sceptical about the value of such critical inquiries. In opposition to the analysis of existing international legal structures, the analysis offered here posits the admittedly disturbing notion that any understanding of international law limited to its existing, discursive structure will, to a greater or lesser extent, support its continued operation as a distracting fantasy, diverting attention away from the very real imperative for “World other” concretised in the contemporary reality of climate change. Any

⁶¹⁷ Lee Jeong-ho, n 615.

⁶¹⁸ Susan Marks, “Human Rights and Root Causes” (2011) 74(1) *Modern Law Review* 57, 72.

⁶¹⁹ *Ibid* 74.

⁶²⁰ United Nations General Assembly Resolution 70/1 (n 595) paragraph 53: “The future of humanity and of our planet lies in our hands ... We have mapped the road to sustainable development; it will be for all of us to ensure that the journey is successful and its gains irreversible.”

⁶²¹ Marks, “Human Rights” (n 618) 74.

⁶²² Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press, 2010) v.

⁶²³ *Ibid* 229, and see 227-230 and 218 (“Discourse analysis as action”).

⁶²⁴ “within” – see Koskenniemi quotation at n 94, and part 2(1) of this article in general.

⁶²⁵ “critique and contestation” – see Koskenniemi quotation at n 78.

form of blueprint utopianism – Cassese’s, Koskenniemi’s, Allott’s or Moyn’s – misunderstands the utopian inheritance of literature stretching from Thomas More to Ursula Le Guin and Kim Stanley Robinson,⁶²⁶ presenting Utopia as something to be planned and created when its true, creative function is to hold open the possibility of an exit from or neutralisation of extant social, political, economic and cultural conditions.⁶²⁷

In previous work, and in opposition to Susan Marks’ emphasis on the need to understand why international law is as it is, I have argued for attempts to write another international law into being, calling for a re-imagining of international law.⁶²⁸ A re-imagined international law would step beyond existing forms, established traditions and consolidated cultures and, whilst I did not use the language of iconoclasm or utopianism in making that argument, its rejection of existing international law is both iconoclastic and utopian. My argument in this article is, in a sense, a continuation and development of my earlier re-imagining argument, and it re-plays and develops the disagreement, explored as part of my re-imagining argument, with Marks’s emphasis on “explanatory analysis.”⁶²⁹

As a critical perspective Marks’ concept of “false contingency” is an invaluable tool for the critique of voluntarist, blueprint perspectives that pay insufficient attention to the social, political, cultural and economic factors that limit prospects for fundamental change.⁶³⁰ If, however, any capacity international law may have to foster fundamental change is neutralised by the discursive formation of international legal fantasies or “degenerate utopias” that represent reality as “an inert, blocked, and recurrent image” (the UNFCCC system or the SDGs for example),⁶³¹ then analysis of existing structures is insufficient. What is needed, instead, is a theory of the form of practice required to move from what is towards “World other.” On that basis I argue that the utopic practice theorised and illustrated in Marin’s, Jameson’s, Robinson’s and Le Guin’s work – a practice that actively seeks to get outside the existing structure in an effort to explore the “possibilit[ies] above [the existing] order”⁶³² – is preferable to critical perspectives, including Marks’ argument for “explanatory analysis,” that operate within existing international legal discourse.⁶³³

⁶²⁶ See text at n 388 to 391.

⁶²⁷ See text at n 20, n 379, and part 3, section 3 (“Finding the Exit...”).

⁶²⁸ See Nicholson, “Walter Benjamin” (n 383) 109: “In contrast with Marks’ materialist concern to understand ‘why’ international law is as it is, I take the relatively idealist position that it is possible to think and write an international law that transcends its current anxiety of influence [that is, its anxiety to be faithful to disciplinary influences – methods, practices, texts – from the past] into being.”

⁶²⁹ Marks, “Human Rights” (n 618) 77.

⁶³⁰ On “false contingency” see text at n 217 and n 618 to n 621. See also my treatment of Marks’s work and “false contingency” in Nicholson, “Walter Benjamin” (n 383) 108-109.

⁶³¹ See Marin quotations at n 554 and n 594.

