

The Structure of the International Legal Discourse*

Akbar Rasulov**

My topic in these pages is the structure of the international legal discourse. My goal is to develop an insight into the logic underlying the phenomenological fabric of international law as a professional project. To accomplish this goal, I will try to reconstruct the self-image of international law. That is, I will study international law's appearance from within the international legal discourse itself. By international law's self-image I understand that portrait of the discipline of international law which its discourse imparts to its participants. These participants, for the sake of brevity, I will simply call international lawyers.¹

The primary objective of this inquiry is to develop a better understanding of the social practice of international law, conceived of as a professional project orchestrated and carried out by socially conditioned agents. The secondary objective is to clarify some ontological implications of this project's internal structure. What kind of a world does the international legal discourse persuade international lawyers to desire by grooming them the way it does?

The starting point of my analysis lies with the assumption that international law is, first and foremost, a discursive construct.² My essential understanding of discursivity is that every discourse constitutes both a social process and a vehicle for the production of knowledge. Knowledge being politics, I thus treat the international legal discourse as an instrument for the construction of the global social reality, a process which inevitably involves the application of various forms of symbolic and actual violence, corresponding in practice to the various ranges of power bases.

1.

Now, if we are to succeed in reconstructing the phenomenological fabric of the international legal project, the first thing we need to achieve is to capture international law's Lacanian *point de capiton* (nodal point; floating signifier),³ that is, to identify the wilfully posited centre of the structure of the international legal project in reference to which the rest of this project is ordered

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** Law School, University of Glasgow. Email: a.rasulov@law.gla.ac.uk. This paper is a work-in-progress paper. With time, it is intended to develop into a normal-length article. As it stands now, most of its theses are presented in an abridged form. I want to thank Arnulf Becker Lorca, Jason Beckett, Professor Lindsay Farmer, Neil McDonald, Ewan Smith, and Joze Strus for their helpful comments and criticism. All views and opinions expressed in this paper are mine alone.

¹ Given that by far not all the participants of the international legal discourse consider themselves 'international lawyers,' a more exact designation would probably be 'international-law-minded individuals,' but this is not the most appropriate occasion for hair-splitting.

² For introduction to the discourse theory, see SARA MILLS, *DISCOURSE* (London: Routledge, 1997).

³ The notion of the *point de capiton* is roughly similar to the Kelsenian notion of *grundnorm*, except, of course, Kelsen was concerned with the form of the legal order and Lacanians are concerned with the psychological environment of the discursive experience.

and organized and which itself remains immune to any structural re-organization moves from within the project's field.⁴

To capture the *point de capiton* of the international legal discourse is to work out essentially what international lawyers think about their professional project in terms of its function and existence. Why do they do international law? For what reason do they commit themselves to it? What do they think international law exists for? What do they think it is supposed to achieve in the context of the broader social reality? Capturing the *point de capiton* of the international legal discourse is pinning down the self-professed *raison d'être* of the international legal project.

Now, if we study closely the most characteristic discursive moments of the international legal project – from the *Lotus* judgment and the Helsinki Principles of the CSCE to *Nicaragua* and the *Nuclear Weapons* opinion, from Brierly and Oppenheim to Kelsen and Pashukanis, from Guggenheim and McDougal to Jennings and Henkin – a single great theme quickly emerges that has defined the conditions of international law's discursive project across space and time for as long as the living generation of international lawyers can only remember themselves. It is the theme of international law as a regulatory enterprise.

International law exists (in the eyes of international lawyers) in order to ensure the orderliness of international politics. Put differently, the self-professed *raison d'être* of international law is to bring regulation to the life of the international society. The structural centre of the phenomenological fabric of the international legal project, in other words, is the belief that international law exists in order to bring order to the workings of the international community. What are the ontological implications of this belief? Can international law bring order to international politics? These are the questions to which the present undertaking is dedicated.

Schematically, I read the idea that international law exists to bring order to international politics as a symptom of a deep-seated metaphorical understanding of international law as medicine, i.e. as the project of delivering the cure.

2.

International lawyers visualize their professional project as a quasi-medical discourse. They regard international regulations as the act of treatment, themselves as doctors and nurses, and the international society at large as the suffering patient. The *raison d'être* of the international legal project is to save the international society from its diseases: armed conflicts, genocide, colonialism, WMD proliferation, trade wars, and so on.

