

## 4 Deconstructionism, Normative Theory and Custom

### Introduction

Defining ideas in legal discourse has become so commonplace that one might mistake it for a rule. The practice has its advantages. It is often said that knowledge is gained when we render reality more intelligible by seeking generalisations of empirical validity, while remaining alert to unique and deviant phenomena.<sup>1</sup> But often, instead of marking out fields of enquiry, definitions tend to foreclose arguments, enabling enquirers to exclude from their enquiry everything else but that which would facilitate their arguments in reaching a general conclusion. Without building into the definition exercise safeguards that oppose this risk, the process of defining can initiate in legal discourse and elsewhere violence that limits our understanding of the same ideas that we seek to examine. The argument being made here is not that there is some intrinsic virtue in theoretical pluralism, but that in acknowledging that we live in a theoretically and socially dynamic and complex world, we also acknowledge that definitional exercises' main assumption that a single perspective could adequately and comprehensively explain all the characteristics of life, as well as monitor and account for relevant changes as and when they occur, is fraught with difficulty. Pluralism alerts us to the dangers of oversimplification and the culture of violence enthroned through foundationalist philosophy, which lavishly indulges the definitional exercise. Pluralism guards against the hazards of "... intellectual knockouts, - those attempts to disown past methodologies and theories on the assumption that they are entirely wrong, only to replace them with a new orthodoxy".<sup>2</sup> Therefore, indulging in the definitional exercise, at the start of an exercise that examines the textual clarity and factual determinacy of custom, would be wholly counter-productive.

Of definitions, Elam writes that:

...often they work on the basis of consensus or general agreement as to what words or phrases mean, limits must necessarily be imposed to fix the definition in either synchronic or diachronic terms. However necessary this process is for everyday communication, the danger of thinking you know it all is at no time greater than when it comes to grasping hold of definitions. Definitions threaten to function like final answers which erase the fact that there were ever any questions asked in the first place; their status becomes unshakable, almost natural, and rarely, if ever interrogated.<sup>3</sup>

Besides the common problems associated with the definitional exercise, the language we rely on to couch definitions is almost always encumbered by inflections that appear unshakeable. Feminism, for instance, is a thematic criticism, consisting of a variety of inflections. For some, feminism means equal pay, abortion rights, and a partnership in a law firm. For others, feminism means a celebration of women as separate and distinct from men. To others still, feminism is a subversive ideology used to undermine authority and create alternative power structures.<sup>4</sup> The pursuit for definitions can, if not checked, enslave the enquirer who must then stick to the definitions s/he has suggested for her/his study rather than investigate each lead that is thrown up by her/his search. Consequently, invaluable research energy may be sapped unwittingly by an unconscious effort to justify definitions. For these reasons, no definition of deconstruction is offered here. Again because of the thematic nature of deconstruction, it is not possible to indulge in the definition of it without immediately locking ourselves into uneasy disputes because deconstruction means different things to different writers. It has been taken by some to mean “trashing”,<sup>5</sup> or “stinging criticism”<sup>6</sup> and by others “the philosophy of the limit”,<sup>7</sup> or “the philosophy of redemption”.<sup>8</sup> As a means of textual analysis it is imbedded in philosophical ideas that involve the teasing out of hidden antinomies in the language that we use to represent ideas. For instance, article 38(1)(b) of the Statute of the International Court of Justice<sup>9</sup> is a linguistic representation of legal custom. But by their very nature, ideas cannot be brought into the present. They are physically inaccessible, except through representation by some other medium. In spite of attempts to represent any idea by any medium, most commonly language, the idea remains in the background. According to Derrida, the traditional view is that that which is signified is inseparable from the signifier, and that the signified and the signifier are the two sides of one and the same production.<sup>10</sup> Because language comprises symbols deliberately fashioned to stand in place of

ideas and objects, it is vital to ask whether, and to what extent language as a series of symbols of representation of thought and objects successfully represents ideas and thoughts that it is assigned to. This is particularly important for lawyers because:

The law is a profession of words; language is its stock-in-trade. ... Most lawyers rely on a simplistic “functional” understanding of language as a transparent medium for the transmission of ideas and instructions. [Yet]... in skilled hands, it is considered a force for clarity and certainty; [and] in untutored ones, it is a source of confusion and disruption.<sup>11</sup>

Deconstruction attempts to account for a heterogeneous variety, what Sallis calls: “... A manifold of non-logical contradictions and discursive inequalities of all sorts that continues to haunt and fissure even the *successful* development of philosophical arguments and their systematic exposition”.<sup>12</sup> Deconstruction’s relevance to ideas like custom is made imperative by Western thought’s reliance on foundationalist philosophy which tends to deny, oppress and exclude opposites of preferred ideas. However, this is not entirely possible because traces of the ostracised opposites form an essential part of the character of the accepted idea. To borrow from Sallis, all major philosophical concepts - being, essence, the good, the One, truth, logos, custom, etc. are values of unbreachable plenitude and presence.

Yet, concepts are not point-like simplicities, because in order to be what they are, they must be demarcated from other concepts to which they thus incessantly refer. In addition to such referentiality to other concepts with which they form binary oppositions, they are, moreover, caught in systems and conceptual chains.<sup>13</sup>

Derrida argues that no element can function, as a sign without referring to another element which itself is not simply present. This applies to spoken and written discourse.<sup>14</sup> Therefore, the conceptual homogeneity sought in the formation of the concept of legal custom for instance is contradicted in a certain manner, by custom’s constitutive relation to other concepts. Even more, it is contradicted by the constitutive relationship of customary international law’s formal attributes of State practice and *opinio juris* to other concepts. Sallis writes that conceptual inconsistencies that result from a concept’s textual arrangement are complex, and comprise a heterogeneity of possibilities. These range from “... lexicological inconsistencies owing to multiple and variegated uses of one key word, signification, theme, or even signifier”.<sup>15</sup> An example is when the function in the process of custom

of a resolution of the United Nations General Assembly is variably associated with evidence of State practice and *opinio juris* and sometimes as evidence of both regardless of the fact that United Nations General Assembly resolutions were not originally intended to have binding consequences on member States. Discrepancies between a preface, in this case article 38(1)(b) and the main text, in this case norms of customary international law can result in the same lexicological inconsistencies that lead to conceptual inconsistencies in the process of concept formation if in the philosopher's eye there is no evidence of unity, coherence, and wholeness of the philosophical discourse. These lexicological inconsistencies abound in the formal source of customary international law, article 38(1)(b).<sup>16</sup> In a complicated active and passive fashion, they contribute to the philosophical discourse on the theory of customary international law. To enhance customary international law's coherence, textual clarity, and determinacy these lexicological inconsistencies in the formulation of the concept of customary international law must be attended.

Deconstruction seeks to account for these constitutive contradictions first by destabilising the false prisms on which ideas are anchored. This provides for the exciting opportunity to realise what Theneuissen calls: "communicative freedom", where "... one part experiences the other not as boundary but as the condition for its own generalisation".<sup>17</sup> As an example, foundationalist philosophy holds that the idea of science is discernible because of its exclusivity to superstition. This paradigm enables and leads to the creation of patterns for the mutual co-determination of distinctively separate ideas. It enables the argument that customary international law is separate and distinct from treaty. As we have already seen in Chapter One, there is evidence that primary rules of customary international law can result from the treaty process, and also that treaty rules sometimes reflect a codification of existing primary rules of customary international law.<sup>18</sup> Therefore, the two processes of norm creation appear to be mutually supportive and not - as foundationalist philosophy appears to encourage - mutually exclusive and distinct from each other. Deconstruction insists that instead of perceiving "A" and "B" as a pair of independent co-determinant ideas it is possible to show that the relata are internally related "... first negatively, in their contrastive relationship with that which yields their self-definition, and then positively, as the belonging together in and through which the relata become what they are".<sup>19</sup> One consequence of applying foundationalist philosophy unquestioningly appears to be that the syllogisms inherent in our strategies exclude a whole range of pertinent issues. One result of this is that concepts

deficient in coherence and difficult to sustain are created. Article 38(1)(b) appears to be an example of this.<sup>20</sup>

It appears that by over-emphasising the representational capabilities of language to thought, foundationalist philosophy has not only “mystified” language, but also successfully fuelled the campaign for the idea that language and thought are the same. This is an idea which, whether we want to acknowledge it or not, appears to typify Western legal discourse on custom. One consequence of the polarising of differences between language and thought appears to be the creation of ideas whose viability is inherently assumed by the creative process. Of representation, Baudrillard<sup>21</sup> writes that it “... starts from the principle that the sign and the real are equivalent (even if this equivalence is utopian, it is a fundamental axiom)”. However, Gutting’s<sup>22</sup> analysis of Foucault’s commentary on the history of language in *Michel Foucault’s Archaeology of Scientific Reason* shows this not to be the case. In what he calls the Renaissance episteme,<sup>23</sup> knowledge, which according to Foucault is ultimately grounded on “order”,<sup>24</sup> appeared to depend on the physical resemblance of one thing to another. Therefore Renaissance thought ordered the world in terms of relations of resemblance. But how were the knowledge claims of this episteme formulated? By what signs, and on what grounds? It is the linguistic signs that received the highest status in the task of formulating knowledge.<sup>25</sup> Foucault concludes that Renaissance episteme shows that language was:

A part of the world itself, one segment of the complexly intertwined system of resemblances. ...[It] was studied ... in the same way as a natural object. Further, since language was assimilated to the enduring marks (signatures) found on physical objects, priority was given to its written form.<sup>26</sup>

This privileging of written language over spoken language had a profound effect on knowledge gathering for the reason that it did not distinguish between what was seen from what was read, and between directly observed facts from what might possibly fit as unreliable reporting. Fables, reported quotations, exact description, and commentary were all inextricably mixed.<sup>27</sup> For this reason, the value of information relating to myths and that relating to direct observations like descriptions of a thunderstorm for instance was difficult to discern. The question whether these categories of information had the same status in the ordering of knowledge or not appears to have been bypassed. Consequently, the Renaissance episteme’s conception of knowledge is one that places magic, erudition, and science at par.<sup>28</sup>

In the middle of the seventeenth century the Classical episteme emerged in Western thought, and replaced the Renaissance episteme. The Classical episteme ordered things, not just by their resemblance one to another, but by their relations of identity and difference. While the resemblance of things remained the starting point of acquiring knowledge, resemblance was no longer regarded as expressing the true order of reality. Reality was ordered and understood by the process of analysing the structure of elements into which things their resemblance belonged. Strict identities and differences marked by the presence or absence of particular properties established those resemblances that gave birth to knowledge. On the basis of this knowledge things could be ordered, for example, from simplest to most complex.<sup>29</sup> Therefore, knowledge was no longer: "... a matter of recognising resemblances, but of extracting from resemblances precise comparisons of the identities and differences of things' properties".<sup>30</sup> Unlike the preceding episteme, the Classical episteme regarded the analysis of resemblances, and not just their mere recognition, as the birth of knowledge. No resemblances were accorded cognitive value prior to their interrogation, and the realisation through such interrogation, of their comparable identity and differences. Consequently, "... the mind's essential activity in knowing was no longer to draw things together on the basis of their resemblances but to separate them on the basis of their differences".<sup>31</sup> Unlike Renaissance knowledge which appeared at best probable, Classical knowledge was in principle capable of attaining certitude.

Because of its somewhat robust approach to the conception of knowledge the Classical episteme inflicted profound change first on the conception of language itself, and secondly on the use of language. Unlike the Renaissance order which regarded a signifier as a part of the world, and therefore antecedent to man, and therefore up to man to discover, the Classical order held that a signifier exists as such only to the mind that knows. Unlike the Renaissance order, the Classical order held that no such mute and unknown signs existed. An immediate result of this conception of order was that the locus of signs shifted from the world, to the mind.<sup>32</sup> The status of language fell from being an object of creation, to being the product of human construction. Because language's function in ordering things now belonged to the realm of analysis, it served to separate and disperse, rather than to draw things together. Nonetheless, language was also both the product of the analytic exercise, and the function of it. While it may be correct to say that the status of language was therefore demoted during the Classical episteme, there is also a sense in which it was elevated. It no longer belonged to that group of natural signs which are "... awkward

and inconvenient because they typically do not fit easily and effectively into the mind's workings",<sup>33</sup> but in the mind. Language ceased to be natural, and became conventional. Conventional signs are both a blessing and a curse. A blessing in the sense that, arbitrarily, we have the power to construct them, but a curse in the sense that our constructions are limited by the functions we need them to perform.<sup>34</sup> Perhaps the crucial question to ask at this point is how conventional language signifies the real world today.

Foucault thought that Classical signs were ontologically separated from the world and existed in an ideal mental order. Because of this separation "... Classical signs as such are directly related to what they signify, without any intermediary such as resemblance to the signified".<sup>35</sup> The question that tormented the Renaissance order: how is it possible to know that a sign did in fact designate what it signified? translated during the Classical order into the question: how can a sign be linked to what it signifies?<sup>36</sup> It is here that any excitement with conventional signals succumbs to difficult realities; and the assumptions about conventional language which foundationalist philosophy might have engineered are exposed for what they are, i.e. self-serving tools of foundationalist philosophy. It appears that for this reason foundationalist philosophy has mystified language's role first in the way knowledge is gained and ordered, and second in the way that knowledge is understood and applied. For this reason language should be the first obvious site of contest for any deconstruction exercise. The validity of the most common assumptions we make about language, thought, and idea must succumb to scrutiny.

This brings us to the assessment of the relationship between "idea", and "form". Are these two equivalent to each other, or distinctively separate? Cornell's suggestion, with which this writer agrees, is that the "truth" lies in the confrontation and non-identity between concept and object. She writes that:

The "truth" is not to be found in the object, nor in the form of thought of the object, nor in the unity of subject and object in the Concept. The object can neither be grasped in its entirety by the concept nor can it be known in its immediacy.<sup>37</sup>

A similar view is expressed by Rosenfield who writes that, "... a text is not pure presence that immediately and transparently reveals a distinct meaning intended by its author".<sup>38</sup> The difficult English case of *Regina v. Bentley*<sup>39</sup> is instructive of the problems we create for ourselves in legal discourse when we take for granted the relationship between "ideas" and their "forms".