⁶³² See Adorno quotation at n 62.

⁶³³ See Nicholson, “Walter Benjamin” (n 383) 108: “It is only by risking the discipline [of international law], by abandoning [quoting Benjamin] “the intention of preserving the law itself”, that we can truly address international law’s violence.” See also *ibid* 109: “Re-imagining insists that we can make international law into something different from its current material reality by writing that something different into being. Whilst writing it into being will not bring it into being as a material reality – and, in that sense, I agree with Marks that “the meaning of emancipation is not a matter of scholarly fiat but a process of social struggle” [quoting Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP, 2000), 137] – writing is the necessary first step to living it.”

In recent work, co-authored with Andrew Lang, Marks advocates fundamental change in international legal discourse, noting the need for a “remaking of the frameworks of knowledge which structure [international lawyers’] ... engagement with the world.”⁶³⁴ Writing in 2017 Lang and Marks suggest that Walter Benjamin’s work might hold the key to a re-invention of international legal history “not simply as a set of facts to be known, but as a force to be felt, a secret sympathy to be sensed, and an occasion to be grasped for producing new artefacts that might be used to activate new connections”;⁶³⁵ a re-invention driven by the conviction that “[w]e *can* seize the past and bring it into active relation to the present.”⁶³⁶ Writing in 2015, I argued for a Benjaminian, “allegorical-representational” practice of international law in which:

there is no set of texts or concepts which the [international legal] practitioner must use; the responsibility for constellating texts, concepts, aspects or fragments of reality to be included in or excluded from [each international legal] representation rests with the practitioner. Everything ever written or created by anyone, anywhere and everything that exists or has ever existed is a potential fragment, to be included in or excluded from the representation. The allegorical-representational practitioner must “immerse himself in the real in order to dislodge its objective interpretation” ... for “truth content is only to be grasped through immersion in the most minute details of subject-matter.”⁶³⁷

Lang and Marks see critical, transformative potential in Koskenniemi’s attachment to international legal form and tradition, embracing the notion that international law “is made up of beliefs, practices, habits and unwritten rules which are handed down and carried forward within the community of international lawyers.”⁶³⁸ They suggest that “Lauterpacht” – that is, early-to-mid twentieth century international lawyer Hersch Lauterpacht, whose work Koskenniemi considers in the process of building a sense of international law’s form and culture ⁶³⁹ – “becomes a ‘bridge’ which connects us to the past ... not just in a symbolic way, but also through our senses.”⁶⁴⁰

Whilst Lang and Marks explore the possibility of “producing new artefacts” out of and from within international legal history,⁶⁴¹ I argue that a genuine re-imagination of international law can only be achieved after an exit from the established formal, cultural boundaries of international law. Consistent with that argument, I propose a re-orientation in thinking about international law’s ontology, away from an emphasis on form and tradition and towards the notion that international law is a Benjaminian “‘idea’ ... (re)formed in and by every representation,”⁶⁴² in and by every international legal argument, every “presentation of an

⁶³⁴ Andrew Lang and Susan Marks, “People With Projects: Writing the Lives of International Lawyers” (2013) 27(2) *Temple International and Comparative Law Quarterly* 437, 452.

⁶³⁵ Andrew Lang and Susan Marks, “Even the Dead Will Not Be Safe: International Law and the Struggle Over Tradition” in Wouter Werner, Marieke De Hoon, and Alexis Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017) 321, 335.

⁶³⁶ *Ibid* (emphasis in original).

⁶³⁷ Nicholson, “Walter Benjamin” (n 383) 119-120 (quoting Beatrice Hanssen and Walter Benjamin).

⁶³⁸ Lang and Marks, “Even the Dead” (n 635) 322.

⁶³⁹ See Koskenniemi, *Gentle Civilizer* (n 529) 353-412.

⁶⁴⁰ Lang and Marks, “Even the Dead” (n 635) 327.

⁶⁴¹ *Ibid* 335.

