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. . . and New York and The Hague and Tokyo and Geneva and Nuremberg and . . .: The Geographies of International Law

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Abstract

In the dominant narrative of international law, historical events in space and time are made to fall along an invisible line of progress, from Westphalia in 1648 through the Bretton Woods and San Francisco conferences of 1944 and 1945 to the present day and continuing on through the future to a more just world. Against this, a counter-narrative has emerged which denies the possibility of such linear development and consigns international law to forever tracing an unending circular path between points of idealism and realpolitik. This article examines how international lawyers have created and continue to create these metaphysical geographies of international law. Drawing on the work of the French multi-disciplinary thinkers Gilles Deleuze and Félix Guattari, this article shows that both approaches, and indeed the very concept of international law, can at most only replicate and impose pre-conceived theories and that the imposition of such theories is contrary to the natural patterns of human consciousness. It urges us to see international law rather as but one manifestation of the ongoing struggle between efforts to impose unity on and to control human consciousness and the mind's efforts to break free of such restricting structures.

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> Where are you going? Where are you coming from? What are you heading for? These are totally useless questions. Making a clean slate, starting or beginning again from ground zero, seeking a beginning or a foundation – all imply a false conception of voyage and movement (a conception that is methodical, pedagogical, intiatory, symbolic . . .).[1]

1 Introduction

From the Geneva and Hague conventions on the law of armed conflict to the Uruguay and Doha rounds of the World Trade Organization and beyond, international law is punctuated by a series of geographical placeholders. These historical references are imbued, if not overloaded, with meanings far beyond their original purposes of signifying to delegates and their respective travel agents the appropriate arrangements to make for international conferences. They are made to do substantial conceptual work, dividing and segmenting international law and together establishing a geography of the field. To refer to a certain rule as belonging to the law of Geneva or of The Hague is to assign it a particular location in the corpus of international law and to distinguish it from other, often related bodies of law, much the same as reference to the actual cities of Geneva or The Hague specifies a particular physical place, distinguished and delimited from all other similar locations.

This exercise in metaphorical cartography is not a neutral endeavour. Rather, it is part and parcel of an effort to give international law a more or less explicit normative direction. In the dominant narrative of the field, historical events situated at particular coordinates in space and time are co-opted to tell a story of international law's progressive development over time. As these events are made to fall along an invisible line of progress, the history and, more importantly, the future of international law can be told as a series of place names and dates, each bringing us closer to the ideal: from Westphalia in 1648 through the Bretton Woods and San Francisco conferences of 1944 and 1945 to the present day and beyond to a more just world.

Against this dominant narrative, a counter-narrative has emerged which seeks to reinterpret the geography of international law. In this counter-narrative, the forward-moving history of progressive development is made to collapse upon itself. The underlying map is changed and constantly redrawn depending on where one chooses to stand. The Hague becomes Geneva and vice versa, replacing the progressive journey of international law with one of constant oscillation, tracing a circular path between points of realpolitik and idealism, neither of which has any more intrinsic value than any other.

This article offers a critique of such geographies which is radical, in the sense that it goes to the roots of international legal theories. It begins by examining how international lawyers, in particular academics, have created and continue to create the metaphysical geography of international law, first as a linear field of progressive development (Section 2) and then in the circular counter-narrative (Section 3). It argues that neither approach is capable of accurately depicting the reality of international law. Rather, for reasons inherent in the very concepts of law and a legal system, each approach can only replicate the preconceived theories of its narrators. Drawing on the work of the French

[1] G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (B. Massumi trans., 2nd edn, 2004), at 25.

multi-disciplinary thinkers Gilles Deleuze and Félix Guattari, this article rejects such metaphysical geographies as artificial patterns of unity imposed on human thought and urges that we see international law not as a unitary whole but as a particular manifestation of ongoing efforts to control a human consciousness which is inimicable to any such deep structure (Section 4). In the face of deeply-held attachments to the linear and circular narratives, this article concludes by examining to what extent and how it may be possible to describe the history and geography of the field without falling prey to the same tendency towards deep structure (Section 5) and what role remains for the dominant and counter- narratives after the radical critique (Section 6).

2 Historical Geography, Philosophical History and the Linear Progressive Development of International Law

The recent establishment in The Hague of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Court (ICC) has occasioned the publication of numerous books and articles and the convening of several conferences on the theme of 'From Nuremberg to The Hague' or some variation thereof.[2] While this trend may be particularly pronounced in recent writings on international criminal law given the significant recent developments in this field, similar narrative structures abound in other branches of international law where stories are told, for example, of the development of human rights law from the establishment of the United Nations in San Francisco to the 1993 Vienna World Conference on Human Rights,[3] of the development of international environmental law from the 1992 Rio de Janeiro Conference adopting the UN Framework Convention on Climate Change to the

[2] See, e.g., Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland U L Rev* (2008) 81; Goldstone, 'Historical Evolution – From Nuremberg to the International Criminal Court', 25 *Penn State Int'l L Rev* (2006–2007) 763; Kress, 'Versailles – Nuremberg – The Hague: Germany and International Criminal Law', 40 *Int'l Lawyer* (2006) 15; Matas, 'From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials', 10 *Gonzaga J Int'l L* (2006) 17; Nsereko, 'Bringing Aggressors to Justice: From Nuremberg to Rome', 2 *U Botswana LJ* (2005) 5; Nanda, 'Op-Ed: From Nuremberg to The Hague: Nazi Trials Set Stage for Global Law', *Denver Post*, 3 Dec. 2005; Ferencz, 'From Nuremberg to The Hague: A Personal Account', in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity* (2004), at 31; Seck, 'De Nuremberg à La Haye', 2201 *Jeune Afrique* (16–23 Mar. 2003) 101; Rancillo, 'Note: From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation', 78 *U Detroit Mercy L Rev* (2001) 299; McCoubrey, 'From Nuremberg to Rome: Restoring the Defense of Superior Orders', 50 *Int'l and Comp L Q* (2001) 386; Meron, 'International Humanitarian Law from Agincourt to Rome', 75 *US Naval War College Int'l L Studies Series* (2000) 321; King and Theofrastous, 'From Nuremberg to Rome: a Step Backward for U.S. Foreign Policy', 31 *Case Western Reserve J Int'l L* (1999) 47; Meron, 'From Nuremberg to The Hague', 149 *Military L Rev* (1995) 107. See also Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity', 5 *San Diego Int'l LJ* (2004) 73; Miller, 'Comment: From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape', 108 *Penn State L Rev* (2003) 349; Caianiello and Illuminati, 'From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court', 26 *N Carolina J Int'l L and Commercial Reg* (2001) 407, at 416; Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', 10 *Harvard Human Rts J* (1997) 11.

[3] Alston, 'The UN's Human Rights Record: From San Francisco to Vienna and Beyond', 16 *Human Rts Q* (1994) 375.

1997 Kyoto Protocol to that convention[4] or, in the case of the European Union, from its founding in Rome in 1958 to the successive treaties of Maastricht and Lisbon[5] or of other similar journeys.[6] The prevalence of such literary devices is not coincidental or insignificant. The metaphor of the physical journey serves deliberately to highlight and to reinforce an underlying discourse of progressive development which is at the heart of the dominant narrative of modern international law of which each branch sees itself as a part.[7] Individual episodic developments such as the conclusion of the Peace of Westphalia, the adoption of the UN Charter in San Francisco, the Nuremberg Trials, the Kyoto Protocol, or the establishment of the ICC in The Hague become no longer isolated phenomena to take on their own accord, but rather milestones falling on an invisible line of progress from injustice to a more rudimentary, and, finally, to a more advanced international law.[8] From a time of relative injustice or not-law, law began to emerge at a certain historical moment and came to be steadily refined, though not completely, over the period leading to the next significant historical moment.[9] This

[4] Giorgetti, 'From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change', 7 *NYU Environmental LJ* (1999) 201.

[5] Streit and Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"', 1 *ELJ* (1995) 5; Neergaard *et al.* (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (2009).