In that case, Bentley, then 19 years of age, was convicted, together with Christopher Craig, at the Central Criminal Court on 11 December 1952 before Lord Goddard C.J., of the murder of P.C. Sidney George Miles at Croydon on 2 November 1952. He was sentenced to death. Craig was also found guilty of murder, but being only 16 years of age, he could not be sentenced to death. Despite widespread protests, and against the advice of civil servants, the Home Secretary refused to reprieve Bentley, who was hanged on 28 January 1953. The facts of the case are more intriguing than the summary above.

The Crown had alleged that during the evening of 2 November 1952, a married woman saw Bentley and Craig climbing over a gate at the side of a confectionery warehouse in West Croydon. She informed the police. By the time they reached the scene, Bentley and Craig had climbed onto the roof of the warehouse. One of the police officers followed them up onto the roof via a drainpipe. He saw Bentley and Craig almost immediately. He walked towards them. They backed away and went behind a brickstack. When about six feet away, the officer shouted out, "I am a police officer. Come out from behind that stack". Craig shouted back that if he wanted them he would have to come and get them. The policeman then rushed behind the stack and seized hold of Bentley. He pulled Bentley round the stack with a view to closing in on Craig. In this drama, Craig drew a colt pistol which he held towards the policeman. Bentley instantaneously squeezed himself out of the policeman's grip, shouting: "Let him have it Chris". There was then a flash and a loud report. A bullet hit P.C. Fairfax on his right shoulder, making him spin round and fall to the ground. Meanwhile, P.C. Miles and others reached the roof by another route. P.C. Miles confronted Craig, who shot at him, hitting him between the eyes. P.C. Miles dropped dead. It was also recorded that although Bentley was then 19 years of age, his mental state was reported to be: "Just above the level of a feeble-minded person".

This is not the place to indulge in the nuances of English criminal law on the circumstances importing culpability to accomplices in criminal acts. Suffice it to say that Bentley was no more than an accomplice to the murder of P.C. Miles. To link Bentley to the murder beyond all reasonable doubt, the Crown invoked his statement while on the roof of the warehouse: "Let him have it Chris", a phrase that has titled a film, a novel, and several reports on this case. The Crown insisted he meant: "Gun him down Craig!" The defence argued very persuasively, and almost successfully (judging by the public protests that followed both Bentley's conviction, and his hanging), that by: "Let him have it Chris", Bentley meant no more than that Chris should surrender the colt pistol to the



policeman. It was argued that after Craig fired his first two shots, and before the intervention of P.C. Miles and the other police officers, Bentley who was on one side of the roof with P.C. Fairfax had expressed concern at the police officer's plan to try and work his way to the fire escape because: "He (Chris) will shoot you". What did Bentley mean by: "Let him have it Chris?" The day after Bentley was convicted, Lord Goddard C.J. (then trial judge), wrote to the then Home Secretary, Sir David Maxwell Fyfe, and stated:

I regret to say I could find no mitigating circumstances in Bentley's case. He was armed with a knuckle-duster of the most formidable type that I have ever seen and also with a sharp pointed knife and *he called out to Craig when he was arrested to start the shooting.*<sup>40</sup>

The campaign for Bentley's posthumous pardon (which was finally granted in 1994<sup>41</sup>) always insisted that by: "Let him have it Chris", Bentley signalled the end of his involvement with Craig's criminal endeavours. It seems that if Bentley was guilty of only one thing, it was not the murder of the Police Constable, but using ambiguous language. The meaning of the statement: "Let him have it Chris!" in its context is open to interpretation.

There is therefore a sense in which the cues applied by any one listener to receive a statement influence the meaning s/he derives. So when Prime Minister Thatcher remarked in the House of Commons that: "Everyone needs a Willie in life", she understandably would not have intended no more than to make a generous compliment to her then deputy prime minister - Willie Whitelaw.<sup>42</sup> The laughter that immediately united both sides of the House showed instead that Mrs Thatcher had made the joke of her political career because colloquially speaking, a "willie" is a penis.

In interrogating article 38(1)(b) for obscurities that hinder the legitimacy<sup>43</sup> of customary international law two questions must take priority. The first refers to the content that international tribunals attach to the requirements of State practice and *opinio juris*. If State practice and *opinio juris* are the shells of customary international law, what content must international tribunals find in those shells before it can declare the emergence of a new rule of customary international law? The second refers to the consistent, clear and coherent application of those requirements by international tribunals in each case. Is there an enduring insistence on the presence in the shells of customary international law of the same content, in all cases, for the inauguration of a rules of customary international law? Perhaps it is to these attributes of interpretation more than anything else

that we have to look in order to isolate the confusion surrounding customary international law before we can attempt to reformulate it. Deconstruction,<sup>44</sup> with its insistence on accounting for dissimilarities in binary oppositions inherent in foundationalist philosophy, appears a good candidate for this task.

### **Deconstruction**

In *Dissemination*, Derrida does two important things. First, he shows that the sacrificial origins of philosophy are formal and substantial, as well as textual and institutional. Second, he traces the inculcation of the sacrificial logocentric bias of Western Philosophy into Platonism.<sup>45</sup> In *Phaedrus* Plato recounts the myth of Theuth, in which writing as a form of a gift that can aid one's memory is presented to Ra,<sup>46</sup> the father-god, who refuses it because he perceives it to be a *dangerous drug* that impedes the memory and therefore usurps the active functioning of the brain. Says the King:

If men learn this, it will implant forgetfulness in their souls; they will cease to exercise memory because they rely on that which is written, calling things to remembrance no longer from within themselves, but by means of external marks.

Plato calls writing *pharmakon*, by which he means a remedy-poison.<sup>47</sup> Derrida argues that because writing is perceived as a supplement to speech, to presence of mind, to the origin as logos and logos as origin, and because it is expelled for threatening to supplant it altogether, the rejection by philosophic tradition of a radical ambiguity or originary bivalence is exposed.<sup>48</sup> This exposure appears to suggest that the violence of exclusion is imbedded in our philosophical traditions which for the stabilisation of concepts and ideas appear to depend on a process of radical expulsion, exclusion and rejection of the opposite idea: *the sacrifice*. Through this violence or sacrifice, order is established because the difference between the good idea that is kept and the bad idea that is sacrificed is established. Good and bad are just as distinct and as separate from each other as they sound in our ears. We must not suggest that even in the best of us, lies some evil, and in the worst of us, lies some good. No. The difference is obvious and beyond comparison. For Derrida, the central problem with this approach is that the very *sacrifice* that is excluded appears to be the matrix for difference, the matrix for pluralism and the matrix for unsifted knowledge.

The *pharmakon* is the origin, the foundation of oppositions that come into being by its expulsion. Far from being dominated by any oppositions, writing is the condition for the very possibility of opposition; it cannot be contained by any oppositions, but remains ever in excess of them. Writing is insubordinate in principle and, more importantly, of principle as such. The emergence of the logos as the condition of truth, of the presence of the idea itself, is thus traced to the expulsion of an otherness in which it originates. ... This obstacle to truth, the rival to truth is likewise its originary model. This opposition of same to same, where rival model, and obstacle are one, displays the dynamics of violent mimesis of the victimary hypothesis.<sup>49</sup>

This approach alienates violence from the community by protecting the community from its own violence. However, it also appears to mystify the origin of violence by assigning it to the victim. The result is that the same violence which must be eliminated is protected. Therefore, the community is ever in search of new victims in which it blindly seeks its "...store of deep background".<sup>50</sup> The ugliness of this violence lies in that often, the privileged idea is applied to define or interpret its opposite, and we accept the outcome of that process as "rational". For the purposes of this study, the question whether a better understanding of customary international law can be arrived at from a reconciliation of that which the process of formulating rules of customary international law has privileged as a rule of customary international law, and that which it has excluded as its other or opposite, takes priority. Derrida argues that the other is not merely the opposite of the privileged idea. To hold that view would be to perpetuate the violence that gives rise to the sort of interpretation and valuations that are coterminous with it.

All translations into languages that are the heirs and depositories of Western metaphysics thus produce on the *pharmakon* an effect of analysis *that violently destroys it, reduces it to one of its simple elements by interpreting it, paradoxically enough, in the light of the ulterior developments it itself has made possible*. Such an interpretative translation is thus as violent as it is impotent: it destroys the *pharmakon* but at the same time forbids itself access to it, leaving it untouched in its reserve.<sup>51</sup>

It has to be accepted that this approach to creating processes for concept formation and ideas in general is not entirely helpful, not least because of the imponderable paradoxes it infuses in the processes and concepts that result.<sup>52</sup>

Derrida recommends application of reversal reasoning techniques to test the strength of ideas that are otherwise regarded as “givens”.<sup>53</sup> Article 38(1)(b) implies that norms of customary international law are created when States deliberately behave in a particular fashion, under a genuine belief that their conduct is obligated by law. This is the “the given position” of custom. For deconstruction, this must raise at least two questions. The first is whether the concept of customary international law as formulated in article 38(1)(b), and as interpreted by international tribunals, has escaped the trappings of foundationalist philosophy discussed above? The second is whether an interrogation of customary international law by the introduction of its ostracised “other” to the equation would require a radical change in its formulation? Deconstruction evidences several themes, including *inversion of hierarchies*, *supplementing*, *examining free play of texts*, and *liberating texts from their authors*. What follows is a brief attempt to introduce these themes. This involves a *double play of signifiers* by which is meant an attempt to *signify* that which is not present with reference to a previous attempt to signify it. This is a delicate process that calls for much humility. Derrida writes that in such a process:

Not only do the signifier and the signified seem to unite, but also, in this confusion, the signifier seems to erase itself or to become transparent, in order to allow the concept to present itself as what it is, referring to nothing other than its presence.<sup>54</sup>

In this instance, the task is complicated by the fact that Derrida’s writings have earned him not so much a reputation of being incomprehensible as being difficult.<sup>55</sup> In places descriptions of deconstruction are so dense that direct quoting is inevitable if one is to uphold the account. While these themes are described here separately, in practice, they overlap and are therefore better perceived as one body rather than distinct entities.

#### *Inversion of Hierarchies*

The inversion of hierarchies<sup>56</sup> involves identifying hierarchical oppositions - the preferred idea “A”, and the subservient idea “B”, and then immediately reversing the status of the ideas in the hierarchy. The quest here is simply to find out what happens when the “given” idea or the common sense scenario is reversed. This process can unlock conceptual difficulties rooted in linguistic and other related signifiers, giving off fresh insights into knowledge of the sphere of operation of the particular binary opposition. Successful deconstruction of a hierarchical opposition reveals

that the property previously ascribed to “A” alone is also true of “B”, and vice versa. It shows that “A’s” privileged status is an illusion because “A” depends for its meaning upon “B” as much as “B” depends for its status on “A”. It reveals, then, that “B” stands in relation to “A” much like “A” stood in relation to “B”. Indeed, it is possible to find in the very reasons that “A” is privileged over “B” the reasons that “B” could equally be privileged over “A” - the *trace effect*. Because both idea “A” and idea “B” rely for their coherence on the differentiation between each other, idea “A” bears the traces of idea “B”, and idea “B” the traces of idea “A”. The trace is what makes deconstruction possible. By identifying the trace of the concepts in each other, their mutual conceptual dependence is revealed. Nonetheless, *differance* and *trace* are not stable conceptions. “They simply represent the play of differences and dependencies between two mutually opposed concepts. Neither could serve as a foundational concept”.<sup>57</sup> Having reversed the hierarchy, it is possible to see about both “A” and “B” what had hitherto been unnoticed.<sup>58</sup> The Swiss linguist De Saussure’s work presents a vivid illustration of this point. Saussure thought that language depended on *langue* and *parole*. He privileged *langue* (the background system of rules) over *parole* (the set of speech acts made by members of a linguistic community) on the grounds that the rules governing a language form a system that literally creates the language itself. *Parole*, he argued, mirrored the workings of *langue*. Without the pre-existence of *langue*, *parole* would be impossible.<sup>59</sup> A deconstruction of Saussure’s arguments initially presents the chicken and egg argument because the question becomes: How did language begin before the establishment of a system of rules that enabled its users to distinguish between different words, and acceptable word patterns? Culler argues that if a cave dweller is successfully to inaugurate language by making a special grunt signifying “food”, we must suppose that the grunt is already distinguished from other grunts and that the world has already been divided into categories of “food” and “non-food”.<sup>60</sup> It can be argued therefore that language could have begun with speech acts or *parole*, which over time were consolidated to create a linguistic system or *langue*. Balkin writes that:

Speech acts could not have been understood without some pre-existing structure that made others understand that certain primordial grunts signified: “This is a rock”, rather than “I am in pain”. No matter how far back we go, each speech act seems to require a pre-existing linguistic and semantic structure in order to be intelligible, but any such structure could not come into being without a history of pre-existing speech acts by past speakers. Neither *langue* nor *parole* could be a foundational concept in a

theory of language because each is mutually dependent upon the existence of the other.<sup>61</sup>

Therefore, the relationship between “A” and “B” is one of mutual dependence. Derrida coined the word “*differance*” to explain the relationship between hierarchical oppositions. It means that in the hierarchy, each opposition defers the other in the sense of making the other wait for it; and each opposition defers to the other in the sense of being fundamentally dependent upon the other.<sup>62</sup>

A good starting point for deconstructing custom might be to analyse the relationship between State practice and *opinio juris*. Does this relationship typify an opposing hierarchy where the binary ideas ought to defer one to the other? (*Let us call this scenario situation A*). If so, what are the conditions under which such deference takes place, and how should customary international law’s secondary rules of recognition characterise this relationship? Or does this relationship involve two alien ideas; alien in the sense that each of them has its other counterpart, over which it has been privileged, and that this privileging was based on the logocentric bias originating from foundationalist philosophy? (*Let us call this scenario situation B*). If so, could this be a main source of the confusion besetting the contemporary doctrine of custom? Can customary international law’s secondary rules of recognition be couched in such a way that they avoid this problem? Alternatively, do the problems with customary international law point to a very complex problem, where elements of “A” and “B” are present in different measures? (*Let us call this scenario situation C*). If so, how should custom’s legitimacy deficiencies be addressed? Situation “C” may be described fairly as a desperate one, while situations “A” and “B” appear to be very attractive challenges. To discuss this issue under the three situations mentioned above is of course to over-simplify matters because neither of these situations exists in a vacuum. The context is affected also by riddles of interactive oppositions affecting the situation. But this simplification is necessary for the consideration of the matter at hand.