⁶⁴² Nicholson, “Walter Benjamin” (n 383) 124.

image of what is, what was, and what should be to an audience.”⁶⁴³ This approach, in line with Marin’s emphasis on “exiting the series”,⁶⁴⁴ is iconoclastically utopian: it is more interested in “the possibility above [the extant] order” than in exploring the history of the extant order.⁶⁴⁵

Consistent with Lang’s and Mark’s emphasis on “remaking” the structure of international legal practice,⁶⁴⁶ Marks explains her analysis of the human rights system as a structure of “planned misery” – “misery that belongs with the logic of particular socio-economic arrangements”⁶⁴⁷ – in terms of:

an emphasis on materialist explanations ... that account for phenomena not only in terms of the ideas informing them, but also in terms of their connections to processes of social production ... [involving an effort] to delve deeper and ask about the socio-economic conditions within which ... ideas were able to develop and gain influence.⁶⁴⁸

For Marks, this approach has a “repoliticising thrust ... geared less to problem-solving and the elaboration of remedial proposals ... than to the strategic task of channelling grievances into organised and coherent action.”⁶⁴⁹ Acknowledging that this kind of “explanatory analysis cannot itself specify the forms of [organised and coherent] ... action,”⁶⁵⁰ Marks argues that it “can be understood in ways that contribute more and less to effective political mobilisation.”⁶⁵¹

To be in any sense “effective” the “explanatory analysis” that Marks promotes would need to generate “political mobilisation” capable of undermining the “mediated system” behind campaigns like Project Everyone’s Global Goals initiative.⁶⁵² Explanatory analysis and attempts to “[produce] new artefacts” by “activat[ing] new connections” in international legal history cannot,⁶⁵³ I suggest, contend with the commodified, consumerist power – the sheer marketability – of blueprints and “degenerate utopias.” Academic critique of, for example, the “false contingency” behind campaigns like Project Everyone is as intellectually sound as it is socially and politically ineffective.⁶⁵⁴ ‘No poverty’ is a more saleable slogan, than, say, ‘let’s investigate the social, economic, political, cultural and historic causes of global poverty’ – the short version may lack explanatory power but the long version would not fit on a Fyre-style orange tile.⁶⁵⁵

International lawyers ‘buy’ and invest in utopian blueprints, as the analysis in part two shows, and SDG-type, target-based global governance projects are a global industry. Critical projects within international legal history and “explanatory analysis” of extant social and political

⁶⁴³ Ibid 123.

⁶⁴⁴ See Marin quotation at n 20.

⁶⁴⁵ See Adorno quotation at n 62.

⁶⁴⁶ See quotation at n 634.

⁶⁴⁷ Marks, “Human Rights” (n 618) 75.

⁶⁴⁸ Ibid 76.

⁶⁴⁹ Ibid 76-77.

⁶⁵⁰ Ibid 77.

⁶⁵¹ Ibid.

⁶⁵² “mediated system” – see Marin quotation at n 613, and see text at n 608 to n 613 generally.

⁶⁵³ “artefacts” / “connections” – see Lang and Marks quotation at n 635.

⁶⁵⁴ On “false contingency” see text at n 217 and at n 618 to n 621.

⁶⁵⁵ “orange tile” – see text at n 502.

structures seem grounded in the supposed susceptibility of marketised reality to rational inquiry, as though that reality was an aspect of social, political and cultural life. *The postmodern reality is, however, that the market, with its processes of commodification and consumption, sets the terms of contemporary social, political and cultural life, including the limits of what can be achieved through intellectual, explanatory, historical inquiry.*⁶⁵⁶ The starting point, in these lamentable circumstances, lies not in intellectual analysis *per se* but in an attempt to identify – as my argument for the re-imagining of international law attempts to do – an approach to international law that connects with the contemporary fashion for and sheer marketability of “exiting the series”.⁶⁵⁷

The foregoing analysis of international legal blueprintism, international law as a “degenerate utopia,” and the limitations of critical and historical inquiry within international law, combined with contemporary, postmodern, marketized conditions and the realities of climate change, lead me to suggest that iconoclastic utopianism is the *only* way to maintain the idea that international law offers a path towards a better future. That path runs *via* an exit from what is towards an unspecified, unknowable “World other.” As fantasy and science fiction author China Miéville puts it, “if we take utopia seriously, as a total reshaping, its scale means we can’t think it from this side. It’s the process of making it that will allow us to do so.”⁶⁵⁸