[6] See, e.g., Freestone, 'From Copenhagen to Cancun: Train Wreck or Paradigm Shift?', 12 *Environmental L Rev* (2010) 87; Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly', 57 *Int'l and Comp L Q* (2008) 909; Hasani, '*Uti Possidetis Juris*: From Rome to Kosovo', 27 *Fletcher Forum of World Affairs* (2003) 85; Das, 'The Global Trading System: From Seattle to Doha', 57 *Int'l J* (2002) 605 (describing the progress made in developing the global trading system); Bravo, 'From Paris Convention to TRIPs: A Brief History', 12 *J Contemporary Legal Issues* (2001–2002) 45; Myrus, 'From Bretton Woods to Brussels: A Legal Analysis of the Exchange-Rate Arrangements of the International Monetary Fund and the European Community', 62 *Fordham L Rev* (1994) 2095; Willems, 'Note: From Treblinka to the Killing Fields: Excluding Persecutors from the Definition of Refugee', 27 *Virginia J Int'l L* (1987) 23; McNiece and Thornton, 'Military Law from Pearl Harbor to Korea', 22 *Fordham L Rev* (1953) 155; Green, 'From Empire through Commonwealth to . . .', 16 *Alberta L Rev* (1978) 52; Kerr, 'From Empire to Commonwealth', 1 *Foreign Affairs* (1922), Issue 2, 83. Often the journey will be described more directly as between two concepts. See, e.g., Power, 'Responsibility to Protect: from Concept to Implementation', 3 *Irish Yrbk Int'l L* (2008) 305; Thakur and Weiss, 'R2P: From Idea to Norm – and Action', 1 *Global Responsibility to Protect* (2009) 22; Evans, 'From Humanitarian Intervention to the Responsibility to Protect', 24 *Wisconsin Int'l LJ* (2006) 703; Deng, 'From "Sovereignty as Responsibility" to "Responsibility to Protect"', 2 *Global Responsibility to Protect* (2010) 353; Bring, 'The Westphalian Peace Tradition in International Law – From *Jus Ad Bellum* to *Jus Contra Bellum*', 75 *US Naval War College Int'l Legal Studies Series* (2000) 57; Reich, 'From Diplomacy to Law: The Judicialization of International Trade Relations', 7 *Northwestern J Int'l L and Business* (1996–1997) 775.

[7] See Kennedy, 'A New Stream of International Law Scholarship', 7 *Wisconsin Int'l LJ* (1988–1989) 1, at 12–28; Kennedy, 'The Disciplines of International Law & Policy', 12 *Leiden J Int'l L* (1990) 9, at 85–86.

[8] See Bratspies, 'The Politics of Progress in International Law', 102 *ASIL Proc* (2008) 457; Kennedy, 'The Disciplines', *supra* note 7, at 90. While the general implication is normally of a linear advancement of international law, its more enthusiastic supporters will also refer to its expansion as being exponential. See, e.g., Gibson, 'International Human Rights Law: Progression of Sources, Agencies and Law', 14 *Suffolk Transnat'l LJ* (1990) 41.

[9] *Cf.* R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), at 1–4 (observing a tendency emerging among international lawyers in the 17th century and continuing through the 20th century to divide the history of international law as an opposition between the injustice of antiquity and the just modern world).

is not to say that the journey has necessarily been smooth or without occasional setbacks. However, these deviations are seen as mere detours which further serve to illuminate international law's true path and, more importantly, to highlight the extent of the journey which remains and the importance of continuing on apace. The line of progress is given the air of an immutable historical or moral law, reflecting the deep-rooted faith among international lawyers that not only has international law developed progressively in the past but also it should continue to do so in the future.[10] Not content merely to describe the historical evolution of international law or one of its many branches, the writer in the dominant narrative argues, or at least implicitly supports, the notion put forward by Lassa Oppenheim in his early 20th century treatise on international law that '[i]t is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past'.[11] Accordingly, the story of law's metaphorical journey concludes with specific thoughts on how the law should continue to develop in the future or, at a minimum, leaves the reader with the clear impression that the law's present course should be maintained.[12]

The idea of using history to identify a general guiding principle or moral for the future has ancient roots.[13] Under the early Christian church, a Judeo-Christian view of history as unfolding along a 'linear and directional' path to some ideal future state became the dominant overarching historical narrative supplanting pagan cyclical histories of inevitable birth, growth, death, and regeneration.[14] After a brief re-popularization of cyclical histories during the Renaissance, this linear approach was taken up by those credited as being among the founders of modern international law such as Jean Bodin and Hugo Grotius.[15] It is, however, in the Enlightenment that the concept of 'philosophical history' took on the secular form which is most directly recognizable in modern international law.[16] In his 'Idea for a Universal History with a Cosmopolitan Purpose', Immanuel Kant described the endeavour of a philosophical history of international relations and international law as resting on the fundamental proposition that '[t]he history of the human race as a whole can be regarded as the realization of a hidden plan of nature to bring about an internally – and for this purpose also externally – perfect political constitution as the only possible state within

[10] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 15–18, 42–47; Kennedy, 'The Disciplines', *supra* note 7, at 10; Alvarez, 'International Organizations: Then and Now', 100 *AJIL* (2006) 324, at 339.

[11] L. Oppenheim, *International Law* (2nd edn, 1912), i, at 80. See also Allott, 'International Law and the Idea of History', 1 *J History of Int'l L* (1999) 1, at 15.

[12] See, e.g., Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', 10 *Harvard Human Rts J* (1997) 11; Bassiouni, 'The ICC – Quo Vadis?', 4 *J Int'l Criminal Justice* (2006) 421, at 426–427; Blewitt, 'Ad Hoc Tribunals Half a Century after Nuremberg', 159 *Military L Rev* (1995) 101, at 102 (observing signs 'that the international community is moving in the right direction').

[13] See, generally, J. Burrow, *A History of Histories: Epics, Chronicles, Romances & Inquiries from Herodotus & Thucydides to the Twentieth Century* (2009); F. Manuel, *Shapes of Philosophical History* (1965).

[14] Burrow, *supra* note 13, at 68–69, 170–188; Manuel, *supra* note 13, at 7–9, 24–45.

[15] Burrow, *supra* note 13, at 313; Manuel, *supra* note 13, at 18–19, 24–45.

[16] See Burrow, *supra* note 13, at 341–342; Manuel, *supra* note 13, at 70–135.

which all natural capabilities of mankind can be developed completely'.[17] This plan was, however, not to be divined from piecing together the historical record. Rather, Kant and other enlightenment proponents of philosophical history believed this plan could be deduced from reason, and they scoured the historical record instead for evidence of the plan which reason made known to the mind.[18] Kant, however, cautioned that philosophical history is neither the only way to do history nor necessarily preferable to standard empirical history, only that it is a possible way for history to be done.[19]

Modern international legal scholarship is less explicit in its appeal to moral principles, although occasionally a writer may acknowledge his or her pre-conceptions of morality or justice which shape the interpretation of history.[20] As moral principles are open to attack for their subjectivity, the modern philosophical history of international law has instead gone underground, hidden in a seemingly objective discourse of the progressive development and codification of international law.[21]

The concepts of codification and progressive development have a complex and somewhat ambiguous relationship to each other. As defined in the Statute of the International Law Commission, the body of the United Nations tasked with promoting both activities, codification consists of 'the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine'.[22] Progressive development is defined as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'.[23] In these narrow, technical senses, the two tasks of codification and progressive development are diametrically opposed in their approach to history.[24] For codification as defined above, (past) history is all-important as it is from the actual past behaviour and statements of states that one discerns the rules which govern their

[17] Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in H. Reiss (ed.), *Kant's Political Writings* (2nd edn, 1990), at 41, 50; see also G.W.F. Hegel, *The Philosophy of History* (trans. J. Sibree, 1956, reissued 2004). According to Koskenniemi, 'Since its inception, however, international law has been embedded in the optimistic trajectory sketched by Kant in his 1784 essay on *The Idea for Universal History with a Cosmopolitan Purpose*': Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquiries on Law* (2007) 9, at 12.

[18] See Manuel, *supra* note 13, at 103.

[19] Kant, *supra* note 17, at 53. See also Hegel, *supra* note 17, at 1–9 (arguing that such an approach was one of three possible approaches to history).