If evidence of the existence of rules of customary international law depends so much on the coming together of the two limbs of custom, are the two limbs of customary international law - State practice and *opinio juris* - so distinct from each other that evidence of the existence of the one only will not suffice to indicate existence of the other - *the trace effect*? In other words, could we impute evidence of the existence of one limb of custom from evidence of the existence of the other? If this were possible, would it then follow that the two limbs were proximate enough that it would be a tautology to talk of two requirements of custom? If it were not

possible to impute the *trace effect* to the two limbs of custom, would it be correct to say that because the two limbs of custom share no mutual dependence in their effort to describe what is to them a common phenomenon, they both have to be proven in each case that a new norm of customary international law is declared?

*Supplement v. Metaphysics of Presence*

The theme of supplement and metaphysics<sup>63</sup> of presence alerts us to the danger of over-simplifying the relationship between thought on the one hand, and language on the other. This seems to be Derrida's main point of contention with hermeneutics. Using the example of *writing* and *speech*, Derrida shows that the hermeneutics school insists on deciphering the truth shielded in a text. Its presumption is that beneath the textual surface lies a finished meaning or truth which has to be discovered, what Schrift<sup>64</sup> calls a "*transcendental signified*". The discovery of this truth freezes the text in a particular position. This fixing of textual position and settling on a thesis or truth is the biggest weakness of hermeneutics because for him, reading, and any reading for that matter, is a transformational activity which contends itself with the infinite play of the text's surface. Derrida writes that:

The writer writes in a language and in a logic whose proper system, laws, and life his discourse by definition cannot dominate absolutely. He uses them only by letting himself, after a fashion and up to a point, be governed by the system. And the reading must always aim at a certain relationship, unperceived by the writer, between what he commands and what he does not command of the patterns of the language he uses.<sup>65</sup>

At the very least, the hermeneutic approach rests on two suppositions which constitute a metaphysical backdrop. The first is that there is a tenable dichotomy between language and the empirical world, such that it makes sense to think of one as a description of the other. The second is that some such language can in principle be rendered as determinate as the world that it seeks to describe.<sup>66</sup> However, the signifying activity of the sign always, by definition, exceeds the intention of the author. Therefore, reading should not merely aim at a re-production of that signifying intention.<sup>67</sup> This is yet another distinction between Derrida and the hermeneutic school. Whereas the hermeneutics seek to re-produce the same text, with a view to finding or discovering its meaning, deconstructive reading is not bound by the existence of such a meaning of the text. Instead its active approach to reading creates interaction between the reader and the writer, liberating, in

the process, the reader from a *transcendental signified*, so that s/he can interpret the possible meanings of the text.<sup>68</sup> It is during this interaction with the text that the Deconstructionist *supplements*<sup>69</sup> it. However, the word *supplement* has many meanings. It can mean something added to an already complete or self-sufficient thing, or something added to something lacking in order to complete it. The number plates we stick to the front and back of our cars are supplements in the latter sense because while cars could drive without them, it would be enormously difficult to identify them on the public car park, or in the event of a theft, or an accident. In other words, we could not, without number-plates, use cars to achieve the convenience that they are created for without being greatly inconvenienced in the process. Number-plates enable us to identify our cars. The paint we choose for our car appears to be a supplement in the former sense because for functional purposes cars can drive without the layers of paint we dress them in.

Derrida argues that writing can only supplement speech in the first sense, that is, as a representation of speech and not as having a shortcoming that could be fulfilled because speech is not the exact representation of the speaker made present, but aural symbols that represent thought. According to Derrida, speech appears to possess presence only because of the fortuity that people speak and think simultaneously.<sup>70</sup> In this sense, writing can be compared to speech in that, like speech, it plays a mediatory function of signifying what it is not, and what it does not represent.<sup>71</sup> Speech possesses therefore, the same weakness we observe in writing in that it is no more *present* than writing. Like writing it mediates something more present than itself - thought. Not even Rousseau and Levi Strauss' attempt, for their own purposes, to distinguish the two by identifying speech with nature, and writing with culture, can blur that fact.<sup>72</sup> Speech, like writing, is therefore a *supplement* because a *signifier* supplements that which it *signifies*. If speech supplements thought, then thought in itself must be lacking in that it depends in this way on speech or writing. Every *signified* is in reality a *signifier* in disguise, and every *signifier* only imperfectly represents the thing it *signifies*.<sup>73</sup> For this reason our impression of the world is nothing but a series of *signifiers* of *signifiers* of *signifiers*, *ad infinitum* reaching towards an unmediated, complete, self-sufficient presence. If this is acceptable, then it must be acceptable also to say that foundationalist philosophy promotes arbitrary limits of signification which themselves do not sufficiently signify the complete, self-sufficient presence. For this reason uncritical foundationalism is not practical in the exercise of signifying law creating processes such as custom. Derrida advocates the abandonment of the philosophy of foundationalism with a description of what he regards as the ultimate deconstruction of presence.



There is nothing outside of the text ... [The idea of “*dangerous supplement*” shows that] ... in what one calls ... real life... there has never been anything but *supplements*; substitutive significations which could only come forth in a chain of differential references ... the absolute present, Nature, ... has always already escaped, has never existed ...<sup>74</sup>

If Derrida is right, the part of the answer to a legitimate doctrine of custom may lie in identifying the manner in which custom’s rules of recognition supplement the idea of customary international law? Do they supplement customary international law in the sense of completing an incomplete idea, or merely as signifiers *ad infinitum*?<sup>75</sup> Does the jurisprudence of international tribunals on custom reflect a consistent usage of that supplementing? If the jurisprudence shows a consistent pattern of supplementing, we should be concerned to discover the effect on custom of according variable importance to the supplements that depict customary international law where it can be shown that traces of those supplements are evident in the hierarchy of customary international law.

#### *Free Play of Text, Meaning and Interpretation*

Evidence of free play<sup>76</sup> of texts points to ambiguities and risks that we expose ourselves to whenever we participate in the act of communicating, whatever the context. Language is not infinitely capable of harnessing and communicating our thoughts as we assume, yet nearly all the time we attempt to communicate we appear to assume that thought and form will twine to achieve our goal. Bell and Cooper write that:

Language often obscures the actual structure and nature of thought. Of course ... one could not think most of the thoughts one thinks except by means of language. ... Thus natural language is cast in the role of a villain on which one must perforce rely, both in order to think and as a source of clues about the nature of thought. Nonetheless, natural language is an imperfect instrument for thought. And ... only a language yet to be fully fashioned - a “perfect language” (one ideally suited to the expression of thought, especially *a priori* thought) - would express thought, and senses, in a perspicuous manner.<sup>77</sup>

Frege argues that the sense of an expression is not clearly or sharply grasped even by the most competent users of it. In his own words:

What is known as the history of concepts is a history either of our knowledge of concepts or of the meanings of words. Often it is only through great intellectual labour, which can continue over centuries, that a concept is known in its purity, and stripped of foreign covering that hid it from the eye of the intellect.<sup>78</sup>

Foucault writes that because of the decline of representation, and the consequent fragmentation of knowledge in the last few centuries, language has lost the central place it occupied in the Classical episteme. “Language is now itself just one object of knowledge among others”.<sup>79</sup> However, in spite of this demotion in status, language remains the medium through which any knowledge must be expressed. Mandela writes that:

Without language, one cannot talk to people and understand them; one cannot share their hopes and aspirations, grasp their history, appreciate their poetry or savour their songs.<sup>80</sup>

The difficulty with using language, stems from the fact that language cannot be reduced entirely to an object because:

It always reappears in the subject’s effort to express what he knows. ... our use of language burdens us with meanings and presuppositions that confuse and distort what we are trying to say. We express our thoughts in words of which we are not the masters.<sup>81</sup>

The foregoing statements on language appear to make the case that it is necessary to adapt our thinking habits so that they reflect the problems the use of language imposes on us. In turn this should enable us to effect in the legal language we create for legal discourse, the necessary safeguards that limit the risk of confusion that is inimical to the legitimacy of the processes of law we create. A close examination of the philosophical basis for the assumption that a legal language consistent with the “reality out there” is possible, soon leads us to the gates of empiricism.<sup>82</sup> Nonetheless, the success of empirical science proved difficult, especially for social scientists, because there was no tenable dichotomy between language and the empirical world. Sacks observes that the philosopher found himself redundant. “Rather than opposing or evaluating the scientific enterprise, or extending it into new fields, analytic philosophy accepted natural science as paradigmatic.”<sup>83</sup> In a sense, language became the lens to the world, and philosophers and scientists alike disinclined themselves from spending too much time on the dark side of the lens, intent on seeing the world through it. This is neatly summarised in Johnson’s declaration that, “Language is

the dress of thought”<sup>84</sup> The question that hardly surfaced was whether there were blind spots in the lens – language, and what effect this might have on this important tool. The benefit of deconstruction to the lawyer is summed up by its insistence on asking the formerly unasked question. Deconstruction focuses on the means by which we consider the real and the abstract, or the state of things generally through language. Derrida argues that often our use of language reveals that we mean more than we say, and also often say more than we mean. Derrida calls this curious habit of words bursting the seams of our subjective intentions and producing their own kind of logic the *free play of texts*.<sup>85</sup> The implication is that language as a means of considering contexts is not as reliable a tool as our casual and unquestioning use of it suggests. The impressions language portrays cannot be relied upon all the time. Sacks writes that:

Language - must be suitably sensitive for the task. Primarily, language must be such as not to contain any blind spots. It must not contain any ineliminable vagueness. For any point, at which language is ineliminably vague, is thereby a point at which the full determinateness of the world goes unfathomed, unmapped. The requirement is that language comes as close as possible to being as free of vagueness as the world towards which our inquiry - couched in terms of it - is directed. If language is the instrument by means of which we tackle the world, it must be shown to be as fine an implement as the delicate job at hand requires.<sup>86</sup>

The confusion surrounding customary international law may be adduced as evidence that there are blind spots in its formulation, and in the interpretation of that formulation. These blind spots threaten the determinacy, coherence and legitimacy<sup>87</sup> of customary international law. One question this study cannot avoid is whether there is evidence of *free play of text* in the language of custom. If the answer to the former question is in the positive, a question that follows it is this: to what extent does this free play of text threaten the legitimacy of customary international law?

Language signifies bits of the world as phrases and sentences. It is sentences alone that have the burden of depicting what we regard as fact. Sentences are therefore the units of significance. Sacks writes that:

The meaning of the individual word consists in the contribution it makes to the sentences in which it can occur. Sentences are either true or false. And it seems clear that if those units of significance are to be either true or false, they must have determinate meaning. Were a sentence to prove incomplete as the bearer of content, completeness requiring some additional element, then accordingly the sentence on its own - without that additional complementary element - would not

have a determinate truth value. The sentence would then be true, or false only relative to that additional element, whatever that may be.<sup>88</sup>

For this very reason, what we did not intend to say is as important for the deconstructionist as what we actually said. According to Derrida, when we create sentences, the naturalness of the exercise hardly awakens us to the fact that we might be saying more or less than what we intend.<sup>89</sup> However, our speech and writing often perform tricks that we had not envisaged, creating meanings that we had not intended, leading to conclusions that were not in our minds when we wrote or spoke. This has serious implications for any doctrine of law. In part, this study will address the question whether the free play of the text of article 38(1)(b) has contributed to the perceived legitimacy deficiencies in customary international law.<sup>90</sup> Is the intention of the drafters of article 38(1)(b) reflected in international tribunals' practice on the matter? Are the *travaux préparatoires* on article 38(1)(b), article 38(1)(b) itself, and international tribunals' jurisprudence on customary international law united on what constitutes customary international law? Or has the free play of article 38(1)(b) resulted in a misrepresentation of the 1920 Committee of Jurists' idea of customary international law?<sup>91</sup> An enquiry into this question may well identify the blind spots in the lens of customary international law.

The foregoing discussion shows that words are not, and should not be regarded as, passive instruments for communication, but as active instruments capable of surprising even their most eloquent master. It is for this reason that much of deconstructive criticism targets the discovery of unintended connections between words, phrases, and passages put together to signify a particular thought or idea. The benefit of establishing such connections is twofold. The first is that the author's apparent ideas easily can be isolated and crystallised. The second is that it enables the challenging of the logocentric bias that the most important meanings in a text are those that are apparent.<sup>92</sup> In a legal text, discovery of unintended meanings can have one of two effects. It might reveal the inconsistencies underlying the author's rationale. It might also strengthen the apparent and intended meaning of the author by extending the application of his/her ideas beyond his/her intentions. The latter effect serves therefore to justify the effectiveness of the author's thoughts. In this sense, deconstruction attends the void between what "... the author wishes to achieve by his or her language, and what the language actually achieves for him/her".<sup>93</sup> No one that uses language as a means of communication can pretend that this void is not a part of their life, not least lawyers, who spend their time

creating, analysing and utilising texts. This brings us to the question whether we have any remedies to limit or control the free play of texts?