Iconoclastic Utopias, involving a run to an exit that leads who-knows-where, sell – think Brexit, Theranos, Fyre, Bolsanaro’s Brazil, Erdoğan’s Turkey. In his analysis of U.S. mega-retailer Wal-Mart as a curiously utopian entity Fredric Jameson highlights Utopia’s contemporary retail value.⁶⁵⁹ My ultimate point, inspired by Jameson’s Wal-Mart example, and elaborated in the next and final section, is that for international law to play any role in the creation of “World other” it needs to become an iconoclastic marketing tool, representing and promoting a utopian exit from what is. In doing so an iconoclastic, utopian international law must adopt the commodified, consumerist logic of the extant order *purely* as a means of selling and moving towards the “possibility above [that] order.”⁶⁶⁰ Deborah Cook captures the negative essence of this agenda in her insistence that “[c]riticism of damaged life can do no more than to raise the spectre of what is other, the nonidentical, by using concepts [and, perhaps, examples] that are themselves contaminated by what exists.”⁶⁶¹

The project is not, then, about the “channelling [of] grievances into organised and coherent action” through “explanatory analysis” that highlights extant structures of “planned misery,”⁶⁶² for all that this approach has immense *intellectual* value. The project I am proposing involves a deformalized, representational, utopic practice of international law, a practice that draws on

⁶⁵⁶ On this theme see Theodor W. Adorno and Max Horkheimer, “The Culture Industry: Enlightenment as Mass Deception” in Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (Verso, 1997 [1944]) 120.

⁶⁵⁷ “exiting the series” – see Marin quotation at n 20.

⁶⁵⁸ China Miéville, “The Limits of Utopia,” <<https://climateandcapitalism.com/2018/03/02/china-mieville-the-limits-of-utopia/>> (last visited 2nd August 2019).

⁶⁵⁹ See Fredric Jameson, “Utopia as Replication” in Fredric Jameson, *Valences of the Dialectic* (Verso, 2010) 410.

⁶⁶⁰ Adorno, *Negative Dialectics* (n 62) 397: “An order that shuts itself up in its own meaning will shut itself away from the possibility above order” (also quoted at n 62, n 95 and n 459).

⁶⁶¹ Deborah Cook, “From the Actual to the Possible: Nonidentity Thinking” (2005) 12(1) *Constellations* 21, 30.

⁶⁶² See text at n 649 to n 650, and n 647.

“[e]verything ever written or created by anyone, anywhere and everything that exists or has ever existed [as] a potential fragment, to be included in or excluded from [each international legal] representation.”⁶⁶³ This is a concept of international law as an iconoclastic marketing tool that re-presents the extant order to itself as an order that is in the process of negating itself, in the hope that such re-presentation expedites the move towards “World other.” As Marin puts it, “Utopia is a fictive construction” – a marketing tool, perhaps – “which produces it [Utopia] through determinate (rhetoric-poetic) discursive operations and plays across the narrative as a relatively free and independent representation ... in which, figuratively, the *other* or negative of contemporary social reality appears.”⁶⁶⁴

In a sense, by analysing extant international law – the UNFCCC system, the Convention on Biological Diversity, the SDGs – as a “degenerate utopia,” I have been trying (and only trying) to make “the *other* or negative” appear. I have, in the course of this article, been attempting to step out of the extant international legal order by engaging with the utopian scholarship of Marin and Jameson, the utopian fiction of Le Guin and Robinson, and the exit-oriented reality of contemporary social phenomena from Brexit to Erdoğan’s Turkey, in order to re-present the extant international legal order as a Disneyesque fantasy.⁶⁶⁵ Whether my efforts have achieved anything is, of course, not for me to say, but the objective is an *Umfunktionierung*, a “functional transformation” in international legal scholarship:⁶⁶⁶ a shift in the function of international legal theory and scholarship from internal inquiry into international legal discourse’s own structure, boundaries, history, culture and form, to an external perspective, focused on the societal, representational, mediative, and fantastical impact that extant international law has on contemporary reality.⁶⁶⁷ This *Umfunktionierung* is driven by the conviction that the external perspective has a utopian capacity (entirely absent from the internal perspective) to move towards possibilities above and outside the extant order.⁶⁶⁸