[20] See, e.g., Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in M.C. Bassiouni (ed.), *International Criminal Law* (2nd edn, 1999), i, at 3; Yarnold, 'The Doctrinal Basis for the International Criminalization Process', in *ibid.*, at 127, 128–130; Bassiouni, 'The Nuremberg Legacy', in M.C. Bassiouni (ed.), *International Criminal Law* (2nd edn., 1999), iii, at 197.

[21] UN Charter, Art. 3(1)(a); Statute of the International Law Commission, GA Res 174 (II), 21 Nov. 1947 (hereinafter: 'ILC Statute'), Art. 1(1).

[22] *Ibid.*, Art. 15.

[23] *Ibid.*

[24] Scott, 'The Gradual and Progressive Codification of International Law', 21 *AJIL* (1927) 417; Root, 'The Codification of International Law', 19 *AJIL* (1925) 675, at 681; Baker, 'The Codification of International Law', 5 *British Yrbk Int'l L* (1924) 38, at 41–44. See also Brierly, 'The Future of Codification', 12 *British Yrbk Int'l L* (1931) 1 (distinguishing between the narrow sense of codification as opposed to legislation and its broader sense which includes developing the law further).

interactions. The future is of no concern for the codifier of international law who lives constantly in the present. Progressive development works in the opposite manner. It comes into play only where there is a lack of history. History's role is limited to identifying where the law has been sufficiently codified and marking the boundaries of the areas of law where progressive development is unnecessary. Outside such areas, the international lawyer has a free hand in shaping the future. Unlike codification which seeks to divine the rules which fit the existing behaviour of states, progressive development seeks to create rules to which states will fit their behaviour in the future.

In practice, this distinction between progressive development and codification has never been seriously observed, and international lawyers have proceeded instead on the basis of a hybrid concept of progressive development and codification or of the 'progressive codification' of international law.[25] In the late 19th and early 20th centuries, in particular during the period between the two World Wars, states and new organizations devoted to the advancement of international law (such as the *Institut de Droit International*) dedicated significant efforts to the progressive codification of international law in this sense, i.e., the progressive development of a written code of international law.[26] This commitment to progressive codification became manifest, for instance, in the establishment by the League of Nations of a Committee of Experts for the Progressive Codification of International Law.[27] While enthusiasm for such projects decreased significantly after World War II,[28] the international community's commitment to a hybrid concept of progressive development and codification remained. Despite the distinction between the two concepts in its Statute, the International Law Commission has continued consistently to reject this distinction in practice.[29]

The collapsing of any distinction between codification and progressive development occurs for two reasons. First, as a pragmatic matter, any attempt to codify international law will necessarily require the codifier also to create new law to close gaps evident in the codification process. According to then Professor, and later Judge, Jennings:

> it is certain that codification in this very strict sense, however useful it may be in consolidating the already developed rules of a mature system, can have little place in a comparatively undeveloped system like international law. When it has been attempted in the past it has almost invariably been found necessary both to make new law and to modify existing law; for the whole purpose of codification of international law is to resolve differences and to fill in the gaps. . . . In other words, codification properly conceived is itself a method for the progressive development of the law.[30]

[25] See, e.g., Hudson, 'The Progressive Codification of International Law', 20 *AJIL* (1926) 655. For a broad overview of the rejection of the distinction between codification and progressive development see Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23 *Wisconsin Int'l LJ* (2005) 61, at 65–70.

[26] Koskenniemi, *supra* note 10. See, e.g., Scott, *supra* note 24; Hudson, *supra* note 25; Baker, *supra* note 24, at 38–39.

[27] S. Rosenne, *The Committee of Experts for the Progressive Codification of International Law (1925–1928)* (1972).

[28] See Koskenniemi, *supra* note 10, at 353–509.

[29] *Yrbk ILC* (1996), ii, A/CN.4/SER.A/1996/Add.2, at para. 147; *Yrbk ILC* (1979), ii, A/CN.4/325, at paras 12–19; Jennings, 'The Progressive Development of International Law and its Codification', 24 *British Yrbk Int'l L* (1947) 301, at 312.

[30] *Ibid*, at 302. See also Brierly, *supra* note 24, at 2–3; Root, *supra* note 24, at 681.

Second, when looked at over time, progressive development and codification in their narrow senses are intrinsically intertwined in an iterative process. Codification can only take place once the international community has decided that certain laws should come into being and be followed. It is the consolidation of past efforts, not necessarily conscious ones, progressively to develop the law. Progressive development, meanwhile, is the present form of what in the future will need to be codified. Progressive development is followed by codification, which is followed by progressive development, and so on. Keeping in mind that the two initiatives often occur simultaneously, it is not hard to imagine that they would collapse into each other (if they were ever truly separate), giving international law a deep sense of unity and of continuity. As Jennings observed, 'the essential differences between the processes involved depend not upon the object in view but on the differences in the materials available for the task. The end in view – a systematic statement of the law – is the same in either case.'[31]

This collapsing of codification and progressive development has had profound effects on the treatment of history in international law. As past and future merge, the telling of history is no longer an end in itself but a significant, if not definitive, step towards explaining how the future should develop. Historical events are used not merely to elucidate how international law has developed but to advance the very normative claims it purports to uncover.[32] Thus, the journey from Nuremberg to The Hague, San Francisco to Vienna, Rome to Lisbon, or between any other two points becomes less about these particular episodes or even about the branch of international law which they are taken to represent, but part of a broader narrative of international law's progressive development over time.[33] In the process, accuracy in empirical description is sacrificed to advance normative prescriptions.[34] Hegel, one of

[31] Jennings, *supra* note 29, at 303.

[32] See Bratspies, *supra* note 8, at 457. See also Kant, *supra* note 17, at 52 ('[a] philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind must be regarded as possible and *even as capable of furthering the purpose of nature itself*').

[33] See Bratspies, *supra* note 8 (noting that, while the Nuremberg Trials and Rio Conference constituted important moments in international law, 'international law and its advocates are not satisfied with moments, no matter how powerful'). See also Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4, at 5–6; Kennedy, 'The Disciplines', *supra* note 7, at 89–94.

[34] To take the example of the narrative 'from Nuremberg to The Hague' which introduced this section, if anything, the period from Nuremberg to The Hague may be better characterized as a period of intense violence lacking in any effective international response than as a period of development in the law: see, e.g., Biddiss, 'From the Nuremberg Charter to the Rome Statute: A Historical Analysis of the Limits of International Criminal Accountability', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (2004), at 42; Cooper, 'Introduction', in B. Cooper (ed.), *War Crimes: The Legacy of Nuremberg* (1999), at 11. Even the key landmarks in the story of Nuremberg and The Hague are frequently distorted. In their day, the Nuremberg trials were motivated primarily by a desire to respond to Nazi aggression, and not as a response to the crimes of the Holocaust. See Koller, 'The Faith of the International Criminal Lawyer', 40 *NYU J Int'l L & Politics* (2008) 1019, at 1036–1038. While many writers will acknowledge this fact, even some of the most respected international criminal lawyers insist on rooting the idealized-present meaning of Nuremberg in the history of the Holocaust. See, e.g., Goldstone, 'Foreword' to Cooper (ed.), *supra* note 34, at 8.

the most prominent and ambitious proponents of philosophical history, warned, 'we have to take [history] as it is. We must proceed historically – empirically. Among other precautions we must take care not to be misled by professed historians who . . . are chargeable with the very procedure of which they accuse the Philosopher – introducing *à priori [sic]* inventions of their own into the records of the Past'.[35] Yet, for the modern international lawyer, the fact that the historical record may not match the narrative is dismissed as of at most trivial importance, a reminder that the purpose of the historical narrative is not faithfully to recount history but to shape the future.[36] By accepting these anomalies, however, and by moving away from the historical record, legal historians undermine their own method. The perceived validity of the resort to history is its (seemingly) objective grounding in practice. By unmooring the story from the historical record, the dominant narrative of international law opens itself to the objection that it is hopelessly, and perhaps dangerously, idealistic in its ignoring of political realities. It is against such weaknesses that critics of the dominant narrative have emerged and have pushed back, and it is to their stories that we turn next.