### *Controlling Text's Free Play*

Our ability to control or to limit the free play of texts depends on the *iterability* of the *signifiers* in them as well as the *iterability* of the combination of *signifiers*. *Iterability* refers to a *signifier's* ability to signify repeatedly in a number of different contexts. According to Derrida,<sup>94</sup> we benefit from using signs if, and only if, they are separable from our intent; and if, and only if, they mean, whether we intend it or not, what they mean. In this sense, language can *signify* only if it can escape the actual present meaning it had to the person who used it. This requirement implies that for the requirements of *opinio juris*, and State practice to enhance customary international law's legitimacy, they themselves must be unmistakable. At the very least, the number of things that come under *opinio juris* must be unmistakable. However, if the practice of international tribunals regards United Nations General Assembly resolutions variably as evidence of State practice and as evidence of *opinio juris*, or both, then their *iterability* becomes *incommensurate*. *Incommensurate* signifiers are not useful for communication, let alone, for a doctrine of law. Yet international tribunals are encouraged to have regard to United Nations General Assembly resolutions in their determination of the question whether a new norm of customary international law has been created. United Nations General Assembly resolution 3232 (XXIX) of 12 November 1974, stresses that in view of the increasing development and codification of international law in conventions open for universal participation and the consequent need for their uniform interpretation and application, it should be widely accepted that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the United Nations General Assembly which may, to that extent, be taken into consideration by international tribunals.<sup>95</sup> The value of this recommendation is dubious because the United Nations cannot create binding rules except when the Security Council takes decisions under Chapter VII of the United Nations Charter. Its other principal organs, including the General Assembly, have no authority to make binding decisions except in administrative and budgetary matters. During the drafting of the United Nations Charter, attempts to mandate the General Assembly to create rules automatically binding on member States were vigorously rejected. The ILC writes that:

The governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law. As a corollary, they also rejected proposals to confer on the General Assembly the power to impose certain general conventions on States by some form of majority vote.<sup>96</sup>

Article 13, paragraph 1 of the United Nations Charter shows that in the end, the General Assembly was authorised in this regard, only to "... initiate studies and make recommendations" for the purpose of encouraging the progressive development of international law and its codification. It seems that of all the resolutions of the General Assembly, resolution 3232 is most troubling in that it shows the General Assembly, contrary to the United Nations Charter, bestowing upon itself authority which the founding States had earlier on deliberately denied it. If international tribunals have followed on from this and regarded General Assembly resolutions as potential *signifiers* of either *opinio juris* or State practice, then some of the confusion exercising customary international law might be said to result from this resort to *uniterable* signifiers.<sup>97</sup> This is borne out by the fact that Western States have always resisted Third World States' claims that General Assembly resolutions have any binding legal effect.<sup>98</sup> Yet the practice of international tribunals seems to bear no regard to this fact at all.

It has to be borne in mind also that *iterability* alters. What this means is that once the author has communicated, the communication assumes a life of its own, with the contexts in which it finds itself defining its meaning.<sup>99</sup> This liberation of the text from its author is what imports into the application of language, the free play of the text.<sup>100</sup> Could it be that the free play of the text of article 13 paragraph 1 of the United Nations Charter has already broken free from its intended purpose as set out in the *travaux preparatoires* to the United Nations Charter, and created a meaning or meanings which render General Assembly resolution 3232 significant to the process of custom? By its pronouncements in the South West Africa Case, the ICJ seems to have taken this view. It stated that:

It would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.<sup>101</sup>

Perhaps this is what Wilberforce refers to as "... the intelligent use of international processes and remedies ... against the continuous conditions of disturbance and hostility short of war... in which we live today..."<sup>102</sup> or

more precisely perhaps what Judge Elias refers to as “... a serious effort ... being made to take account of the expanding frontiers of international law?”<sup>103</sup> Lee<sup>104</sup> uses the term *opinio communitalis*, to describe these developments. According to Lee, *opinio communitalis* is realised through United Nations General Assembly resolutions when those resolutions establish what rules of international law States support widely.<sup>105</sup> Brownlie<sup>106</sup> writes that although United Nations General Assembly resolutions are *prima facie* incapable of creating legal obligation, there are special circumstances that may give a considerable significance to resolutions on legal questions.

Thus they may be cogent evidence of State practice and *opinio juris*. In the face of a relatively novel situation, the General Assembly provides an efficient index to the quickly growing practice of States.

Many writers<sup>107</sup> point to the formation of instant customary international law via the United Nations General Assembly resolution on the use of outer space, long before the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, as evidence that General Assembly resolutions may be adduced as evidence of the emergence of a rules of customary international law. The case to be made is that all these loose and seemingly contradictory ends of the process of custom need reconciling in order to liberate customary international law from the confusion that continues to threaten its legitimacy.

#### *Liberating a Text from its Author*

Because *iterability* alters,<sup>108</sup> and because the signifiers in a text are capable of interacting to produce a meaning not previously intended or even imagined by the author,<sup>109</sup> it is only fitting that deconstruction also seeks to liberate texts from their authors.<sup>110</sup> The conclusion that reality is illusory because all we have is metaphors that represent other metaphors, and so on,<sup>111</sup> must pose inescapable questions for lawyers particularly because they are greatly concerned with the interpretation of texts for the purpose of establishing “the rule of law”. The development of theories on interpretation of legal texts seems in part to address some of these questions. The teleological approach<sup>112</sup> for example suggests that the reader should give effect to the intention of the author, and the purpose for which the text was written. Therefore the goal of interpretation should be to understand the meaning of a text by grasping the author’s intention. Its

underlying premise seems to be that accurate interpretation results in the actualisation of the author's intent. Inaccurate interpretation on the other hand results in defiance of the author's intention. Therefore, there is a sense in which the goal of all interpretation is to separate correct readings from misreadings. The importance of this approach to the legal world is emphasised by the importance attached to draft statutes, white papers, and *travaux préparatoires* to conventions and treaties. But casual reliance on this approach may have given rise to some of the deficiencies attending customary international law today. What are lawyers looking for when they read texts over and over again, comparing new texts with old ones, reviewing both old and new literature on a subject? They are seeking first to establish the rule of law, and further to assess the justiceability of that rule. This obsession with the rule of law may give rise to the privileging of one idea over its opposites. As lawyers review their materials and literature, they inevitably involve themselves in an endless spin of ideas, punctuated by a transitory crowning of one idea over its rivals, only to revisit the same site, to repeat the same process. A legal orthodoxy is created which denies that the privileged ideas have opposites without which they would not make sense at all. There is a sense in which this victimisation of the other, and the enthronement of the privileged idea limits understanding of the ideas and concepts that apply in our legal systems. This happens so easily that the violence involved is hardly noticed, or if it is, it is easily passed.

For a start, lawyers' readings of texts are always partial in at least two ways. First, they are partial in that they represent only some aspects of the meaning of texts. Second, they are partial in that they are interpretations that benefit the position they advocate. This second kind of partiality is very likely to lead to the first. It does not follow as a matter of course that what is today accepted as a correct reading or interpretation of a statute, a constitution, or a treaty will forever hold as the correct reading. In fact the converse is true because the law develops only when legal materials are subjected to continuing analyses. Different factual, political, and historical contexts sometimes yield new interpretations.<sup>113</sup>

Secondly, teleological interpretation involves a privileging of the correct reading, over other possible readings. Among the so-called misreadings lie some readings that have flaws in their legal reasoning. Correctly, these should not see the light of day. Nonetheless, some of the so-called misreadings are in fact not misreadings. A deconstruction of the process of privileging correct readings over misreadings may show this to be the case. Culler's deconstruction of reading and misreading is quite instructive. He writes that:



When one attempts to formulate the distinction between reading and misreading, one inevitably relies on some notion of identity and difference. Reading and understanding preserve or reproduce a content or meaning, maintain its identity, while misunderstanding and misreading distort it; they produce or introduce a difference. It can be argued that the transformation or modification of meaning that characterises misunderstanding is also at work in what we routinely refer to as understanding. If a text can be understood, it can in principle be understood repeatedly, by different readers in different circumstances. These acts of reading or understanding are not, of course, identical. They involve modifications and differences, but differences which are deemed not to matter. We can thus say, in a formulation more valid than its converse, that understanding is a special case of misunderstanding, a particular deviation or determination of misunderstanding. It is misunderstanding whose misses do not matter. The interpretative operations at work in a generalised misunderstanding or misreading give rise both to what we call understanding and to what we call misunderstanding. The claim that all readings are misreadings can also be justified by the most familiar aspects of critical and interpretative practice. Given the complexities of texts, the reversibility of tropes, the extendibility of context, and the necessity for a reading to select and organise, every reading can be shown to be partial. Interpreters are able to discover features and implications of a text that previous interpreters neglected or distorted. They can use the text to show that previous readings are in fact misreadings, but their own readings will be found wanting by later interpreters, who may astutely identify the dubious presuppositions or particular forms of blindness to which they testify. The history of readings is a history of misreadings, though under certain circumstances these misreadings can be and may have been accepted as readings.<sup>114</sup>

This quotation illustrates that there is a sense in which all readings of legal texts are in fact misreadings. Yet for their legitimacy, legal systems depend on that mechanism inculcated in them to distinguish between readings from misreadings. Is this in fact not where many of the problems affecting the creative processes of our legal systems come from? Perhaps an admission of this problem would unravel more problems than most people are prepared to attend at the moment. An admission that all reading is misreading, and that the other is as important as its enthroned opposite, might threaten the notions of meaning, value, and authority promoted by our institutions.

Each reader's reading would be as valid or legitimate as another, and neither teachers nor texts could preserve their wonted authority. What

such inversions do, though, is to displace the question, leading one to consider what are the processes of legitimisation, validation, or authorisation that produce differences among readings and to expose another as a misreading. In the same way, identification of the normal as a special case of the deviant helps one to question the institutional forces and practices that institute the normal by marking or excluding the deviant. In general, inversions of hierarchical oppositions expose to debate the institutional arrangements that rely on the hierarchies and thus open possibilities of change-possibilities which may well come to little but which may also at some point prove critical.<sup>115</sup>

These concerns leave untouched the violence exhibited in the process of justifying the enthroned reading as the only possible correct reading of a text. Our readings of legal texts are always partial in that they represent only some aspects of the meaning of texts, and also because they are interpretations that benefit the position we advocate. It must follow from this therefore that our justifications for privileging one reading as correct, and other possible readings as misreadings are not always consistent. There is therefore a sense in which the process of privileging one idea as correct, and disregarding all the other possible readings as misreadings is legalistic in nature. In the end, it is the process by which legal doctrine is formulated. This process sows the seeds of its own perpetuation in the doctrines it creates - the very doctrines we later rely on to establish that rule of law which we are always seeking to establish. In the end, this process hedges itself in, precluding its own criticism. No wonder that when these doctrines of law are threatened, we are almost mechanically inclined to believe that solutions to the problem(s) lie within the context we already have, and not outside that context, privileging the already privileged idea, and hoping that we get it right. There appears to be an inclination in us, when the insecurity of privileged ideas starts to show, to supplement them in order to sustain them without asking whether this emerging insecurity is justified by the philosophy of foundationalism that sponsored the ideas in the first place. If we have inclined ourselves habitually to the violence of uncritical foundationalism, we appear also to be only too eager to reject any suggestion that uncritical foundationalism may be a curse. As Johnson has observed, "The chains of habit are too weak to be felt until they are too strong to be broken".<sup>116</sup>

### *Summary*

The deconstructionist problematic<sup>117</sup> can be summed up in the following way. Intimacy with systems of thought which limit our imagination has

resulted in our adoption of the same systems not as systems of confinement, but as the very essence of being human. Therefore, it is not surprising that the most recognised deconstructionists are almost always described as being “wilfully anti-systematic”.<sup>118</sup> Familiarity with foundationalism has created an acceptance of it akin to unquestioning religious adherence and dependence. Thus, investigations into problems and their solutions are almost always unwittingly premised on foundationalist perspectives, and foundationalist definitions, and foundationalist processes. The result is always a narrowing of the knowledge we would otherwise gain from a more open examination of issues. Deconstruction is an attempt at breaking away from the violent cycle of diminishing knowledge by foundationalising ideas at the cost of their sacrificed *others* whose existence is revealed by their *trace* in the privileged ideas. Deconstruction emphasises the need for a philosophical interrogation of the systems and doctrines that we apply to create processes and systems on which we order our lives. Deconstruction strongly emphasises that:

- 1) writing precedes speech, instead of operating as a mere supplement to it,<sup>119</sup>
- 2) every text refers to other texts,<sup>120</sup>
- 3) because an idea, and the form that expresses it are not congruent, texts are always fused with disparities between what the author of the text means to say, and what the text is nonetheless constrained to mean,<sup>121</sup>
- 4) every writing embodies a failed attempt at reconciling identity and difference, unity and diversity and self and other,
- 5) even writings that give the impression that they have realised the desired reconciliation are nothing more than another distortion and suppression of difference and subordination of the other,<sup>122</sup>
- 6) all meaning depends on a future rewriting of past writings as rewritten in the present writing which confronts the interpreter,<sup>123</sup> and that,
- 7) “a present writing is both a completion and an erasure of the past writing, and a text which must face erasure and completion by some future writing in order to acquire meaning”.<sup>124</sup>

By writing, Derrida means the system of representation that makes communication possible, not just what we normally mean by writing, a system of graphic signs with something like a recognisable alphabet.<sup>125</sup> Derrida writes that, “... the genealogical relation and social classification are the stitched seam of arche-writing”.<sup>126</sup> From these postulations, it seems either that the challenge deconstruction poses to legal interpretation is

insurmountable, or that deconstruction is not suited to an analysis of the process of adjudication. Fiss describes adjudication as "... a process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text".<sup>127</sup> This is a dynamic process. The interaction between the text and the reader produces "a meaning" which reflects both the subjective and objective elements of human existence and experience.<sup>128</sup> Nonetheless, to shut out deconstruction from adjudication would condemn it to the violence of foundationalism whose present state has been described by some as being: "... mired in a deep and persistent crisis".<sup>129</sup> It would privilege foundationalism over all else. This does not seem desirable not least because the roots of most of the confusion observable in legal theory today owe their existence to foundationalist philosophy. It is also true that many of the challenges confronting governments today demand universal rather than national responses. For this reason, even domestic legal discourse is ferment with universalistic aspirations. If these aspirations are to be of any significance, the international legal system itself must exhibit through its doctrines, legitimacy that inspires confidence that these international aspirations can actually be realised. This legitimacy can be achieved by ridding the doctrines of the international legal system of distortions resembling the violence of the philosophy of foundationalism. Besides, there is no justification for shielding the doctrine of customary international law from deconstruction. Fiss argues that because the adjudication process brought together both the subjective and the objective elements, it is the successful reconciliation of the two through deconstruction that will "... deepen our understanding of law, and in fact might even suggest how law is possible".<sup>130</sup>

It is worth noting also that there are no easy solutions to the challenge deconstruction poses to legal interpretation. On its own, this should not be accepted as sufficient justification for not asking about customary international law the questions deconstruction raises. Perhaps deconstruction's greatest benefit to this study is that it might confirm the genuine nature of the crisis affecting legal interpretation and, to be precise, the reason why there is a loss of faith<sup>131</sup> concerning the availability of objective criteria permitting the ascription of distinct and transparent meanings of customary international law.<sup>132</sup> This on its own is a necessary first step to understanding customary international law.