“[I]f thinking is to be true – if it is to be true today, in any case – it must also be a thinking against itself.”⁶⁶⁹

2. Selling the Negation

Jameson conceptualises Wal-Mart as:

the contemporary version of what Marx called the negation of the negation ... not an aberration or an exception, but rather the purest expression of that dynamic of capitalism which devours itself, which abolishes the market by means of the market itself.⁶⁷⁰

⁶⁶³ Nicholson, “Walter Benjamin” (n 383) 120.

⁶⁶⁴ Marin, “Theses” (n 394) 72 (emphasis in original).

⁶⁶⁵ Rasulo (n 98) highlights the fantastical quality of international law (see Rasulo quotation in n 101) but – contrary to the approach advocated here – invests in the extant international legal structure (see Rasulo quotation in n 98).

⁶⁶⁶ “*Umfunktionierung*” / “functional transformation” – see text at n 190 to n 191.

⁶⁶⁷ This is, as discussed above, consistent with my argument in Nicholson, “Walter Benjamin” (n 383).

⁶⁶⁸ Adorno, *Negative Dialectics* (n 62) 397: “An order that shuts itself up in its own meaning will shut itself away from the possibility above order” (also quoted at n 62, n 95, n 459 and n 660).

⁶⁶⁹ *Ibid* 365.

⁶⁷⁰ Jameson, “Utopia as Replication” (n 659) 421.

Reciting various allegations against this mega-business – that it “drives local businesses under,” “reduces available jobs,” “scarcely pay[s] a living wage ... is anti-union (except in China),” “hires illegal immigrants,” “increasingly emphasizes part-time work,” “drives American businesses abroad,” “promotes sweatshops and child labor outside the country,” “exercises a reign of terror over its own suppliers,” and “destroys whole ecologies abroad and whole communities here in the US”⁶⁷¹ – Jameson situates Wal-Mart within a wider global system. That system involves “the so-called bar code” that stores and transmits vast amounts of information.⁶⁷² It also involves “containerization ... a revolution in transport” providing a common means of transport – the shipping container – for all types, sizes and shapes of commodity,⁶⁷³ replacing the disordered process of longshoremen packing individual items into a ship’s hold with identical cranes in virtually identical ports loading identical boxes onto virtually identical ships.⁶⁷⁴

In the words of “a nameless CEO ... ‘they [Wal-Mart] have killed free-market capitalism in America’.”⁶⁷⁵ “[N]ot an aberration or an exception,”⁶⁷⁶ Jameson identifies Wal-Mart as “the purest expression of that dynamic of capitalism which devours itself.”⁶⁷⁷ It has the “capacity to reduce inflation ... and to make life affordable for the poorest Americans” whilst being “the very source of their poverty ... the prime mover in the dissolution of American industrial productivity.”⁶⁷⁸ In this sense, Wal-Mart is the expression of “the historically unique and dialectical dynamic of capitalism itself as a system.”⁶⁷⁹ It embodies the “dialectic[al] ... injunction to think the negative and the positive together at one and the same time, in the unity of a single thought,”⁶⁸⁰ the need to think against and outside of what is from within it.⁶⁸¹

Whilst a “moralizing” response to Wal-Mart “wants to have the luxury of condemning this evil without particularly imagining anything else in its place,”⁶⁸² the utopian response approaches Wal-Mart:

as a thought experiment ... [as evidence of] what Raymond Williams calls the emergent, as opposed to the residual – the shape of a Utopian future looming through the mist, which we must seize as an opportunity to exercise the Utopian imagination more fully, rather than an occasion of moralizing judgments or regressive nostalgia.⁶⁸³

⁶⁷¹ Ibid 420.

⁶⁷² Ibid 422.

⁶⁷³ Ibid 422.