3 The Geography of Criticism: Of Circles, Trees, and Fractals

Criticisms of the dominant narrative of international law have appeared at two levels. At one level, criticism contends that the dominant narrative of progress makes sense only from a narrow perspective. By introducing new voices, critics (often grouped together into different strands based on identity such as a third world approach or a feminist theory) identify where the law has failed to meet the needs of the excluded and chart a desired path for new progress.[37] Such critics often largely accept – and advocate for – a vision of international law based on a linear deep structure, but argue that the law has either advanced in the wrong direction or has not yet advanced as far as the dominant narrative would have us believe. In terms of formal deep structure, it can be difficult to distinguish these critical arguments from the dominant narrative which seeks also to convince us that law should develop in one or another direction.

A second, deeper, level of criticism has emerged which challenges the supposed linear deep structure of international law.[38] This form of criticism, most closely

[35] Hegel, *supra* note 17, at 10.

[36] See, e.g., Teitel, 'Nuremberg and its Legacy: Fifty Years Later', in Cooper (ed.), *supra* note 34, at 44 (claiming that 'despite the general record of failure of criminal accountability and the Nuremberg Tribunal's anomalous nature, we have a sense that Nuremberg's impact transcends this anomaly and has acted as a guiding force in the latter half of this century').

[37] See, e.g., Mutua, 'What is TWAIL?', 94 *ASIL Proc* (2000) 31; Charlesworth, Chinkin, and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613; Aceves, 'Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution', 39 *Columbia J Transnat'l L* (2001) 299, at 312–313; Matsuda, 'Pragmatism Modified and the False Consciousness Problem', 63 *S California L Rev* (1999) 1763, at 1769–1770.

[38] Challenges to the dominant narrative of international law which appeal to identity may also take this deeper form of criticism. See Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese J Int'l L* (2003) 77 (describing how Third World Approaches to International Law can take one or the other form); Teson, 'Feminism and International

identified with certain writings of Martti Koskenniemi and David Kennedy, rejects the idea of law as linear progressive development towards justice, and offers in its place a vision of international law as a constant struggle between equally valid but opposing values such as accountability and sovereignty, community and autonomy, or peace and justice.[39] These binary pairs exist in dynamic equilibrium, each constantly seeking to colonize the other. The advocate for justice, when confronted with the argument that peace should take precedence, argues that justice is in fact an integral part of peace and that pursuing peace in the short term without justice will prevent the realization of sustainable peace in the future.[40] This is a potentially endless iterative process in which the two opponents find themselves continually trying to seize the other's ground, moving constantly back and forth between opposing poles of peace and justice, community and autonomy, law and politics, etc. The shape of history in the counter-narrative is the circle (or, as it has also been occasionally depicted, the pendulum) tracing a path of constant oscillation between opposing poles.[41]

This circular shape is not a historical accident. The opposing concepts do not simply happen to exist in binary pairs; they cannot exist independently of one another. To avoid being either hopelessly idealistic or a manifestation of the will of the stronger, law must continue to shift between the two poles, trying, in the words of Koskenniemi, to be simultaneously normative and concrete.[42] As a result, the binary pairs collapse into each other with each opposing concept coming to entail its opposite.[43] Sovereign autonomy can exist only within an international community while a community is

Law: A Reply', 33 *Virginia J Int'l L* (1993) 647 (distinguishing 'liberal' and 'radical' feminist critiques of the dominant international law); Charlesworth, 'Feminist Methods in International Law', 93 *AJIL* (1999) 379.

[39] See, e.g., M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, 2005); Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yrbk Int'l L* (2002) 1; Kennedy 'My Talk at the ASIL', 94 *ASIL Proc* (2000) 104; Kennedy, 'When Renewal Repeats: Thinking against the Box', 32 *NYU J Int'l L & Politics* (2000) 335. See also Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', 26 *Harvard Int'l LJ* (1985) 327, at 355. Both Koskenniemi and Kennedy have also adopted different approaches to international law or admitted that this understanding is only one of several possible approaches. See M. Koskenniemi, *supra* note 10, at 2; Kennedy, 'My Talk', *supra*, at 104–106. However, this particular vision of international law offered by each of them has taken hold as the significant structural challenge to the dominant narrative of international law. See Paulus, 'International Law after Postmodernism: Towards Renewal or Decline of International Law', 14 *Leiden J Int'l L* (2001) 727, at 731.

[40] See, e.g., UN, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', S/2004/616 (2004), at para. 2.

[41] See, e.g., Koskenniemi, *From Apology to Utopia*, *supra* note 39, at 62–63, 382–389, and 410–438, Kennedy, 'When Renewal Repeats', *supra* note 39, at 376. Like the linear dominant narrative, this circular counter-narrative echoes a broad trend in philosophical history which predates the Judeo-Christian narrative and which became more significant in Renaissance legal thought and (combined with a progress narrative) appeared also in the dialectical reasoning of Hegel and Marx. Manuel, *supra* note 13, at 6–9, 48, and 123–124; Burrow, *supra* note 13, at 174.

[42] Koskenniemi, *From Apology to Utopia*, *supra*, note 39, at 18–22.

[43] *Ibid.*, at 10.

by definition a collection of sovereign individuals.[44] The metaphors of the circle or pendulum which are used to introduce the counter-narrative falsely imply movement from one concept to the other. A better metaphor for the shape of the counter-narrative may be the fractal in which the dialectic of opposing concepts is replicated at every level from the broadest history of international law to the most technical dispute.[45] Like the dominant narrative, it is a tree-like or 'arborescent'[46] structure, portraying international law as a series of choices between two branches in a path. The difference between the two approaches is that, whereas the counter-narrative views the two branches as indistinguishable and the path of law therefore as cyclical, the dominant narrative imports a substantive conception of right or justice which allows the narrator to chart a path breaking out of such cycles of poverty, violence, injustice, or impunity towards justice and the rule of law.

The counter-narrative thus presents a vision of an international law which is indeterminate in content, with each binary conceptual pair constituting a dialectic that allows for the generation of a seemingly infinite number of arguments, acting as an engine for the constant renewal of the field.[47] This indeterminacy of content belies, however, significant overdeterminacy in the counter-narrative's deep structure. The chosen method drastically reduces the complexity of international law to a world in which, as described by Professor Chodosh, 'differentiated terms or concepts are necessarily either "fundamentally opposing" (dichotomous) or "identical" (equivalent). No other relationships are possible.'[48] Moreover, by reducing international law to self-contained formalistic argument around opposing concepts, the critical counter-narrative has not merely placed the content of solutions to legal problems outside international law but has actually made this content inaccessible to the international lawyer, who lacks the means and methods to reach out of law's endless circularity to sociology, philosophy, or political science to identify workable solutions and to introduce them to the legal discourse.[49]

[44] See *ibid.*, at 476–512; Koskenniemi, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View'. 6 *EJIL* (1995) 325, at 329. See also Wildhaber, 'Sovereignty and International Law', in R. MacDonald and D. Johnston (eds), *The Structure and Process of International Law* (1983), at 425, 427.

[45] See Post and Eisen, 'How Long is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems', 29 *J Legal Studies* (2005) 545; Balkin, 'The Crystalline Structure of Legal Thought', 39 *Rutgers L Rev* (1986) 1.

[46] The term 'arborescent' is taken from Deleuze and Guattari, *supra* note 1. While it refers literally to any structure which is tree-like or branched, Deleuze and Guattari use it specifically to describe and to criticize forms of thought which follow a tree-like pattern as described above.

[47] See Kennedy, 'When Renewal Repeats', *supra* note 39, *passim*; Koskenniemi, *From Apology to Utopia*, *supra* note 39, at 69.

[48] Chodosh, 'An Interpretive Theory of International Law: The Distinction between Treaty and Customary Law', 28 *Vanderbilt J Transnat'l L* (1995) 973, at 1046. See also Beckett, 'Rebel without a Cause? Martti Koskenniemi and the Critical Legal Project', 7 *German LJ* (2006) 1045, at 1075; Onuf, 'Book Review: From Apology to Utopia: The Structure of International Legal Argument', 84 *AJIL* (1990) 771, at 772; Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law', 26 *Harvard Int'l LJ* (1985) 385, at 392.

[49] See Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *Leiden J Int'l L* (1997) 137, at 153–154.