The notion of medicine presupposes the ability to make diagnoses and issue prescriptions. Before the doctor can prescribe the cure, he identifies the nature of the malady. To diagnose is to decode. To decode is to unveil the hidden reality. The basic self-image of the international legal project is the search for the truth about the malfunctioning of the international society. Just look at the way in which we have come to visualize the algorithm of the international legal process as exemplified in the basic model of international adjudication: first establish the facts, then pronounce the law. As a professional project, international law is obsessed with the task of accurately ascertaining the conditions of the global social reality. The problem with this task,

⁴ On this see further Jacques Derrida, 'Structure, Sign and Play in the Discourse of the Human Sciences,' in JACQUES DERRIDA, *WRITING AND DIFFERENCE* 278 (transl. by Alan Bass; Chicago: University of Chicago Press, 1978).

however, is that both metaphysically and in practical terms it is inherently impossible to perform. But more on this later.

The usefulness of the medical analogy for our purposes does not end with the ascertainment of the *point de capiton* of international law. Indeed, I argue that not only does international law unconsciously seek to emulate medicine's central project – diagnosing and curing – but it also actually shares in medicine's social career in that, just like the latter, it invents around its central core a protective layer of 'spin.' The end goal of the enterprise is to secure a steady inflow of symbolic capital into the international legal project through a projection of a positive image of the discourse to the rest of the society.

The 'spin zone' represents the second structural component of the international legal project. On this level of their discourse, international lawyers campaign on behalf of their discipline, presenting it as a success story and making it look good. Some lawyers engage in this enterprise out of plain cynicism, bearing in mind the implications this has on their wages and career advancement. Others do it out of idealistic delusion. A vast majority of the profession do it out of a mixture of both.⁵

The binary opposition 'truth' versus 'spin' permeates the whole body of the international legal discourse and defines the basic form of its structure. Its imagery, however, represents only the initial snapshot of international law's discursive existence.

3.

On closer analysis, it emerges that the binary structure 'truth-spin' is itself nothing more than a perception of how international lawyers perceive their professional project. Delving deeper and more carefully into a phenomenological study of international law, we can see how in the practical reality of its discursive construction this structure starts to collapse, proving itself incapable of living up to its promises.

As it is posited, the validity of the 'truth-spin' structural construct is premised on a metaphysical mixture of naïve realism and objective idealism. Neither one nor the other, however, is philosophically sustainable in the broader context of contemporary internationalist thought, not to mention general social theory. The objective status of the global social reality, to the extent it exists, is not verifiable with any degree of reliability. The realization of international law's *point de capiton* is thus precluded by its own content. So how does then the discursive construct of international law continue to hold?

As the ideal of objective knowledge becomes intrinsically unrealizable, I submit, the discipline imperceptibly reinvents itself around a new *point de caption* and correspondingly a new structural blueprint, discarding in the course of this transformation the outdated categories of 'truth' and 'spin' in favour of newer, more contingent and volatile epigones. Martti Koskenniemi's 'kitsch' is one such epigone. Philip Allott's 'self-constitution of the all-humanity' is another.

In the end, all this rather unequivocally appears to suggest the inherently postmodern character of the international legal project. A transcendental position from which the life of the international community could be regulated has never been obtainable. The law, that is, did not speak to politics but was always part of it. Perspective has always been the key. And international law is itself part of that predicament in reaction to which it thinks it has come about.

⁵ Peter Sloterdijk calls this state of mind 'the enlightened false consciousness.'

Provided any of these conclusions is correct, it logically follows then that all our communal memories of the time when international law seemed to be a business of bringing objective certainty to the sea of subjective (political) uncertainty are nothing but a nostalgia for a past that never was. Ever since its political inception, the current incarnation of the international legal discourse has been wholly immersed in the condition of postmodernity. Framed this way, the problem of international law's phenomenology acquires radical dimensions.

Naturally, not every analysis of international law's phenomenology is necessarily supposed to reach this stage. That is to say, not every student of the international legal discourse, let alone every international lawyer, must necessarily detect the fundamental instability of the binary structure 'truth-spin.' Indeed, most of us, strictly speaking, are not even aware of that structure to begin with. None of this, however, ultimately detracts from the validity of the present analysis.