⁶⁷⁴ See Tim Harford, “The simple steel box that transformed global trade” 9th January 2017, *BBC News*, <<https://www.bbc.co.uk/news/business-38305512>> (last visited 2nd August 2019).

⁶⁷⁵ Jameson, “Utopia as Replication” (n 659) 421, quoting Charles Fishman, *The Wal-Mart Effect* (Penguin, 2006).

⁶⁷⁶ Ibid 421.

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid.

⁶⁸¹ See Adorno quotation at n 669.

⁶⁸² Jameson, “Utopia as Replication” (n 659) 421.

⁶⁸³ Ibid 423. Susan Marks endorses an “anti-moralistic” posture in “Human Rights” (n 618), at 76. Lang and Marks, “Even the Dead” (n 635), at 327, note the role of “nostalgia” in international legal history (specifically in the work of Martti Koskenniemi).

What Jameson says of Wal-Mart applies, in my view, to Brexit, Theranos, Fyre, Bolsanaro's Brazil, and Erdoğan's Turkey. The desire for an exit, manifested in these situations, calls for something more meaningful than a "moralizing," condemnatory response or a nostalgic evocation of liberal democratic stability (Turkey and Brazil), sovereignty (Brexit), or some notional history of responsible, well-regulated corporations (Theranos and Fyre). These situations and phenomena speak to the nature and limitations of contemporary reality and the strength of utopian desire for an exit from it. Whilst populist, opportunistic, authoritarian politics and misleading corporate schemes that exist only in the media (Instagram in the case of Fyre, *Fortune* magazine for Theranos) are not to be celebrated,⁶⁸⁴ they cannot be wished away.

The sketch of international law as a "degenerate utopia" above needs to be approached in the same way. It cannot be dismissed by condemnation, overcome by a moralising, idealistic response in the style of Philip Allott, or remedied by "regressive nostalgia" for international law's historic form or structure (Koskenniemi and Cassese). It should, I suggest, serve as a stimulus that leads international legal thinkers and practitioners to "experimentally declare positive things which are clearly negative in our own world, to affirm that dystopia is in reality Utopia if examined more closely, [and] to isolate specific features in our empirical present so as to read them as components of a different system."⁶⁸⁵

The failure of the UNFCCC system to provide any viable response to expected global temperature rises in excess of 1.5°C, the failure of the Convention on Biological Diversity to reduce global loss of biodiversity, and the commodified consumerism of the SDGs can be seen as positively negative features of extant international law that make the utopian imperative for "World other" manifest, serving as the fledging "components" – the pre-cursors – "of a different [international legal] system." There will, of course, be numerous other positively negative features within international law. My aim has not been to offer a comprehensive list but to make the case for a methodology, a utopian international legal research agenda, a way of identifying such positively negative features.

This iconoclastic, negative (in the sense that it seeks to negate the extant international legal order) international legal utopianism inverts the realism of blueprint international legal utopianism. Whilst the Cassese and Koskenniemi variety of blueprint international legal utopianism treats extant international law as a frame that fixes the boundaries of possibility, the iconoclastic utopianism advocated here critiques extant international law as a "degenerate utopia." It seeks to identify Wal-Mart-type openings in contemporary reality, cracks in the supposed stability of reality, that offer a chance to exit from what is by demonstrating that extant international law is, in reality, positively negating itself.

It would not, then, be accurate for 'realists' to dismiss iconoclastic utopianism as unrealistic. The better view is that blueprint and iconoclastic variants of utopianism simply have divergent

⁶⁸⁴ Jameson, "Utopia as Replication" (n 659) 433: "I hasten to assure the reader that I do not mean to celebrate Wal-Mart, let alone to forecast the emergence of anything good and progressive from this astonishing new post-monopoly institution. ... I have been using [Wal-Mart] ... to illustrate a method."