The overdeterminacy of the critical counter-narrative is a direct result of the method through which international law's supposed indeterminacy was discovered.[50] While the critical counter-narrative claims to discern that international law is 'constructed in an adversarial way',[51] it in fact constructs this adversarial nature by presuming an underlying dualism.[52] Having presupposed this dualistic structure, the counter-narrative's attempt to map international law's deep structure becomes infected with this dualism to the point that the chosen method can only find itself masquerading as deep structure.[53] As the French multidisciplinary scholars Gilles Deleuze and Félix Guattari have described similar thought-initiatives more generally, 'it is inaccurate to say that a tracing reproduces the map. It is instead like a photograph or X ray that begins by selecting or isolating, by artificial means such as colorations or other restrictive procedures, what it intends to reproduce. The imitator always creates the model and attracts it. The tracing has already translated the map into an image . . .. when it thinks it is reproducing something else it is in fact only reproducing itself.'[54] In this way, the counter-narrative is not altogether dissimilar to the dominant narrative's approach to philosophical history in its use of the historical record to justify a pre-determined theory. Neither presents an objective basis for understanding history – past, present, or future. Rather, international law is interpreted through the lens of and thereby reflects a preconceived theory of law's development. Moreover, as noted above, the underlying theory is, in both cases, tree-like or arborescent, tracing international law's development across a potentially endless series of different branchings. The following section explores the origins of these similarities, finding them grounded in common fundamental assumptions cutting across legal theory, and examines the significant implications of these assumptions for our understanding of the history and possibilities of international law.

4 Of Trees and Rhizomes: The Arborification and Deforestation of International Law

As described above, both the dominant and counter-narratives presuppose an arborescent or tree-like deep structure underlying international law and trace international law's development across this structure through history. These are not mere accidental properties of the particular narratives. Rather, they are inherent characteristics of the assumptions underlying the very ideas of law and of a legal system,

[50] *Cf.* Deleuze and Guattari, *supra* note 1, at 6–7 (observing that attempts to create a multiplicity succeed only because the subject 'accedes to a higher unity of ambivalence or overdetermination, in an always supplementary dimension to that of its object').

[51] Koskenniemi, *From Apology to Utopia*, *supra* note 39, at 598–599.

[52] Koskenniemi is explicit in his appeal to such method: *ibid.*, at 6–14. While David Kennedy has a less explicit commitment to method, giving the impression of discovering the law 'out there', he too imposes a dualistic structure onto facts: see Kennedy, 'My Talk at the ASIL', *supra* note 39, at 106.

[53] See Onuf, Book Review *supra*, note 48, at 772.

[54] Deleuze and Guattari, *supra* note 1, at 14–15.

whether international or municipal.[55] Inherent in any theory of law or legal system is the assumption of law's unity in two forms.[56] First, there is an external unity, distinguishing the world of law from that of not-law and setting the boundaries of the system.[57] Second, there is an internal unity, organizing the different rules and principles of the system within a coherent whole.[58] In each case, this unity is established through tree-like principles, separating law from not-law as two branches of human experience or categorizing law's internal aspects into different branches and organizing them hierarchically. The principles or means by which this arborecent unity, external and internal, is generated establish a deep structure of the legal system and set the framework through which legal developments are understood.[59] Any attempt to describe the legal system, in whole or in part, presupposes this unity and necessarily traces its internal and external organizing schema.

The attachment to unity is at the core of the international lawyer's projected idea of international law.[60] To define oneself as an international lawyer and to partake in international legal argument is to accept the existence and unified structure of a thing called international law. In the dominant narrative, law's metaphysical unity is postulated in the form of a sense of right or justice to which law must progressively develop over time. The counter-narrative rejects law's substantive unity in this sense (what Raz would call its 'material unity'[61]), offering instead a vision of international law as indeterminate in content.[62] However, it succeeds in doing this only by asserting a 'unity of totalization' in a higher, cyclical dimension (what Raz would call its 'formal

[55] Cf. *ibid.*, at 13 ('genetic axis and profound structure are above all infinitely reproducible principles of *tracing*. All of tree logic is a logic of tracing and reproduction. . . . It consists of tracing, on the basis of an overcoding structure or supporting axis, something that comes ready-made. The tree articulates and hierarchizes tracings; tracings are like the leaves of a tree').

[56] See Kennedy, *supra* note 7, at 8 (arguing that 'law is nothing but an attempt to project a stable relationship between spheres it creates to divide').

[57] See Raz, 'The Identity of Legal Systems', 59 *California L Rev* (1971) 795.

[58] *Ibid.* See also Summers, 'The Formal Character of Law', in R. Summers, *Essays in Legal Theory* (2000), at 125. This internal unity may stem from an individual sovereign as in Austin's command theory of law, a root-principle the existence of which precedes the operation of the legal system as with Hart's 'rule of recognition' or Kelsen's '*Grundnorm*' or, in a more sophisticated form, it may result from the internal circularity of the law in operation as in Luhman's autopoietic conception of the law. See J. Austin, *The Province of Jurisprudence Determined* (1832); H.L.A. Hart, *The Concept of Law* (1961); H. Kelsen, *Pure Theory of Law* (trans. M. Knight, 2nd edn, 1978); N. Luhmann, *A Sociological Theory of Law* (1985), at 281–288; Luhmann, 'Closure and Openness: On Reality in the World of Law', in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1987), at 335, 336–337.

[59] See J. Raz, *The Concept of a Legal System* (2nd edn, 1997), at 183–184 (describing a theory of law's genetic structure as setting out a hierarchy of laws' immutability and of the processes for resolving conflicts among laws).

[60] See, e.g., Paulus, 'Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State', 25 *Michigan J Int'l L* (2005) 1047, at 1057.

[61] See Raz, 'The Identity of Legal Systems', 59 *California L Rev* (1971) 795, at 796.

[62] Koskenniemi, 'Repetition as Reform: Georges Abi-Saab *Cours Général de Droit International Public*', 9 *EJIL* (1998) 405, at 411.

unity'[63]) as manifest in the narrative's overdeterminacy of deep structure.[64] Not only does the circular counter-narrative present a self-contained system of law effectively cut off from neighbouring fields, thereby cementing its external unity, but, in holding that each concept necessarily entails its opposite, it reproduces the unity of international law throughout.[65] Given the deep and necessary attachment to the unity of international law in any description of the international legal system in whole or in part, we should not find it, *à la* David Kennedy, 'surprising how many international legal arguments read as arguments for international law'.[66] Rather, we should be surprised if an international legal argument did not, in some form, constitute, at least implicitly, an argument for international law. Any attempt to describe international law from within the field must begin with the presupposition of its arborescent unity and, as a result, can only succeed in tracing this unified deep structure. This has two profound implications which are explored below.

First, any arborescent theory of international law will inevitably distort or misrepresent the reality of law's development in order to force it into a structure. As Deleuze and Guattari have pointed out, arborescent structures such as those described above are unnatural, externally imposed patterns of control imprinted on the natural pattern of thought. They explain, '[t]hought is not arborescent and the brain is not rooted or ramified matter'.[67] In place of arborescent structures, Deleuze and Guattari urge us to view thought as a rhizome – a horizontal, subterranean network which 'connects any point to any other point', 'an acentered, nonhierarchical, non-signifying system without a General or central automaton'.[68] Unlike arborescent structures, which seek to reduce understanding to an overall unity, '[a] rhizome is not amenable to any structural or generative model. It is a stranger to any idea of genetic axis or deep structure.'[69] As a socially constructed field of ideas, international law replicates the rhizomatic characteristics of mind.[70] What we perceive to be institutions, organizations, disciplines, or schools of thought within international law (and even the whole of international law itself, not to mention its primary building blocks, states) are not singular, clearly delimited entities. They neither exist apart from other similar concepts nor possess immutable internal structures. Rather, they are perceptions that the rhizomatic network of human consciousness has developed such a dense web of

[63] See Raz, *supra* note 61, at 796.

[64] See Korhonen, 'The Role of History in International Law', 94 *ASIL Proc* (2000) 45, at 46; Deleuze and Guattari, *supra* note 1, at 6.

[65] Cf. *ibid.*, at 6–7 (observing that in elevating unity to this circular dimension, 'unity is consistently thwarted and obstructed in the object, while a new type of unity triumphs in the subject. The world has lost its pivot; the subject can no longer even dichotomize, but accedes to a higher unity of ambivalence or overdetermination, in an always supplementary dimension to that of its object').