The simple jurisprudence of "original intent" that suggests that the meaning of legal texts can be ascertained by referring to some "transparent, self-present" intent of the author of the text seems incapable of addressing these challenges because even divinely prescribed law involves multiple

writings, erasure, and inter-subjective collaboration. Resort to the jurisprudence of original intent can only lead to idolatry that forecloses any genuine inter-textual elucidation of legal relationships.<sup>133</sup> Neither does the theory of inter-subjective perspective of interpretation meet the challenges posed by deconstruction. According to this theory, the legitimacy of any doctrine of law depends on the idea of an interpretative community that recognises the norms of that particular doctrine as being valid.<sup>134</sup> The existence of such a monolithic community can only be illusory.<sup>135</sup> Its existence, if it ever existed, would only serve to signal the violence instituted by foundationalism, where the suppression of difference and the subordination of the dissenting other would have prevailed. Nor would a theory of legal interpretation that included extra-legal values meet the challenges posed by deconstruction. A good illustration of such an approach is afforded by Posner's wealth maximisation principle.<sup>136</sup> At the risk of over-simplification, the wealth maximisation principle holds that legal rules should be interpreted so as to enhance the creation of wealth in society. If this were to be accepted as the appropriate way to interpret legal doctrines and the norms they created, it would still not meet the challenges posed by deconstruction precisely because of its basic assumption that the sole purpose of law is to create wealth. This assumption does not hold universal support. Because of the absence of consensus on this basic premise, the law and economics theory of interpretation fails the test set by deconstruction that it should not ostracise part of the community of legal actors that did not subscribe to its principal assumption.<sup>137</sup> In Dworkin's "Law's Empire", Rosenfield<sup>138</sup> sees an interpretative technique that nearly meets the challenges posed to legal interpretation theory by deconstruction. Dworkin's approach focuses on "the process" of interpretation rather than the object of interpretation or the substantive values espoused by the interpreter. Its main argument is that, "Provided that legitimate interpretative procedures are followed, the interpretative outcome will be justified regardless of actual substantive disagreements concerning the object of interpretation or extra-legal values held by the community of legal actors".<sup>139</sup> Nonetheless, Dworkin's theory succumbs to the foundationalist vice of privileging one set of contested values over another.<sup>140</sup>

### **Customary International Law and Deconstructionist Critique**

The link between deconstruction and language has been proven. To apply deconstructionism to the search for a deconstructionist theory of custom,

we may need to show the link in general between deconstructionism and normative theory. To borrow from Frost:

We engage in normative theory when we embark on the difficult task of explaining the meaning of establishing the relationships which hold between, and striving to evaluate different comprehensive patterns of core normative concepts such as liberty, equality, justice, human rights, political obligation, sovereignty, group rights, self determination, property rights, restitution, retribution, etc.<sup>141</sup>

Normative theory pursues the meaning of each of these values. Even more, it seeks to understand the interconnectedness between each of these values. For instance, the question what is liberty, is followed by the question, what is the relationship between liberty and equality? Are they mutually exclusive or mutually supportive? Do all nations have the right to self-determination? How ought wars to be fought? What is the relationship between sovereignty and human rights? These are questions easier asked than answered. This underlines both the difficulty of engaging in normative theory, and the importance of that exercise. Its importance lies in the fact that the deductions of normative arguments have been, and continue to be relied upon as justifications and springboards for launching "... historic, sometimes heroic, and often tragic deeds"<sup>142</sup> by both nations and individuals. We remember Hume for his theory of "moral sentiments", Kant for his theory of "categorical imperatives", Hegel for his rejection of these first two, and for his propagation of the need for "self-knowledge" through rational, ethical and modern thinking as opposed to reliance on mythology.<sup>143</sup> At the peak of their influence, each of these theories formed the basis on which one nation declared war against another, and allies formed to defend "just causes". However, with time they were each succeeded or replaced by other theories, which were also eventually replaced by other yet "better" ones. We observe therefore a cyclic tendency in the grounding of knowledge. In this sense, whether we like it or not, have noticed it or not, want to accept it or not, modern thought appears inherently anti-foundationalist. Yet in practice we try to rethink and try to reformulate the systems and doctrines that we apply to run our processes and systems as if foundationalism were the basis of everything. To that end, traditional normative theory is defined by an unquestioning acceptance of the foundationalist model.<sup>144</sup> The difficulty with this situation is primarily threefold.

First, the consequences of this model have been questionable, and continue to attract discussion.<sup>145</sup> Second, many developments in the

international legal system have undermined the premises that still form the basis of doctrines that create substantive norms. Third, all legal systems tell their own story.<sup>146</sup> To that end, all legal systems are *signifiers*. If a legal system *signifies* a community's way of life, it cannot be denied that that way of life *signifies* values and assumptions about human life that are rooted in particular philosophies about the function of being human. Some of these philosophies as we have already seen are encumbered with violence which when harnessed to legal force, induce in both law creation and law application *violence* which rejects the existence of otherness. Most of these philosophies are not themselves accurate descriptors of the ideas that they purport to represent, so that if we uncritically rely on them to appraise the contexts of law creation and law application, we risk confusion instead of order. We can never hope to understand our reality in circumstances where the lenses through which we seek to see that reality (philosophy) are warped, and the tools with which we interrogate that reality (doctrines based on uncritical foundationalist philosophy) are equally warped.

The answer to the question whether deconstructionist critique is relevant also to an analysis of normative theory, and to international law in particular can only be in the positive. To rid custom of its legitimacy deficit attempts must be made to undo the *violence* that foundationalist philosophy has induced and continues to perpetuate in the doctrine. This can be achieved it seems by reconciling the foundationalised idea with its ostracised other. Deconstruction seems, therefore, to set the conditions conducive to the creation of a system of norms whose law-creating processes achieve the target of interpretation required of them. In this sense, deconstruction seems to emphasise the Hegelian aspiration to reciprocal symmetry and mutual co-determination<sup>147</sup> as a prerequisite to legitimating ideas. This can only happen when deliberate responsibility for the signature of the other is brought into the equation of customary international law. Deconstruction makes this possible because it tests our own ability to exercise our openness to and tenderness toward otherness. It demands that we seek to internalise toward otherness the attitude that shines through the cracks and the crevices of *negative dialectics*. It demands that our ethical vision rests on expansiveness rather than on constriction. To borrow from George and Campbell:

Since we cannot be sure of the truth of anything, including the appropriateness of Western Values, we need to adopt a new Socratic spirit, combining a genuine humility before knowledge with a critical attitude that accepts no givens, takes nothing for granted, acknowledges

nothing axiomatically, questions all presuppositions, challenges all arbitrarily imposed boundaries and always asks why?<sup>148</sup>

Deconstruction offers that rare opportunity of seeking to understand customary international law not from the perspective of the arrogant expert armed with the life-giving stethoscope, but from the humble, knowledge-seeking pupil's perspective. The haste with which many<sup>149</sup> have tried to point us out of the confusion abiding in custom seems to have among other things exposed our lack of knowledge of the defects inherent in the foundationalist philosophy that we rely on to formulate concepts as fundamental as customary international law is to the international legal system. It also seems that these limitations, whose origin lies in the violent culture of ostracising otherness - a ritual evident in the writings of generations of judges, practitioners, and scholars alike - has become our second nature.

In *Plato's Pharmacy*, Derrida uncovers the tragic origins of philosophy in the fearful symmetry between logos and its rival model and obstacle in whose expulsion logos originates. Rene writes that, "Philosophy like tragedy, can at certain levels serve as an attempt at expulsion, an attempt perpetually renewed because it is never wholly successful".<sup>150</sup> This desire to muzzle and exclude contradiction sits at the heart of Western philosophy, which also happens to be the bedrock for many established disciplines, including law. In *Dissemination*, Derrida shows that madness has undergone a process of exclusion, silencing and internment in Western culture. In seventeenth century France, "*le grand enternment*" meant that mad people were rounded up and placed in newly organised asylums.<sup>151</sup> In their writings, philosophers of the time, notably Descartes, completely ignored the subject of madness. Derrida observes that at the time, juridical language scarcely masked the themes of sacrificial expulsion. "Madness is expelled, rejected, denounced in its very impossibility from the very inferiority of thought itself".<sup>152</sup> McKenna observes a complicity by the rational, and the political orders to silence and capture madness through an institutional discourse that presumed to objectify it.<sup>153</sup> The dynamics of this process were buttressed not just by philosophy, but also by professional psychiatry.<sup>154</sup>

Derrida argues that a similar exclusionary mechanism that mystifies reality so that those ideas that are held exist exclusively at the expense of their opposites is observable in what is accepted as logic today. He calls this practice logocentric bias.<sup>155</sup> What for instance is the opposite of customary international law? What traces of that opposite remain in customary international law? When does or should customary international



law defer to its opposite, and when does/should it not, and why? Of what is customary international law a *signifier*? How much of that component can we trace in State practice, and how much in *opinio juris*? Derrida's chief criticism of Western philosophy is that it is incomplete because by foundationalising ideas, it disregards everything else contrary or near to the foundationalised idea.<sup>156</sup> Benjamin<sup>157</sup> sets out the arguments why such legal violence should not be tolerated. He also exposes the complicity of natural law and positive law to gloss over this *violence*. He argues that although each of them distinguishes between the types of *violence*, albeit in different ways, each does so with a view to justifying *legal violence*, or at least certain types of *legal violence*, rather than criticising *legal violence*. For natural law, a criteria of ends - the just and the unjust - forecloses a critique of *violence per se*, precisely because this criteria does not permit problematisation of the use of just but also *violent* legal force to achieve just ends. While positive law thematises *legal violence* by analysing it without reference to the justice of its ends, it retains the essential characteristics of the *violent exercise* in question. Positive law merely labels *violence* either as legitimate *violence*, or illegitimate *violence* without creating the basis for problematising the *violence* that it describes or labels as legitimate. "Natural law attempts, by the justness of the ends, to "justify" the means, positive law to "guarantee" the justness of the ends through justification of the means."<sup>158</sup> For this reason, Benjamin<sup>159</sup> argues that a critique of legal violence must commence outside both positive legal philosophy, and natural law. Only this way can *law-founding violence* and *law-preserving violence* be exposed, and the problems they create for legal imagination brought to the fore. *Law-founding violence* is the historical violence which substitutes a new *grundnorm* for an old one, as happens in revolutions, etc. *Law preserving violence* is that *violence* that results from all the efforts to promote, protect, and enforce the new *grundnorm* founded by *law-founding violence*. Examples of this include judicial enforcement of contracts, and the punishment of those that offend the new code of law. Wolcher writes that:

Whatever it is that is founded by *law-making violence* does not deserve the name "law" until the moment it is founded. However, at that precise moment, if there is one, the *violence* that founds it ceases to deserve the name "founding", and instead passes over into *violence* that preserves what has already been founded. (... see evidence of this in history, in the tendency of successful revolutions to ratify the *violence* that brought them success by retroactively declaring it justified, if not legal.) On the other hand, *law-preserving violence*, for its part, does not preserve anything that deserves the name "law" until what it preserves has already been founded.

... *Law-founding violence* and *law-preserving violence* always name the same thing - the distinction collapses in the recognition that they are both kinds of *violence*.<sup>160</sup>

There is therefore, a sense in which deconstruction can be described as an attempt to undo the *violence* that sits at the heart of ideas created through foundationalist philosophy. One of the effects this *violence* has is that sometimes the ideas created and circulated are very difficult to comprehend. Sometimes they are very difficult to apply consistently. Deconstruction traces problems with any norm of law backwards to the process by which it was created or established. Instead of regarding the law as a standard for what is possible among human beings, given their human nature,<sup>161</sup> deconstructionist critique upholds that:

Our social vision and system of laws are not based upon human nature as it really is, but rather upon an interpretation of human nature, a metaphor, a privileging. We do not experience the “presence” of human nature; we experience different versions of it in the stories we tell about what we are “really like”. These stories are incomplete; they are metaphors and can be deconstructed. Too often we forget that our systems are based upon metaphor and interpretation; we mistake the dominant or privileged vision of people and society for real “present” human nature.<sup>162</sup>

In this sense, deconstruction enables a reconsideration of the meaning of a doctrine when we remove from its secondary rules of recognition the privileging that enabled their foundationalisation so that we then seek a new understanding of the doctrine from a reconciliation of the once privileged rules and their other opposites. Does the confusion surrounding customary international law stem from a suppression of those attributes of customary international law traceable in its secondary rules of recognition, which the authors of article 38(1)(b) had consciously or unconsciously muzzled and excluded from the doctrine altogether, or does that confusion originate from the inconsistency that occurs when international tribunals adduce as evidence of the emergence of rules of customary international law, inferences of the privileged idea from traces of its more evident rejected other? While it cannot be guaranteed that immediate answers can be found to these questions, asking them is itself a necessary first step to addressing the challenges posed by a known problem. No attempt to address any such challenges, no matter how small, is irrelevant because its value may lie in subtracting from the number of possibilities left to explore in order to resolve the problem.