⁶⁸⁵ Ibid 434.

views of the relationship between utopia and reality; divergent views on what reality is and, most importantly, on utopianism's role in determining what is real. Blueprintism maintains that extant reality defines the nature and structure of international law and the extent of its utopianism. Iconoclasm, by contrast, maintains that utopia is a negative, neutralising means of re-presenting reality to itself, in pursuit of its own self-transcendence; a method by which extant international law can think against and outside of itself from within itself.⁶⁸⁶

My aim is not to convince those committed to a blueprint perspective that the iconoclastic perspective presented here ought to be preferred – I doubt even an article this long can shake their commitment. My aim is to establish and promote an iconoclastic perspective that has, to date, been almost entirely absent from international legal theory. Without this perspective international legal thinkers and practitioners are caught in “the ideological closure of the system in which we are somehow trapped and confined” and,⁶⁸⁷ more importantly, international law – as a field of intellectual inquiry, and as a practical, professional endeavour – is incapable of moving extant reality towards “World other” because of its status as a “degenerate utopia.”

The divergence between blueprint and iconoclastic forms of utopianism centres on historical method. The utopianism advocated here involves “a reawakening of that historicity which our [extant] system – offering itself as the very end of history – necessarily represses and paralyzes.”⁶⁸⁸ Blueprintism reflects an anti-utopian posture of the kind developed by Popper, Berlin and Arendt, imprisoning thought and practice in well-recognised realities and forms,⁶⁸⁹ for fear that their overthrow would “sacrifice ... present generations for some future utopian state.”⁶⁹⁰ This fear connects with an anti-modern sentiment “in liberal as well as in conservative culture” that is suspicious of “mass culture,” the urban, the industrial, and all forms of collectivism (most obviously, socialism and communism).⁶⁹¹

That anti-modern sentiment leads to a “standard way of dealing with ... social anxieties” – a blueprintism – that “assur[es] us that in whatever future ‘more perfect society’ all of the negative features it enumerates will have been corrected” through a nostalgic return to what was based of the condemnation of what is.⁶⁹² This can be seen, for example, in Moyn's call for a return to a properly politicised, pre-1970s human rights as a replacement for a post-1970s depoliticized, formal human rights;⁶⁹³ in Allott's insistence on the value of classical, Enlightenment political philosophy and the capacity of the human mind to re-create reality, in place of the fallen reality of contemporary life and law, including his attack on ‘mass culture’ in the form of “bad art and popular culture”;⁶⁹⁴ and in Koskenniemi's evocation of a lost,

⁶⁸⁶ On “method” see Jameson quotation in n 684, and on “thinking against” see Adorno quotation at n 669.

⁶⁸⁷ “the ideological closure...” – see Jameson quotation at n 7.

⁶⁸⁸ Jameson, “Utopia as Replication” (n 659) 434.

⁶⁸⁹ See text at n 205 to n 215.

⁶⁹⁰ Jameson, “Utopia as Replication” (n 659) 425.

⁶⁹¹ *Ibid* 426.

⁶⁹² *Ibid* 427.

⁶⁹³ See part 2(4) of this article.

⁶⁹⁴ “bad art and popular culture” – see Allott quotation at n 182, and see part 2(3) of this article.

historic international legal formalism that offers the key to a revival in international legal culture.⁶⁹⁵

The process of correction involves “so many obedient replacements of the reigning negative terms by their positive opposites”⁶⁹⁶ – Jacobin, socialist politics in place of post-1970s formalist, minimalist human rights (Moyn); Enlightenment philosophy and its ideal of human self-(re)creation in place of the chaos of postmodernity (Allott); a commitment to international law’s form in place of international legal pragmatism (Koskenniemi). A “negative diagnosis” is the foundation and essence of this regressively nostalgic blueprint utopianism,⁶⁹⁷ but the negativity of the diagnosis has “priority” over the positive blueprint prescription that emerges from it.⁶⁹⁸ If negativity is, then, the source or origin of Utopia blueprints of what will replace that which is negated are, at best, a secondary feature of the utopian.