[66] Kennedy, 'The Disciplines', *supra* note 7, at 94.

[67] Deleuze and Guattari, *supra* note 1, at 16.

[68] *Ibid.*, at 23.

[69] *Ibid.*, at 13.

[70] See Murray, 'Nome Law: Deleuze & Guattari on the Emergence of Law', 19 *Int'l J for the Semiotics of Law* (2006) 127. P. Allott, *The Health of Nations: Society and Law Beyond the State* (2002), at 291.

interconnections and rigidity as to give the appearance of unity – of internal coherence and outward delimitation. However, this unity exists only as a matter of mind. To perceive international law is to create it,[71] to establish certain connections across the rhizome and to cut off others, to define its borders and its internal relations, in short, to impose on the rhizome of human thought an arborescent unity.

The rhizomatic nature of international legal developments is readily apparent in any discussion of the relationship between branches of law or in the case of multilateral negotiations wherein a multitude of different actors seek to harmonize diverse, but not necessarily contradictory, views into a compromise solution. It is perhaps most clearly and easily illustrated in the case of international organizations such as the United Nations. While the organization is often described as a unitary entity – one rooted in the Charter, with singular legal personality and a Secretary-General who provides one voice for the organization and whose branches reach out like branches of the central nervous system – this image belies the rhizomatic characteristic of the organization. It ignores the specialized agencies, the regional organizations, the International Court of Justice, and even the non-hierarchical nature of the relationship between the Security Council and the General Assembly, not to mention the more fundamental roles of member states and the individual staff members which comprise the Secretariat – all of which are symptoms of its rhizomatic character. Similarly, the ICC which, as an independent court, professes an even greater claim to unity remains a multiplicity – of states parties, of organs, and of staff members.[72] And it is a multiplicity which is inherently connected to other 'external' multiplicities, plugged into national foreign and justice ministries through its cooperation regime,[73] into national courts through the principle of complementarity,[74] into finance ministries through its budgeting process,[75] into the United Nations,[76] and more or less informally into a slew of different actors who affect it or are affected by it,[77] as well as into broader networks outside international law from the global economy[78] to various other academic disciplines.[79]

The necessary artificiality of unity extends also to the narratives which underlie and shape our understanding of international law. Contrary to the unifying narrative of 'from Nuremberg to The Hague' (or any equivalent story of law's progressive

[71] See Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', 16 *EJIL* (2005) 213, at 214–215 (describing law as a 'thought object' which does not exist until we define it).

[72] Rome Statute of the International Criminal Court, Arts 34, 44, and 112 (1).

[73] *Ibid.*, Pt IX

[74] *Ibid.*, Arts 17–19.

[75] *Ibid.*, Art. 115 (a).

[76] *Ibid.*, Art. 2.

[77] See Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 *AJIL* (1999) 2, at 4.

[78] See Official Records of the Assembly of States Parties to the Rome Statute, Seventh Session (2008), ICC-ASP/7/20, Part II, at paras 26–27.

[79] See L. May and Z. Hoskins (eds), *International Criminal Law and Philosophy* (2009).

development), the path which led to the creation of the ICC was not one but multiple: all roads led to Rome. Not only the Nuremberg Tribunal, but also the law of Geneva on armed conflict, the prior Hague Conventions of 1899 and 1907, legal and political processes worked out in the United Nations in New York and Geneva, a proposal emanating from Trinidad and Tobago on a new way to combat drug-trafficking,[80] a new world-wide network of non-governmental organizations,[81] and many other tributaries fed into and left their mark on the eventual Court. For its part, the seemingly self-contained unitary structure of the counter-narrative emanates from and is connected to external sources, most conspicuously the deconstructionism of Derrida.[82]

The second implication of the imposition of arborescent structures by the dominant and counter-narratives of international law is even more significant. It is not just that these narratives force international legal history, past and present, into artificial arborescent structures of unity. In doing so, they also seek, intentionally or not, to control its future. As Deleuze and Guattari observe, 'Language is made not to be believed, but to be obeyed, and to compel obedience'.[83] To speak of international law in any doctrinal or dogmatic sense, to say something is or is not law, or to describe law's internal relations is to impose one arborescent vision of unity, to attempt to persuade others to this vision, and, in doing so, to petrify it. As Professor Allott observes, 'If we are legal theorists, we are saying to those involved in the law – lawyers and lawyees – these are the limits and possibilities of your law-life, because this is what law is'.[84]

The development and evolution of the idea of international law *qua* legal system constitutes an ongoing struggle to impose (arborescent) structure and order on the multiplicitous nature of reality. Throughout history, international lawyers have sought, through their declarations of what the law is, to force the rhizome of human thought and experience into unified, arborescent structures of order and control.[85] Yet, the human mind and the human community are constantly exploring and establishing new connections across the rhizome that threaten to undermine the supposed unity of international law. As Deleuze and Guattari note, 'The tree imposes the verb "to be," but the fabric of the rhizome is the conjunction, "and. . .and. . .and. . ." This conjunction carries enough force to shake and uproot the verb "to be".'[86] Where the rhizome does manage successfully to break through imposed unity, the forces of

[80] UN Doc A/44/195 (1989).

[81] The NGO network itself can be seen as a non-hierarchical, non-centralized rhizome challenging the traditional arborescent structure of international negotiations: see Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law', 39 *Cornell Int'l LJ* (2006) 243.

[82] Koskenniemi, *From Apology to Utopia*, *supra* note 39.

[83] Deleuze and Guattari, *supra* note 1, at 84. See also Allott, 'Kant or Won't: Theory and Moral Responsibility', 23 *Rev Int'l Studies* (1997) 339, at 342.

[84] *Ibid.*, at 340.

[85] In his history of international law, Koskenniemi describes, albeit in different terms, how a number of prominent thinkers in international law, including Kelsen, Scelle, and Lauterpacht, recognized the rhizomatic nature of reality and sought to force it into a unified understanding: Koskenniemi, *supra* note 10, at 238–245, 331–331, and 360–364.

[86] Deleuze and Guattari, *supra* note 1, at 27.

international law regroup and seek to re-impose order and unity. One of the most striking appearances of the rhizome in international legal discourse was the recognition around the end of World War II of individuals as moral agents, as equal subjects and objects of rights and duties within a theretofore statist international law. However, as Professor Allott points out:

> The emergence of potentially universal values after 1945 suffered a deformation as the emerging values were subject to almost instant rationalizing, legalizing, institutionalizing and bureaucratizing. That is to say they were corrupted before they could begin to act as transcendental, ideal, supra-societal, critical forces in relation to the emerging absolute statism of society, including 'democratic' society.[87]

Similarly, we have seen repeatedly how the initial creative power unleashed in bringing together previously disparate disciplines such as law and economics becomes quickly overtaken by the emergence of a unified discipline (Law and Economics in capital letters) which turns its back on its original creative act of conjunction in search of hegemony over other disciplines.[88]

When seen in light of the struggle to gain and to maintain arborescent control over the rhizome of human consciousness, recent discussions about the fragmentation of international law appear to miss the point. Fragmentation presumes a unity which exists only in the minds of the creators.[89] What is described as fragmentation is the establishment and perceived (or, rather, perceiving-creating of) hardening of new connections across the rhizome, leading to the appearance of new institutions, new regimes, and new disciplines.[90] It is not that some mystical metaphysical unity has been shattered by the development of such instances of agglomeration in the rhizome. To the contrary, the perception of fragmentation arises from the rhizome of human thought pushing its way, like grass forcing its way through a concrete pavement, through the unity imposed by the minds of law's creators. Where the rhizome successfully breaks through, it is immediately subject to different forces of arborification – those which seek to reinstate the previous order and those which are focused on giving structure and order to this new outbreak by defining its internal and external relations. The debate about fragmentation is not about whether the unity of international law is under threat, but rather about which unity should be given priority.[91]

[87] Allott, *supra* note 70, at 311.

[88] It is not always the case that a new discipline will emerge. The initial connection may also fail to gain sufficient momentum and recede into memory: see, e.g, Abbott, 'Toward a Richer Institutionalism for International Law and Policy', 1 *J Int'l L and Int'l Relations* (2004–2005) 9 (bemoaning the failure of 'international law and international relations' to emerge as a discipline).