The central question for this study is whether the suggestion that rules of customary international law result from State practice coupled with *opinio juris* is sound given that numerous claims have been made about the need to abandon altogether<sup>163</sup> customary international law as a source of international law. For this reason, it is necessary at this point of the study to suspend this hypothesis of customary international law so that from a fine combing of international tribunals' jurisprudence on custom, the meaning of article 38(1)(b) can be discerned. Following that, a more comprehensive description of customary international law will then be attempted. But before we proceed, a word must be said about the weaknesses of deconstructionism.

### *Criticism of Deconstruction*

Critiques of deconstruction appear united that its usefulness is limited because ultimately, society requires somewhere to start off from, a common ground which deconstruction appears to negate.<sup>164</sup> This is a misunderstanding of deconstruction because deconstruction is not unethical in its approach. Its opposition is to the ethics of uncritical foundationalism that appear to legitimate the violence inherent in the process of law creation. Deconstruction does not suggest that it is possible to have law without violence. Indeed even the most benevolent legal decision is violent in that it posits an outcome. In this sense, the ethics of deconstruction do not reflect an entirely anti-structuralist ethos. Rather, they advocate a more inclusive system of thought and knowledge gathering and application.

On these terms, a foundation is the inescapable set of values and limitations that structure human interaction. Saurette argues that this, above all else, is the message of Nietzschean and Foucauldian genealogies that underline the historically constructed nature of all perspectives.<sup>165</sup> He writes that, "A society ... requires a foundation so that it can temporarily forget the ungroundable nature of judgment and affirm action and life in spite of the 'thrownness' of being and arbitrariness of existence".<sup>166</sup> Nietzsche buttresses this argument by demonstrating that whether we believe it or not, the act of forgetting is actually an active and positive faculty of repression. He writes that:

To close the doors and windows of consciousness for a time; to remain undisturbed by the noise and struggle of our underworld of utility organs working with and against one another; a little quietness, a little *tabula rasa* of the subconsciousness, to make room for new things ... that is the purpose of active forgetfulness, which is like a doorkeeper, a preserver of

psychic order, repose and etiquette: it is immediately obvious how there could be no happiness, no cheerfulness, no hope, no pride, no present without forgetfulness. The man in whom this apparatus of repression is damaged and ceases to function properly may be compared with the dyspeptic - he cannot "have done" with anything. [Yet] ... the very life that requires forgetfulness demands the temporary suspension of this forgetfulness; this is when it is supposed to become absolutely clear precisely how unjust the existence of certain things - for example, a privilege, a caste or a dynasty - really is, and how much these things deserve to be destroyed. This is when its past is viewed critically, when we take a knife to its roots.<sup>167</sup>

By emphasising deconstruction's call to destabilise foundations on the one hand, and ignoring deconstruction's fervent call for the need to reconcile the privileged idea with its ostracised other, opponents of deconstruction<sup>168</sup> expose themselves as loyal and faithful servants of uncritical foundationalism. Deconstruction is not only about the systematic unveiling of contradictions embedded in writing by fruitlessly inverting observable binary oppositions. Derrida denies that there is such a thing as a self-sufficient originary foundation for a system of thought because, ultimately, it can be shown that the same foundational terms depend upon the subordinate terms we would like to think depend on them.<sup>169</sup> Deconstruction therefore challenges the commonly held view that we perceive an idea independently of its opposite. For example, that when one thinks of speech one does not simultaneously relate one's thinking to writing. In *Of Grammatology*, Derrida argues that, "... when we hold an idea on our minds, we hold both the idea and its opposite; we think not of speech, but of speech as opposed to writing, or speech with traces of the idea of writing, from which speech differs, and upon which it depends".<sup>170</sup> Deconstruction neutralises the former justifications for privileging some ideas, texts or concepts over others, compelling the deconstructionist to explain the basis for the way in which s/he orders his/her ideas or concepts. Such a task can yield or even impose the discovery of new or fresher insights into the subject matter. Nonetheless, any novel explanations would themselves not be immune to deconstruction, justifying perhaps the charge of nihilism that its opponents like to use against it. Does this make deconstruction a bottomless pit, with no foundation? For Derrida that question points to the conditioning of Western foundationalist philosophy, of wanting to foundationalise everything. In *Of Grammatology*, he argues that this is Western philosophy's agenda, that:

One can only seek truth if one discovers fundamental principles and builds upon them. We should recognise this “agenda” by now as privileging. The act of privileging requires the privileged term to be foundational, complete, self-sufficient; however, it is none of these things. It is related to the non-privileged term in a system of mutual differentiation and dependence or *defferance*. [But] [t]he privileged concept is incomplete; it is only a supplement, a signifier, a metaphor. For that reason we are able to use it against itself, to deconstruct it. The act of privileging, of asserting that one of two mutually dependent concepts is really foundational, is like drinking from the springs of the mythical river Lethe, after which we forget our past. Once we have accepted the privileging, we forget our past. Once we have accepted the privileging, we forget that the foundational concept was only a metaphor, a supplement. Deconstruction awakes us from our dogmatic slumber, and reminds us that our truth is only an interpretation.<sup>171</sup>

Nonetheless, critics of deconstruction insist that Derrida’s argument is not sufficient to answer to the charge of nihilism.<sup>172</sup> However, it seems that such criticism ignores the facts of the history of knowledge. Such history awakens us to the reality that the strength of knowledge, indeed the reason it has remained so powerful throughout the ages, is precisely because of its ability to metaphorically shade its skin, when the previous basis of knowledge was succeeded by yet another, and more appropriate basis, which still remained open to criticism, and succession by yet another. Brown<sup>173</sup> illustrates this same point by conducting what he calls “before and after” comparisons of the ways in which thinkers of different periods have set up their positions. Towards the end of the eighteenth century, Kant’s inquiry into the nature of moral judgment, led him to believe that he had found a sufficient answer to David Hume’s scepticism by his principle of “categorical imperative”, claiming that the moral law is imbedded in the minds of all rational beings, and that its content is rational and unavoidable - a reversal of Hume’s position, perhaps. Nonetheless, a few years later Hegel rejected Kant’s position. By historicising the notions of morality and rationality, he established a new position, namely that the emergence of the modern, ethical, rational state and the subjectively free private individual created a new self-knowledge which defied the myths of the self-realising spirit invoked by Kant to justify his position - (a reversal of Kant’s position). Clearly, knowledge’s protection from obsolescence lies in part with the opportunities available to deconstruct previously held perceptions of the basis of knowledge. The clamour for a leveling off point shows on the one hand, a misunderstanding of the dynamic power of knowledge and on the other, a desire to kill knowledge by bursting the bubble that

perpetuates its power. There is therefore a sense in which the possibility of the deconstruction of one position by another, and so on, is actually necessary for knowledge to remain as powerful as it has been over the ages. However, if the acceptance of deconstruction as one of the fitting tools of critical enquiry should be married to an identifiable levelling off point, such a point would not be too difficult to find either, though of course its existence would only be relative to the abiding reconciliation of the formerly privileged idea with its other idea. The level of reconciliation achieved by any one deconstruction exercise becomes the power that determines the achievement of that exercise. Rosenfield argues that at too high a level of reconciliation "... all meanings appear to be interchangeable, as every writing is grasped in its infinite regress along the opposite directions of its endless past and its perpetually incomplete future".<sup>174</sup> At too low a level of reconciliation "... meanings remain completely opaque as myopic concentration on the features of individual texts would tend to conceal or obscure the relationships between such texts and other texts".<sup>175</sup> Nonetheless, a proper level of reconciliation can be reached by "... grasping texts in their unfolding as part of the process of historical formation that gives shape to the ontology of postponement of the reconciliation of self and other and to the ethical call to the other renewed by each such postponement".<sup>176</sup>

It seems therefore that the charge of nihilism is quite misplaced. Similarly, the charge that it is a denial of the existence of objective truth<sup>177</sup> is best understood as a reflection of two things. One is the success of uncritical foundationalist conditioning over time, and the second is unjustified frustration with Derrida's thesis.

## **Conclusion**

In this chapter two tendencies that appear to hinder the normative legitimacy of custom have been observed. The first is the timid and unquestioning acceptance of "givens" by judges, scholars and practitioners in international law. Only when we begin to ask questions about the standards that masquerade as "unquestionable law" while they covertly structure the limits of our legal imagination, will we understand that these same standards are among the least "acceptable", least benign, and perhaps least suited to serve us in the spheres that they operate. The second, which follows from the first, is the consequent need to understand norms as hierarchical, or purely foundational. By attempting to historicise and destabilise the philosophical roots of normative theory a new and unfettered

understanding of the doctrine of customary international law can be grasped. Once it becomes clear that our present understanding of customary international law is based on violence, and that the ghosts of this violence have now come to haunt custom, that understanding becomes unacceptable. For anything less than a profound historical interrogation of the most basic philosophical foundations of our legal civilisation misconceives the origins of values which we might otherwise regard as intrinsic and natural to the legal processes and systems that we apply.

The modern legal scholar has inherited so much material from his predecessors. Deconstruction provides an invaluable tool for testing the validity of what have often been passed down as “givens” in much of this inheritance. First, a deconstructive reading can show how arguments presented as the basis of a given rule not only undermine themselves, but also support an opposing view. Second, the process of deconstruction can reveal the effect on legal arguments of ideological thinking whose main function is to disguise the real issues at stake. Third, the application of this technique enables a valuable critique of conventional interpretations of legal texts.<sup>178</sup> The value of deconstruction to a study intent on revitalising existing institutions cannot be overemphasised. The ideas of trace, *differance*, iterability and supplement shall be invoked in this study, with the aim of teasing out the content of customary international law from the decisions of international tribunals and then to compare that content with the requirements imposed on customary international law by its secondary rules of recognition. This exercise should facilitate isolation of the problems complained about customary international law, and reveal possible alternatives to the formulation of a more legitimate doctrine of custom.

## **Notes**

1           1           See Holsti, K. J. (1989) "Mirror, Mirror on the wall, Which are the Fairest Theories of All?" *International Studies Quarterly*, vol. 33 No.3, p.255, at p.256.

2Ibid.

3           3           Elam, D. (1994) *Feminism and Deconstruction*, Routledge, London/New York, p.4.

4           4           Ibid. p.7. See also Charlesworth and Chinkin, "The Gender of Jus-Cogens", *Human Rights Quarterly*, 115 (1993) p.63.

5           5           See for example, Kelman, M.G. (1984) "Trashing", *Stanford Law Review*, vol. 36, p.293.

6           6           See Balkin, J.M. (1987) "Deconstructive Practice And Legal Theory", *The Yale Law Journal*, vol. 96, p.743.

7           7           See Cornell et al. (eds) (1992) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.1.

8           Adorno, quoted in Cornell, *ibid.* p.15.

9           9           Statute of International Court of Justice 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat 1031.

10          10          Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press, London, p.18.

11          11          Hutchinson, A.C. (1984) "From Cultural Construction to Historical Deconstruction", *Yale Law Journal*, vol. 94, pp.209 - 210.

12          12          Sallis, J. (1987) *Deconstruction and Philosophy, the Texts of Jacques Derrida*, The University of Chicago Press, Chicago/London, p.4.

13          Ibid.

14          14          Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press, London, p.26.

15          15          Sallis, J. (1987) *Deconstruction and Philosophy, the Texts of Jacques Derrida*, The University of Chicago Press, Chicago/London, p.5.

16          16          See discussion of Kelsen's claim that customary international law poses an unanswerable question, and Allot's claim that customary international law manifests an imponderable paradox, and Parry's suggestion that customary international law is a mysterious phenomenon in Chapter One.

17          17          Quoted in Cornell et al. (eds) (1992) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.15.

18          18          See also Villiger, M.E. (1985) *Customary International Law and Treaties*, Martinus Nijhoff Publishers, Dordrecht/ Boston/ Lancaster.

19          19          Cornell et al. (eds) (1992) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.15.

20          20          See Allot, Kelsen, Trimble, Parry, and Tanaka's arguments on customary international law's imponderable paradox discussed in Chapter one.

21Baudrillard, J. (1983) *Simulations*, Semiotext, New York City, p.11.

22          22          Gutting, G. (1989) *Michel Foucault's Archeology of Scientific Reason*, Cambridge University Press, Cambridge.

23          23          To understand the cognitive status of the human sciences, we need to understand the modern conceptions of order, signs, and language. It is our idea of knowledge, based on these conceptions that Foucault calls the episteme. And history shows that the episteme varies because different epochs conceive and experience order differently. See Gutting, *ibid.* pp.138-9.

24          24          "Order" should be understood here to mean the fundamental way in which things are connected to each other.

25See Gutting, *ibid.* p.140.

26          Ibid. p.144.

27          Ibid.

28          Ibid.

29          Ibid. p.146.

30          Ibid. p.147.

31          Ibid.

32          Ibid. p.148.

33          Ibid.

34Ibid.

35          Ibid. p.149.

36          36          Foucault, in Gutting, G. *Michel Foucault's Archeology of Scientific Reason*, 1989, Cambridge University Press, Cambridge, p.150.