The twentieth century anti-urban, anti-collectivist sentiment underpinning blueprint utopianism is, Jameson argues, incompatible with the urban, collectivist reality of “postmodernity and globalisation” apparent in “world population explosion ... desertion of the countryside and the growth of the mega-city, global warming and ecological catastrophe ... [and] the universal emergence of small-group politics of all kinds.”⁶⁹⁹ A utopianism consonant with this postmodern, globalised reality involves a move “from anxiety to affirmation,”⁷⁰⁰ a “resituating in a more positive way [of] ... contemporary denunciations of contemporary society in terms of the spectacle ... and the simulacrum.”⁷⁰¹

Embracing the spectacular and the simulated necessitates a re-appraisal of “mass culture” – a re-appraisal of Wal-Mart, Project Everyone and the Global Goals campaign, the “degenerate utopia” of Disneyland, the exit-oriented utopianism of Brexit, Theranos, Fyre, Bolsanaro’s Brazil and Erdoğan’s Turkey, and the manifest belief in international law as a blueprint for a better future. “Mass culture” is to be seen as “an industry of the means of production,”⁷⁰² something at work, for better or worse, on the process of creating society and reality, “an enactment of collective sharing and participation.”⁷⁰³

The task for international legal thought and practice is not, then, to replace what is with a utopian blueprint of how it ought to be, nor is it to critique contemporary legal-social reality through “explanatory analysis” designed to spark “effective political mobilisation.”⁷⁰⁴ The task is to sell mass culture’s ongoing self-negation to a mass cultural audience, deliberately misappropriating the methods of Project Everyone in a marketing campaign that sells extant

⁶⁹⁵ See part 2(1) of this article and text at n 529 to n 537.

⁶⁹⁶ Jameson, “Utopia as Replication” (n 659) 427.

⁶⁹⁷ “negative diagnosis” – *ibid* 427; “regressively nostalgic” – see Jameson quotation at n 683 (referring to “regressive nostalgia”).

⁶⁹⁸ Jameson, “Utopia as Replication” (n 659) 427: “[The] very reactivity of the Heideggerian response tends to confirm the priority of the negative diagnosis in the first place.”

⁶⁹⁹ *Ibid* 428.

⁷⁰⁰ *Ibid*.

⁷⁰¹ *Ibid* 429.

⁷⁰² *Ibid* (quoting Paolo Virno).

⁷⁰³ *Ibid*.

⁷⁰⁴ See Marks quotations at n 650 and n 651.

international law's self-negation to the widest possible audience. The message we should be selling is that international law has no blueprint for utopia, no plan for a better future; that the UNFCCC system is not going to avert catastrophic climate change; that a cataclysmic loss of biodiversity will not be averted through the Convention on Biological Diversity; that the Sustainable Development Goals will not end poverty.

I am suggesting that international lawyers should stop telling positive stories about the nature, capacity and achievements of international law because doing so perpetuates a “fixed, stereotyped, powerful [mass culture] fantasy” of international law as the means of securing a better global future.⁷⁰⁵ In place of such fantastical degeneracy international lawyers should, I suggest, offer detailed accounts of extant international law's inability to address the most fundamental challenges, from climate change to global poverty, as evidence of the very beginnings of something beyond extant international law, something “World other.”

Such negative, neutralising, truly utopian accounts would serve as “contribution[s] to the reawakening of the imagination of possible and alternative futures;”⁷⁰⁶ attempts to turn the “consumers” – the scholars and practitioners – of extant international law into the “producers” of an international law connected to and evolving in response to the negativity of contemporary reality.⁷⁰⁷ The project I am proposing is underpinned by a sense that it is time to “go somewhere else ... [to] have another goal ... [to] walk a different road ... [to] stop following the road [we]’re on, in either direction ... [and to] break the circle.”⁷⁰⁸

If “[l]ight is the left hand of darkness, and darkness the right hand of light,”⁷⁰⁹ then walking through the cold negativity of contemporary reality's darkness offers the best chance of finding international legal light.

⁷⁰⁵ “fixed, stereotyped...” – see Marin quotation at n 552.

⁷⁰⁶ Jameson, “Utopia as Replication” (n 659) 434.

⁷⁰⁷ See quotation from and discussion of Benjamin at n 193.

⁷⁰⁸ Le Guin, *The Left Hand* (n 419) 132 (also quoted at n 447).

⁷⁰⁹ *Ibid* 199 (also quoted at n 455).

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