[89] Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Int'l LJ* (2004) 999, at 1017. Even this unity may be fragmented into a number of different forms of unity: Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation', 17 *Finnish Yrbk Int'l L* (2006) 131.

[90] See Fischer-Lescano and Teubner, *supra* note 89, at 1017 (describing fragmentation as the product of 'collisions' between regimes).

[91] See Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553, at 561–562. See also Prost and Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?', 5 *Chinese J Int'l L* (2006) 341, at 343.

Interestingly, it is the rhizome itself which enables its own arborification. One of the most puzzling challenges in legal theory is the problem of change, or how to explain the continuity of legal systems or the birth of new legal systems in place of old.[92] An arborescent theory of law, resting on law's presumed unity, cannot explain how law can capture and impose order on rhizomatic external forces or reanimate itself when such forces have uprooted its very foundations.[93] A rhizome in contrast, once broken, may resume at any point of the break.[94] By forging new rhizomatic connections at the level of its deep structure, the legal system is able to adapt itself, organically to re-establish, bit by bit, the system's internal and external boundaries and to shore up its defences (futile though the effort may be) against future incursions from the 'outside'.

5 Life after Deforestation: Towards a Rhizomatic Map of International Law?

As described above, the geographies of international law reflected in the dominant linear and circular counter-narratives constitute mere tracings of preconceived ideas and not true maps of international law. As explained by Deleuze and Guattari, a map is 'altogether different' from a tracing; '[t]he map does not reproduce an unconsciousness closed in upon itself; it constructs the unconscious. It fosters connections between fields. . . . The map is open and connectable in all of its dimensions; it is detachable, reversible, susceptible to constant modification.'[95] If, however, the concepts of unity, order, and deep structure which epitomize a tracing are inherent in the very concept of a legal system, the question arises whether it is even possible to create a map of the rhizomatic nature of consciousness underlying international legal history without tracing a pre-ordained theory or whether the rhizomatic approach is destined to remain only an external (and not fully articulable) critique of law. After all, as Koskenniemi has observed, we need some sort of theory to organize and to make sense of the multitude of facts which comprise international law.[96] Deleuze and Guattari acknowledge this mediating role played by theory and recognize that it is impossible to have a rhizomatic map of history without replicating the entirety of human experience.[97] History

[92] See Raz, *supra* note 57, at 797–798.

[93] See M. Bonta and J. Protevi, *Deleuze and Geophilosophy: A Guide and Glossary* (2004), at 34 (noting that one of the advantages of a rhizomatic view is in understanding situations where 'certain sections of human populations develop new fundamental behavior patterns, rather than merely move between the already constituted patterns they predictably adopt due to their social positions').

[94] Deleuze and Guattari, *supra* note 1, at 10.

[95] *Ibid.*, at 13–15.

[96] Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory', 1 *Finnish Yrbk Int'l L* (1990) 77; See also Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', 16 *EJIL* (2005) 213, at 227; Korhonen, 'The Role of History in International Law', 94 *ASIL Proc* (2000) 45, at 46.

[97] Deleuze and Guattari, *supra* note 1, at 10 ('[t]he ideal for a book would be to lay everything out on a plane of exteriority of this kind, on a single page, the same sheet: lived events, historical determinations, concepts, individuals, groups, social formations').

itself, being the product of human thought, contains two characteristics of a tracing reminiscent of the actions which generate the unity found in international law. On the one hand, there is an act of inclusion/exclusion, a determination of which facts are relevant to the history which limits artificially and tries to extract for examination a portion of the rhizome of human experience.[98] On the other hand, there is the introduction of narrative, the organizing of the selected facts into an intelligible whole, which imposes internal limitations on the connections which can be made across the portion of the rhizome studied.[99] This is not to say, however, that the rhizomatic nature of consciousness cannot be depicted. Indeed, it is always present in any description of a legal system or history, if only in what is left unexplained or unanswered. However, to bring out the rhizomatic nature of human experience and to assist the reader in throwing off the shackles of imposed unity of thought, what is needed is not a new history, but an 'anti-history' (what Deleuze and Guattari call a 'nomadology'[100]) which can transcend these two limiting moves of inclusion/exclusion and narrative. If this can be achieved, an anti-history, while unable fully to replicate international law's underlying rhizomatic nature, may artificially reconstruct it through various methods.[101] The remainder of this section sketches some of the ways in which this anti-history might be constructed, as well as the limitations of such efforts.

A rhizomatic anti-history of international law rejects attempts to establish borders and instead recognizes and embraces the porous nature of the boundaries within international law and between international law and other fields. It rejects attempts to delimit clearly the subjects it seeks to study from other such subjects, in particular efforts to define general or overarching theories of international law. Where international lawyers claim that there are boundaries to the law which they cannot transgress,[102] it actively crosses such boundaries in search of an interdisciplinary approach.[103] In terms of presentation and style, it deploys a range of diverse syntactic and other techniques to get beyond the directional and segmenting narrative flow of the phrase, sentence, paragraph, and chapter which characterize the journal article,

[98] Onuma, 'When Was the Law of International Society Born? – an Inquiry of the History of International Law from an Intercivilizational Perspective', 2 *J History of Int'l L* (2000) 1, at 6; Anand, 'The Influence of History on the Literature of International Law', in MacDonald and Johnston (eds), *supra* note 44, at 341.

[99] See Burrow, *supra* note 13, at p.xvi, 1; Allott, *supra* note 11, at 18–19. See also H. White, *The Content of the Form: Narrative Discourse and Historical Representation* (1990), at p. x. While narrative is common to many forms of history, as Hayden White points out, in its efforts to impose order on the past and in its implication of a code against which past transgressions can be evaluated, narrative has particular relevance to legal histories: *ibid.*, at 13–14.

[100] Deleuze and Guattari, *supra* note 1, at 25.

[101] *Ibid.*, at 24.

[102] See Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *EJIL* (2003) 105, at 106.

[103] See Jennings, 'International Lawyers and the Progressive Development of International Law', in J. Makarczyk (ed.), *Theories of International Law at the Threshold of the 21st Century: Essays in Honour of Krysztof Skubiszewski* (1996), at 413, 414.

thesis, or argumentative brief through which the international lawyer normally communicates.[104]

Examples of such rhizomatic tendencies appear in differing degrees in any original or creative piece of scholarship. David Kennedy's urging that we view international law as 'a terrain on which to read the development of ideas about identity, geography, and entitlement'[105] (which brings to mind also Deleuze and Guattari's related concepts of 'strata' and 'lines of flight'[106]) is one of the best descriptions of international law's rhizomatic underpinnings, rivalled perhaps only by Fischer-Lescano and Teubner's network theory of international law (one of the very few pieces of international legal scholarship to refer to Deleuze and Guattari and the concept of 'rhizome').[107] Recent scholarship on transnational networks also goes some way in this direction.[108] Theories of legal pluralism which assert that '[m]ultiple forms of order coexist in the same social space'[109] challenge the idea of law's internal coherent unity. More explicitly, normative approaches may foster the instrumentalization of the imagined boundaries between law's branches[110] (or between law and not-law[111]) or, where connections already exist between branches, take them apart and reconnect the branches in new ways.[112] Koskenniemi's approach to international law is also emblematic of such a rhizomatic approach when seen not as the propagation of a theory of law's deep structure but as a series of new connections between law and other disciplines such as post-modern deconstructionism in *From Apology to Utopia* and history in *The Gentle Civilizer of Nations*.[113]

[104] See, e.g., Gough, 'Geophilosophy and Methodology: Science Education Research in a Rhizomatic Space', available at: www.bath.ac.uk/cree/resources/noelg_SAARMSTE_ch.pdf; Sellers, 'Review of *Technology, Culture, and Socioeconomics: A rhizoanalysis of educational discourses*', 3 *Transnat'l Curriculum Inquiry* (2006) 28; J. Law, *After Method: Mess in Social Science Research* (2004), at 1, 3. For less radical approaches see L. Wittgenstein, *Philosophical Investigations* (revised 4th edn. trans. Anscombe, Hacker, and Schulte, 2009) (offering a series of fragments which can be freely rearranged by the reader); Osofsky, 'A Law and Geography Perspective on the New Haven School', 32 *Yale J Int'l L* (2007) 425, at 425 (urging the reader to adopt a 'non-linear' reading of the article). But see Deleuze and Guattari, *supra* note 1, at 6 (arguing that Joyce shattered the linear unity of language only to create a higher cyclical unity).