37          Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, New York, p.19.

38          38          Rosenfield, M. (1992) "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.153.

39          39          Regina v. Bentley (Ex. parte. Bentley) [1994] (D.C.) p.349. See also The Times, 13 January 1953, p.24.

40          Ibid. p.355.

41          Ibid. p.349.

42          42          Thatcher, M. (1993) *The Downing Street Years*, Harper Collins Publishers, London, p.27.

43          Discussed in Chapter Three.

44          44          See Brown, C. (1994) "Turtles all the way Down: Anti-Foundationalism, Critical Theory and International Relations", *Millennium Journal of International Studies*, vol. 23 No.2, p.213; Cavell, S. (1995) *Philosophical Passages: Wittgenstein, Emerson, Austin, Derrida*, Blackwell Publishers, Oxford/Massachusetts; Derrida, J. (1982) *Margins of Philosophy* (translated by Boss) University of Chicago Press, Chicago; Derrida, J. (1982) *Dissemination* (translated by Johnson) University of Chicago Press, Chicago; Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press,



London; Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore; Hamilton and Huntington (eds) (1964) *Plato, The Collected Dialogues*, Pantheon, New York; Hawthorn, J. (ed.) (1984) *Criticism and Critical Theory*, Edward Arnold Publishers, London; Hutchinson, A.C. (1984) "From Cultural Construction to Historical Deconstruction", *Yale Law Journal*, vol. 94, p.229; McKenna, A.J. (1992) *Violence and Difference*, University of Illinois Publishing Co. Illinois; Norris, C. (1982) *Deconstruction: Theory and Practice*, Methuen Publishers, London/New York.

45 45 Derrida, J. (1982) *Dissemination* (translated by Johnson) University of Chicago Press, Chicago, pp.76-168.

46 46 Ra is an Egyptian God. Therefore Derrida's positing of Plato as the origin of "Western" philosophy is deconstructible in that "the West" and its "philosophical origin" recedes into Africa because Plato appears to be Derrida's myth of origin.

47 47 Hamilton and Huntington (eds) (1964) *Plato, The Collected Dialogues*, Pantheon, New York.

48 48 McKenna, A.J. (1992) *Violence and Difference*, University of Illinois Publishing Co., Illinois, p.28.

49 49 Ibid. p.32. See also Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press, London, pp.24-5.

50 50 Derrida, J. (1982) *Dissemination* (translated by Johnson) University of Chicago Press, Chicago, p.128.

51 51 See McKenna, A.J. (1992) *Violence and Difference*, University of Illinois Publishing Co., Illinois, p.33.

52 Emphasis added; Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press, London, p.20.

52 52 On the paradoxes inherent in the formulation of article 38(1)(b) and international tribunals' jurisprudence on customary international law, see Chapter One.

53 53 Derrida, J. (1981) *Positions* (translated by Alan Bass) The Athlone Press, London, p.19.

54 Ibid. p.22.

55 55 See for instance Wood, D. (ed.) (1992) *Derrida: A Critical Reader*, Blackwell Publishers, Oxford/Massachusetts, pp.1-4.

56 56 See in particular Derrida, J. (1982) *Margins of Philosophy* (translated by Boss) University of Chicago Press, Chicago.

57 57 Derrida, J. (1982) *Margins of Philosophy* (translated by Boss) University of Chicago Press, Chicago, p.27. Emphasis added.

58 58 Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, vol. 96, p.743 at p. 747.

59 Ibid. p.750.

60 Ibid. p.751.

61 Ibid.

62 62 See Derrida, J. (1982) *Margins of Philosophy* (translated by Boss) University of Chicago Press, Chicago, p.27.

63 63 See especially Sacks, M. (1990) "Through a Glass Darkly: Vagueness in the Metaphysics of the Analytic Tradition", in Bell and Cooper (eds) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/Massachusetts.

64 64 See Schrift, A.D. (1990) *Nietzsche and the Question of Interpretation: Between Hermeneutics and Deconstruction*, Routledge, London/New York, p.110.

65 65 Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore, p.158. See also Sharpe who writes that the reader has a more active role than a concert-goer or play goer primarily because the addresser sends a message to the addressee. "And to be operative, the message requires a context referred to, sizeable by the addressee, and either verbal or capable of being verbalised; a code, fully, or at least partially, common to the addresser and the addressee; and finally, a contact, a physical channel and a psychological connection between the addresser and the addressee, enabling them both to enter and stay in communication". Sharpe, R. (1984) "The Private Reader and the Listening Public", in Hawthorn, J. (ed.) *Criticism and Critical Theory*, Edward Arnold Publishers, London, p.15.

66 66 See Sacks, M. (1990) "Through a Glass Darkly: Vagueness in the Metaphysics of the Analytic Tradition", in Bell and Cooper (eds) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/Massachusetts, pp.176 - 92.

67 67 See Schrift, A. D. (1990) *Nietzsche and the Question of Interpretation: Between Hermeneutics and Deconstruction*, Routledge, London/New York, p.110.

68 68 Schrift writes that, "the point which Derrida objects to in the project of hermeneutics should be clear. If hermeneutics seeks to make present some meaning or truth which lies hidden behind or beneath or inside the text, then hermeneutics belongs with the logocentric metaphysics of presence which Derrida is continually attempting to deconstruct. ... .. (p.113). Moreover, ... a pluralistic approach to interpretation is committed to the view that there are multiple ways to get a text "right", and it will attempt to appraise interpretations, in part, in terms of the internal standards they set for themselves and, in part, in terms of their consequences for subsequent interpretative activity". Schrift, A.D. (1990) *Nietzsche and the Question of Interpretation: Between Hermeneutics and Deconstruction*, Routledge, London/New York, pp.111-3.

69 69 The term supplement can be traced back to Rousseau, who describes writing as a supplement to speech. He argues that because the natural condition of language is speech, writing is merely an attempt at representing it. He writes that: "Speech being natural, or at least the natural expression of thought, ... writing is added to it, is adjoined, as an image or representation. In that sense, it is natural. It diverts the immediate presence of thought to speech into representation and the imagination. This recourse is not only "bizarre", but dangerous. It is the addition of a technique, a sort of artificial and artful ruse to make speech present when it is actually absent. It is violence done to the natural destiny of the language ...". Quoted in Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore, p.144.

70 70 Ibid. p.144. Balkin adds that: "In reality, ... speech-as-thought is a sham; like writing, speech is a meditation of thought, a delaying through representation. It is for that reason that writing can supplement, or take the place of speech". Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, vol. 96, p.743, at p.759.

71 71 Speech mediates thought, but it is not itself thought, nor can it fully signify the thoughts it mediates. Writing mediates speech, but it is itself not speech, nor can it fully signify the speech it mediates because of things such as tone,

voice, intonation, etc.

<sup>72</sup> See Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore, pp.101 - 40.

<sup>73</sup> From this position, Derrida concludes that all understanding is metaphorical. And this is his basis for his cliché *n'y a pas de hors-texte* (there is nothing outside of the text). Writing is therefore all there is, and through the process of deconstruction, one can access all the reality that exists. He argues that: "Our very relation to "reality" ... functions like a text". Ibid. p.158.

<sup>74</sup> Ibid. pp.158-9. Emphasis added.

<sup>75</sup> Supra.

<sup>76</sup> See particularly Baudrillard, J. (1983) *Simulations*, Semiotext, New York City; Bell and Cooper (eds) (1990) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/ Massachusetts; Derrida, J. (1978) *Writing and Difference* (translated by Bass) University of Chicago Press, Chicago; Elias, T.O. (1985) "New Trends In Contemporary International Law", *Josephine Onoh Memorial Lecture*, Hull University Press, Hull; Hargrove, J.L. (1987) "The Nicaragua Judgment and the Future of the Law of Force and self-defence", *American Journal of International Law*, vol. 81, p.135; Lee, R. (1995) "Rule Making in the United Nations: *Opinio Communitatis*", *New York University Journal of International Law and Politics*, vol. 27 No.33, p.571.

<sup>77</sup> Bell and Cooper (eds) (1990) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/ Massachusetts, p. 32.

<sup>78</sup> See Burge, T. in Bell and Cooper (eds) (1990) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/ Massachusetts, p.38.

<sup>79</sup> See Gutting, G. (1989) *Michel Foucault's Archeology of Scientific Reason*, Cambridge University Press, Cambridge, p.195.

<sup>80</sup> Mandela, N. (1995) *Long Walk To Freedom*, Abacus, London, p.97.

<sup>81</sup> Gutting, G. (1989) *Michel Foucault's Archeology of Scientific Reason*, Cambridge University Press, Cambridge, p.195. On simulation and representation, see also Baudrillard, J. (1983) *Simulations*, Semiotext, New York City, pp.11-13.

<sup>82</sup> Sacks observes that: "The idea that the world is fully determinate, such that for any fact in the world there is a reason why it is so rather than some other way, or that the world abides bivalence, was not new. However, by the early part of the twentieth century the conviction that the principle of sufficient reason held true of the world seemed to be fully borne out by empirical successes of science, and no longer required rationalist principles to be adduced in its favour". Sacks, M. "Through a Glass Darkly: Vagueness in the Metaphysics of the Analytic Tradition", in Bell and Cooper (eds) (1990) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/ Massachusetts, p. 193.

<sup>83</sup> Ibid. p.174.

<sup>84</sup> See Jordan and Jordan (1984) *Man in Context*, McGraw-Hill, Johannesburg, p.396.

<sup>85</sup> See Derrida, J. (1978) *Writing and Difference* (translated by Bass) University of Chicago Press, Chicago, p.292.

<sup>86</sup> Sacks, M. (1990) "Through a Glass Darkly: Vagueness in the Metaphysics of the Analytic Tradition", in Bell and Cooper (eds) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/Massachusetts, p.175.

<sup>87</sup> See Chapter Three.

<sup>88</sup> Sacks, M. (1990) "Through a Glass Darkly: Vagueness in the Metaphysics of the Analytic Tradition", in Bell and Cooper (eds) *The Analytic Tradition: Meaning, Thought and Knowledge*, Basil Blackwell, Oxford/Massachusetts, p. 177.

<sup>89</sup> To what extent does what international tribunals accept as evidence of State practice and evidence of *opinio juris* reflect the intentions of the authors of 38(1)(b)? Or has the interpretation of this provision allowed us other meanings of these limbs of custom? If so, to what effect?

<sup>90</sup> See Chapter One.

<sup>91</sup> See Chapters one and two.

<sup>92</sup> Balkin reasons that: "The critic does not think less of her interpretation of Molby Dick because Melville did not see the same connections as he composed his work. A philosopher does not think less of her critique of the Phaedo when she discovers a connection between the ideas that Plato did not recognise in his text. Indeed, there is generally a great critical importance in discovering that a text says more than the author meant it to say, or that hidden flaws or strengths in a work of literature or philosophical treatise only become apparent over time". Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, vol. 96, p.743, at p. 778.

<sup>93</sup> See also, Balkin, *ibid.* pp.778 -9. If we substituted the international legal system's custom procedure for any other municipal legal system's custom procedure, would the attributes of *opinio juris* and "subject" practice when adapted to the new context maintain, enhance or damage the legitimacy of the doctrine of custom in that legal system? It must be noted though that while this may be a secondary way of assessing the efficacy of a concept, that test does not detract from the virtues of such a concept within its own legal system, but only enhances it if it can also stand its ground in upholding coherence and legitimacy when applied in other legal systems.

<sup>94</sup> See Derrida, J. (1982) *Margins of Philosophy* (translated by Boss) University of Chicago Press, Chicago, p.317.

<sup>95</sup> See for instance, The International Court of Justice (2<sup>nd</sup> ed. 1979) The Hague: ICJ Publications, p.89.

<sup>96</sup> See Documents of the United Nations Conference on International Organisation - San Francisco, 1945, Vol. III, Documents 1 and 2; Vol. VIII, Document 1151; and Vol. IX, Documents 203, 416, 507, 536, 571, 795, and 848; See also The Work of the International Law Commission (4<sup>th</sup> ed. 1988) *United Nations Publication*, The Hague, p.4.

<sup>97</sup> See South West Africa Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia) International Court of Justice Reports, 1971, p.16; Nicaragua Case (Nicaragua v. US) Merits, International Court of Justice Reports, 1986, p.196. See also Hargrove's remarks on the Nicaragua judgment and the future of the law of force and self-defence. Hargrove, J.L. (1987) "The Nicaragua Judgment and the Future of the Law of Force and self-defence", *American Journal of International Law*, vol. 81, p.135.

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See Chapter One.

See the example of Mrs. Thatcher, and that of Derick Bentley above.

<sup>100</sup> Balkin writes that: “If the meaning of a signifier is context bound, ... there are always new contexts that will serve to increase the different meanings of a signifier. ... : The words in a statute or in a case used as precedent take on new meanings in new factual contexts, and cannot be confined to a limited number of meanings. There are an indefinite number of possible contexts in which a given legal text could be read. For this reason, a text is always threatening to overflow into an indefinite number of different significations”. Balkin, J.M. (1987) “Deconstructive Practice and Legal Theory”, *The Yale Law Journal*, vol. 96 p.743, at p.781.

<sup>101</sup> South West Africa Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia) International Court of Justice Reports, 1971, p.16.

<sup>102</sup> Lord Wilberforce (1985) Foreword to Elias, T.O. “New Trends In Contemporary International Law”, *Josephine Onoh Memorial Lecture*, Hull University Press, Hull, p.i.

Elias, *ibid.* p.1.

<sup>104</sup> Lee, R. (1995) “Rule Making in the United Nations: Opinio Communitatis”, *New York University Journal of International Law and Politics*, vol. 27 No.33, p.571.

<sup>105</sup> *Ibid.* pp.573-5. For a list of the General Assembly resolutions said to reflect *opinio communitatis*, see *ibid.* pp.574-5.