[105] Kennedy, 'The Disciplines', *supra* note 7, at 101.

[106] See Deleuze and Guattari, *supra* note 1, at 44–82, 212–228.

[107] See Fischer-Lescano and Teubner, *supra* note 89.

[108] See, e.g., Koh, 'How is International Human Rights Law Enforced?', 74 *Indiana LJ* (1999) 1397; Koh, 'Bringing International Law Home', 35 *Houston L Rev* (1998) 623.

[109] Merry, 'New Legal Realism and the Ethnography of Transnational Law', 31 *Law and Social Inquiry* (2006) 975, at 980. See also Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', 31 *NYU Rev Law and Social Change* (2006–2007) 641; Drumbl, 'Pluralizing International Criminal Justice', 103 *Michigan L Rev* (2005) 1295.

[110] See, e.g., Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', 43 *Columbia J Transnat'l L* (2004) 1.

[111] See, e.g., Slaughter-Burley, 'International Law and International Relations: A Dual Agenda', 87 *AJIL* (1993) 205.

[112] See Koller, 'The Moral Imperative: Towards a Human Rights-Based Law of War', 46 *Harvard Int'l LJ* (2005) 231 (arguing for the inversion of the dominant interpretation of the relationship between human rights and humanitarian law).

[113] See Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn In International Law', 16 *EJIL* (2005) 539.

No matter how successful, however, such approaches can never fully replicate the rhizomatic nature of consciousness as, to be intelligible, they must suppose certain unities (of the nodes in the network or the network itself, of the legal orders comprising the pluralist landscape or the landscape itself, or of the individual intellectual disciplines or even the concept of an intellectual discipline).[114] The danger is also that once the structure of internal or external boundaries is broken down, the method used to break down this structure will take its place as a new arborescent unity at the root of international law. Koskenniemi's application of Derrida's method of deconstruction to international law established a powerful new rhizomatic connection across disciplinary boundaries which unleashed considerable creative force upon pre-existing theories of international law. As it began to be taken, not necessarily by Koskenniemi but definitely by others, as depicting the 'true' deep structure of international law, it came to replace prior histories of progressive development with one grounded in an even deeper unity.[115] Any attempt to portray the rhizomatic nature of consciousness underlying international law and to 'deterritorialize' law's boundaries must therefore acknowledge that such deterritorialization also implies an immediate 'reterritorialization', and must disclaim its own imposition of unity and hegemony over other methods, accepting the validity of the application of a multiplicity of methods.[116]

6 Conclusion: Where to From Here? (Or Does it Even Matter?)

Patterns of history's linear progress and of its inevitable circularity have recurred throughout history and are likely to continue to appear.[117] Increased awareness of the rhizomatic nature of thought underlying international legal history will not displace such narratives, nor should it. However, as the above has shown, each historical map of international law (including here within the term 'maps' those self-proclaimed maps which depict only an underlying tracing) serves particular purposes and entails certain limitations. Our challenge is to find the right map, linear, circular, or rhizomatic, for the right purpose.[118]

Much like the Mercator projection which, from the sixteenth century onwards, was the dominant method for making maps for navigational purposes, the linear

[114] See Paulus, *supra* note 60, at 1050–1051 (identifying such unities in the relatively rhizomatic approach of Fischer-Lescano and Teubner).

[115] But see Onuf, 'Book Review', *supra*, note 48, at 772 (arguing that Koskenniemi detaches his project from Derrida's efforts to show deep structures to be groundless and, in contrast, seeks to identify the deep structure of international law).

[116] See Deleuze and Guattari, *supra* note 1, at 59–63.

[117] See Manuel, *supra* note 13, at 5.

[118] See Deleuze and Guattari, *supra* note 1, at 5 ('when one writes, the only question is which other machine the literary machine can be plugged into, must be plugged into in order to work'); Koskenniemi, 'Letter to the Editors of the Symposium', 93 *AJIL* (1999) 351, at 356 ('[t]he final arbiter of what works is nothing other than the context (academic or professional) in which one argues'); Allott, *supra* note 11, at 17 ('[i]t seems rather that socially effective history-writing serves different social purposes in different circumstances').

dominant narrative of international law is most useful in its ability to chart a direction for the future. However, its effectiveness depends on a common understanding between cartographer and map-reader of the map's orientation and of its symbols. It presumes that the audience already shares the cartographer's commitment to the rule of law, justice, or right,[119] and will recognize the significance of the developments recounted along the journey towards these goals.[120]

In contrast to the linear dominant narrative, the counter-narrative is singularly useless for charting a course for the future. Its purpose is not to advocate one particular map, but rather to examine how the dominant narrative's cartographers use the tools (concepts) at their disposal to generate their maps. This enables the critical cartographer to demonstrate how the maps of the dominant narrative distort reality and to use the same tools to generate a plethora of maps. The counter-narrative gives us a tutorial on the 'rules of the game'[121] which can sharpen our abilities to practise as international lawyers. It cannot however provide any basis for choosing between differing maps,[122] nor can it assist 'in navigating outside the constraints of the professional vocabulary' of international law.[123] The concepts of international legal discourse are the building blocks of the critical cartographer and, as Duncan Kennedy observes, '[w]hen we approach it in this way law constrains as a physical medium constrains – you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your circumstances'.[124]

The value of depicting the rhizomatic nature of international law through the techniques preliminarily sketched above lies in the challenge it presents to the very constraints of international legal discourse. As Deleuze and Guattari's translator tells us in remarks which may as well have been directed in response to Duncan Kennedy, '[a] concept is a brick. It can be used to build the courthouse of reason. Or it can be thrown through the window.'[125] A rhizomatic understanding of international law is of limited day-to-day use to the international lawyer for whom to step outside the accepted conventions of the international law game may amount to professional suicide.[126]

[119] *Cf.* Koller, *supra* note 34, at 1046–1048 (noting that the receptivity among audiences to the development of international criminal law presupposed their commitment to the goals of criminal law more generally).

[120] See, e.g., Anghie and Chimni, *supra* note 38, at 95 (arguing that the law of war would be better observed if we recognize its 'multicultural basis').

[121] See Allott, *supra* note 70, at 318; Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', 36 *J Legal Education* (1986) 518, at 527.

[122] To claim, on the basis of the counter-narrative, that one or another map should be favoured would be to repeat the error of the physical geographer Arno Peters who argued that his preferred map projections (known as the 'Peters' or 'Gall-Peters' projection) which highlighted the Mercator projection's distortions of the size of countries as one moves away from the equator were superior to the Mercator projection, prompting cartographic organizations to disclaim the objectivity of any rectangular projections: see J. Snyder, *Flattening the Earth: Two Thousand Years of Map Projections* (1993), at 163–166.

[123] Kennedy, 'My Talk at the ASIL', *supra* note 39, at 125.

[124] Kennedy, *supra* note 121, at 526.

[125] Massumi, 'Introduction' to Deleuze and Guattari, *supra* note 1, at p. xviii.

[126] See Koskenniemi, *supra* note 118, at 360 (discussing the removal of Bosnia's American counsel before the ICJ for use of the wrong style).

Its value lies elsewhere, in highlighting the processes of control imposed by any predetermined method and in fostering new potential connections across the entirety of human consciousness, thereby unleashing law's (and not-law's) creative potential.

All too often, international lawyers have been willing to accept the map which is handed to them (often by their professors or by other academics) and to apply it to all settings without question. However, as this article has sought to show, such maps inevitably come overburdened with notions of law's predestination. While these maps may have their uses, it is equally important to cultivate an awareness that not only is neither the realization of justice nor professional competence in manipulating the internal grammar of the law not the be-all and end-all of the work of the lawyer embedded in the rhizomatic human community, but also that such manipulation without a broader understanding of the role of law in controlling humanity is positively dangerous. As the primary cartographers of the field, academics and the institutions in which they work and write should not only solidify and reinforce arborescent structures of international law, whether dominant or critical, but should also lead the way in challenging these structures and giving life to the rhizomatic nature of international law. It is in such a way that we can unleash law's (and not-law's) true creative potential.