<sup>106</sup> Brownlie, I. (ed.) (3<sup>rd</sup> ed. 1991) *Basic Documents in International Law*, Clarendon Press, Oxford, p.204.

<sup>107</sup> See United Nations General Assembly resolution 1721 (XVI) of 20 December, 1961, United Nations Doc. AA/A/C.105/C.2/SR.14, Legal Sub-Committee on Outer Space, 22 August 1962. See also Fawcett, J.E.S. (1968) *International Law and the Uses of Outer Space*, Manchester University Press, Manchester; Haley and Heinrich (eds) (1960) *Survey of Legal Opinion on Extraterrestrial Jurisdiction*, Stockholm Printers, Stockholm. Jenks, C.W. *Space Law* (1965) Stevens, London; McMahon, J.F. (1962) “Legal Aspects of Outer Space”, *British Yearbook of International Law*, vol. 38, p.338; Jenks, C.W. (1956) “International Law and Activities in Space”, *International and Comparative Law Quarterly*, p.103.

Supra.

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<sup>110</sup> See Fitzmaurice, G. (1951) “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points”, *British Yearbook of International Law*, p.1; Gamble, J.K. (1980) “Reservations to Multilateral Treaties: a Microscopic View of State Practice”, *American Journal of International Law*, p.372; McNair, A.D. (1961) *Law of Treaties*, Clarendon Press, Oxford; Plender, R. (1986) “The Role of Consent in the Termination of Treaties”, *British Yearbook of International Law*, p.133; Rosenne, S. (1989) *Developments in the Law of Treaties, 1945 - 1986*, Cambridge University Press, Cambridge; Sinclair, I. (1984) *The Vienna Convention on the Law of Treaties*, Manchester University Press, Manchester.

<sup>111</sup> See Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore, pp.158-9. Emphasis added.

<sup>112</sup> A popular theory of interpretation in the international legal system. See among others, Fitzmaurice, G. *loc. cit.* (n.110) p.1; Gamble, J.K. *loc. cit.* (n.110) p.372; McNair, A.D. *loc. cit.* (n.110); Plender, R. *loc. cit.* (n.110) p.133; Rosenne, S. *loc. cit.* (n.110); Sinclair, I. *loc. cit.* (n.110).

<sup>113</sup> See Balkin, J. M. (1987) “Deconstructive Practice and Legal Theory”, *The Yale Law Journal*, vol. 96 p.743, at p.775.

Culler, in Balkin, J.M. *ibid.* pp. 774-5.

Balkin, J.M. *ibid.* p.775.

<sup>116</sup> See Jordan and Jordan (1984) *Man in Context*, McGraw-Hill, Johannesburg, p.620.

<sup>117</sup> See particularly Bernauer, J.W. (3<sup>rd</sup> ed. 1994) “Michel Foucault’s Ecstatic Thinking”, in Bernauer and Rasmussen (eds) *The Final Foucault*, The MIT Press, Cambridge, Massachusetts/London; Fiss, O.M. (1982) “Objectivity and Interpretation”, *Stanford Law Review*, vol. 34, p.739; Dalton, C. (1985) “An Essay in the Deconstruction of Contract Doctrine”, *Yale Law Journal*, vol. 94, p.1007; Jacobsen, A.J. (1992) “The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.95; Veljanovski, C.G. (1981) “Wealth Maximisation, Law and Ethics - On The limits of Economic Efficiency”, *International Review of Law and Economics*, vol. 1, p.5; Dworkin (1986) *R. Law’s Empire*, Fontana Press, London; Brudner, J. (1990) “The Ideality of Difference: Toward Objectivity in Legal Interpretation”, *Cardozo Law Review*, vol. 11, p.1133; Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, New York.

<sup>118</sup> See Bernauer, J.W. (3<sup>rd</sup> ed. 1994) “Michel Foucault’s Ecstatic Thinking”, in Bernauer and Rasmussen (eds) *The Final Foucault*, The MIT Press, Cambridge, Massachusetts/London, p.45.

<sup>119</sup> See Norris, C. (1982) *Deconstruction: Theory and Practice*, Methuen Publishers, London/New York, p.18.

*Ibid.* pp.23-4.

<sup>121</sup> See Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.157.

*Ibid.*

*Ibid.*

*Ibid.*

Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, New York, p.51.

<sup>126</sup> Derrida, J. *Of Grammatology* (translated by Spivak) 1974, Johns Hopkins University Press, Baltimore, p.125.

<sup>127</sup> Fiss, O.M. (1982) “Objectivity and Interpretation”, *Stanford Law Review*, vol. 34, p.739.

128 Ibid.

129 <sup>129</sup> Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152. See also Dalton, C. (1985) “An Essay in the Deconstruction of Contract Doctrine”, *Yale Law Journal*, vol. 94, p.1007.

130 <sup>130</sup> Fiss, O.M. (1982) “Objectivity and Interpretation”, *Stanford Law Review*, vol. 34, p.739 at p.740.

131 <sup>131</sup> Rosenfield writes that this loss of faith manifests itself in: “The intensification of the conflict among the community of legal actors, the dissolution of any genuine consensus over important values, the seemingly inescapable indeterminacy of legal rules, and the belief that all the dispositions of legal issues are ultimately political and subjective”. Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152.

132 Supra.

133 <sup>133</sup> See Jacobsen, A.J. (1992) “The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.95, pp.98-112.

134 <sup>134</sup> See Fiss, O.M. (1982) “Objectivity and Interpretation”, *Stanford Law Review*, vol. 34, p.739 at p.740; Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.154.

135 <sup>135</sup> See for example, Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, New York, pp.155-9.

136 <sup>136</sup> See Veljanovski, C.G. (1981) “Wealth Maximisation, Law and Ethics - On The limits of Economic Efficiency”, *International Review of Law and Economics*, vol. 1, pp.5-28.

137 <sup>137</sup> See also Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.154.

138 Ibid.

139 <sup>139</sup> Ibid. See also Dworkin, R. (1986) *Law’s Empire*, Fontana Press, London, p.228.

140 <sup>140</sup> Discussing the demerits of Dworkin’s integrity theory, see among others Brudner, J. (1990) “The Ideality of Difference: Toward Objectivity in Legal Interpretation”, *Cardozo Law Review*, vol. 11, p.1133, at p.1156; Rosenfield, M. (1992) “Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism”, in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.156.

141 <sup>141</sup> Frost, M. (1994) “The Role of Normative Theory In International Relations”, *Millennium Journal of International Studies*, vol. 23 No.1, p.109, at p.110.

142 Ibid.

143 <sup>143</sup> See Rawls, J. (1971) *A Theory of Justice*, Oxford University Press, Oxford, p.51.

144 <sup>144</sup> On disillusionment with the idealist paradigm in the period of intellectual ferment following World War two, and the ascendance to popularity of the realist paradigm on which most policy decisions, both domestic and international, thrived; and problems even with this latter paradigm, see for example Kegley and Wittkopf (3<sup>rd</sup> edn. 1989) *World Politics: Trend and Transformation*, McMillan Education Limited, London, pp.12-24.

145 <sup>145</sup> See Saurette, P. (1996) “I Mistrust All Systematizers and Avoid Them: Nietzsche, Arendt and the Crisis of the Will to Order in International Relations Theory”, *Millennium Journal of International Studies*, vol. 25 No.1, p.1, at p.18.

146 <sup>146</sup> The rights that a legal system protects, and the enforcement techniques it allows, tell a story about what people are, and should be. Dalton, C. (1985) “An Essay in the Deconstruction of Contract Doctrine”, *Yale Law Journal*, vol. 94, p.999.

147 <sup>147</sup> See Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, New York, p.13.

148 <sup>148</sup> George and Campbell (1990) “Patterns of Dissent and the Celebration of Difference”, *International Studies Quarterly*, vol. 34 No.3, p.269, at p.273.

149 <sup>149</sup> See among others, D’Amato’s theory of manifest intent, Kirgis’ theory of custom on a sliding scale, Tunkin’s theory of consent, all discussed in Chapters One and Two.

150 <sup>150</sup> See Girard, R. (1978) *Violence and the Sacred* (translated by Gregory) Johns Hopkins University Press, Baltimore, p.297.

151 <sup>151</sup> Derrida, J. (1982) *Dissemination* (translated by Johnson) University of Chicago Press, Chicago, pp.124-40; Gutting, G. (1989) *Michel Foucault’s Archeology of Scientific Reason*, Cambridge University Press, Cambridge, pp.55-100.

152 <sup>152</sup> See Derrida, J. (1978) *Writing and Difference* (translated by Bass) University of Chicago Press, Chicago, p. 47.

153 <sup>153</sup> See McKenna, A.J. (1992) *Violence and Difference*, University of Illinois Publishing Co., Illinois, pp.40-50.

154 <sup>154</sup> See for instance, Rabinow, P. (ed) (1984) *The Foucault Reader*, Penguin Books, London, pp.125-8.

155 <sup>155</sup> Derrida, J. (1978) *Writing and Difference* (translated by Bass) University of Chicago Press, Chicago.

156 <sup>156</sup> Ibid. See also Wolcher, L.E. (1996) “The Man in a Room: Remarks on Derrida’s Force of Law”, *Law and Critique*, vol. VII No.1, p.35, p.48.

157 <sup>157</sup> (1986) “Critique of Violence”, in Demetz, P. (ed.) *Walter Benjamin: Reflections, Essays, Aphorisms and Autobiographical Writings*, Schocken Books, New York, pp.277-300.

158 <sup>158</sup> Ibid. p.278. On weaknesses of foreclosing discussion in order to privilege one idea over its opposite other, see also Wolcher, L.E. (1996) “The Man in a Room: Remarks on Derrida’s Force of Law”, *Law and Critique*, vol. VII No.1,

p.35 at p.51.

- <sup>159</sup> See Demetz, P. (ed) (1986) *Walter Benjamin: Reflections, Essays, Aphorisms and Autobiographical Writings*, Schocken Books, New York, p.279.
- <sup>160</sup> Wolcher, L.E. (1996) "The Man in a Room: Remarks on Derrida's Force of Law", *Law and Critique*, vol. VII No.1, p.35 at p.52. Emphasis added.
- <sup>161</sup> <sup>161</sup> Discussing the limitations placed on creation of legal systems by what he calls the human predicament, see Hart, H.L.A. (2<sup>nd</sup> ed. 1994) *The Concept of Law*, Oxford University Press, p.128.
- <sup>162</sup> Ibid.
- <sup>163</sup> <sup>163</sup> See among others, Trimble, Charlesworth, and Tanaka, discussed in Chapter One.
- <sup>164</sup> <sup>164</sup> See Sallis, J. (1987) *Deconstruction and Philosophy, the Texts of Jacques Derrida*, The University of Chicago Press, Chicago/London, p.8.
- <sup>165</sup> <sup>165</sup> Saurette, P. (1996) "I Mistrust All Systematizers and Avoid Them: Nietzsche, Arendt and the Crisis of the Will to Order in International Relations Theory", *Millennium Journal of International Studies*, vol. 25 No.1, p.1, at p.24.
- <sup>166</sup> <sup>166</sup> Ibid. The fact that the act of creating foundations is inescapable is further illustrated by our realisation that "to act" is necessarily to privilege, if only because one option is chosen over another. And the consequences of these actions, infused with the inevitable power of human relations, always privilege, oppress, and create otherness.
- <sup>167</sup> <sup>167</sup> See Nietzsche, F. (1995) *Unfashionable Observations* (translated by Gray) Stanford University Press, Stanford CA, pp.89, and 106. See also Saurette, P. (1996) "I Mistrust All Systematizers and Avoid Them: Nietzsche, Arendt and the Crisis of the Will to Order in International Relations Theory", *Millennium Journal of International Studies*, vol. 25 No.1, p.1, at p.24.
- <sup>168</sup> <sup>168</sup> See Rosenfield, M. (1992) "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.158.
- <sup>169</sup> <sup>169</sup> See Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, vol. 96, p.743, at p. 753.
- <sup>170</sup> <sup>170</sup> Derrida, J. (1974) *Of Grammatology* (translated by Spivak) Johns Hopkins University Press, Baltimore. See Balkin, J.M. *ibid*.
- <sup>171</sup> <sup>171</sup> See Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, 96 p.743, at p. 761.
- <sup>172</sup> <sup>172</sup> Ibid. pp.764-772; McKenna (1992) *A.J. Violence and Difference*, University of Illinois Publishing Co., Illinois, pp.95-106; Elam, D. (1994) *Feminism and Deconstruction*, Routledge, London/New York, pp.53-5.
- <sup>173</sup> <sup>173</sup> Brown, C. (1994) "Turtles all the way Down: Anti-Foundationalism, Critical Theory and International Relations", *Millennium Journal of International Studies*, vol. 23 No.2, p.213, at p.215.
- <sup>174</sup> <sup>174</sup> Rosenfield, M. (1992) "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", in Cornell et al. (eds) *Deconstruction and the Possibility of Justice*, Routledge, London/New York, p.152, at p.159.
- <sup>175</sup> Ibid.
- <sup>176</sup> Ibid.
- <sup>177</sup> <sup>177</sup> While he does not deny the existence of objective truth as such, Derrida argues that signifiers only imperfectly represent it, and the way to achieve more meaningful signifiers is through the interpretative analysis, and not the hermeneutic search for a definite truth concealed in any one text. The frustration with wanting the real truth inherent in the hermeneutic approach for Derrida, stems from Western philosophy's desire to foundationalise. See Schrift, A.D. (1990) *Nietzsche and the Question of Interpretation: Between Hermeneutics and Deconstruction*, Routledge, London/New York., pp.22-3.
- <sup>178</sup> <sup>178</sup> Balkin, J.M. (1987) "Deconstructive Practice and Legal Theory", *The Yale Law Journal*, vol. 96, p.743, at p.744.