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International law, Literature, and Interdisciplinarity

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### **Abstract**

The article analyses the relationship between international law and literature from the point of view of its form of expression. Using the insights from Deleuze and Guattari's analysis of Kafka's oeuvre as a minor literature it argues that stylistic conventions of international law represent a serious barrier to the full development of a truly revolutionary potential of international law. International law is situated in proximity to minor literature. Therefore, the constraints imposed on the use of language by the discipline of international law produce particularly distorting results within international law scholarship. These distortions reflect the need for opening up of the international law language to new uses that allow for the precedence of the expression over content as in minor literature.

**Keywords:** International Law, Minor Literature, Deleuze and Guattari, Kafka, Interdisciplinarity

### INTRODUCTION

Law and literature is today quite a broad and well-recognised field. However, its extension to the realm of international law is still very fragmented and rudimentary. The only exception represents the area of human rights. Since human rights concerns relate to human beings directly, they are more easily appropriated by the dominant approaches of the law and literature field. Other areas of international law, especially such foundational topics as subjects or sources of international law are situated at such a high level of abstraction, that it is not always obvious how these topics can be analysed using the traditional tools of law and literature movement. One notable exception is a chapter on foundational issues of public international law in the book 'Aesthetics of International Law' by Edward M. Morgan.<sup>1</sup> The author uses narrative analysis to look at the form of international law. The present article proposes a different avenue that allows for a fruitful exchange between international law and literature. In order to be able to approach the abstract topics of international law, it utilises also literary theory, not the literary works in themselves, as the main entry point. The specific approach borrowed from literary theory – Deleuze and Guattari's analysis of Kafka's work as a minor literature – is in itself abstract and theoretical, focuses on structures and forms, not the content and meaning even more than narrative analysis. This abstractness and use of literary theory beyond the realm of interpretation and narrative studies is the main methodological novelty of the article.

International law and literature have a series of affinities: they both work with texts and produce a variety of types of texts. Rules of production and interpretation of various types of texts form a core of both disciplines. However, international law and literature also differ significantly in the type of texts they accept as part of each respective discipline. This article addresses the relationship between international law and literature from the point of view of their respective differences and similarities in the use of language and style. It thus focuses on the form of expression instead of meaning departing from the traditional and more familiar to lawyers field of interpretation. In doing so it also discusses the interplay of methodological

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<sup>1</sup> Edward M. Morgan, *Aesthetics of International Law* (University of Toronto Press, 2007) 28-44.

approaches in both areas and argues that international law informed by literary theory can uncover new potential for a radical rethinking of many traditional notions of public international law. In this connection the article also contributes to the exploration of disciplinary boundaries and the limits of interdisciplinarity. It should be noted that within the framework of this article it will not be possible to engage into a detailed discussion of how precisely notions of international law can be re-thought using Deleuze and Guattari's tools. Therefore, the article focuses on demonstrating the *potential* for radical re-thinking using some examples without claiming to engage in the radical re-thinking of international law notions as such. This is a task for future research and a topic for other articles.

The starting point for discussion is the analysis of Kafka's work by Deleuze and Guattari.<sup>2</sup> The central notion from the point of view of literary theory is the notion of minor literature.<sup>3</sup> As far as public international law is concerned, in order to situate the discussion, the article focuses on the issue of constitutionalisation of international law. It is not the purpose of this article to engage in a close reading of Kafka's texts themselves in order to get insights about international law. However, since the works of Kafka are presented by Deleuze and Guattari as the example of minor literature par excellence, some illustrative references to Kafka's work will be utilised.<sup>4</sup>

Firstly, the analysis by Deleuze and Guattari clearly demonstrate the artificiality of the theory of genres in literary studies.<sup>5</sup> Drawing a parallel between genres in literature and the division between different types of writings in public international law: jurisprudence, doctrine, official documents, the article asks to what extent this division is justified and implemented in public international law and what purposes it serves. What happens if we regard different types of writings in international law not as separate categories but as a single 'oeuvre' as Deleuze and Guattari did when interpreting Kafka's letters, stories and novels?

Once this discussion is concluded, it will allow a renewed look at the expression of constitutionalisation of international law in different types of international writings. While academic writings come first as the most obvious source, the article also draws on the case-law of the International Court of Justice (ICJ). The article moves between these different types of writings imitating the movements of Deleuze and Guattari between novels, stories and letters of Kafka. Simultaneously, this analysis, these movements are informed by Kafka's visions of law and justice as they emerge from the Deleuze and Guattari's reading of Kafka. Can these new movements produce different visions and readings of international constitutionalism? Can they challenge the traditional approach to such a theoretical issue as constitutionalisation of international law? It will be left to other interpreters and readers to decide. However, the exercise will demonstrate the *potential* (or its absence?) of applying literary theory methodologies to the field of international law as a move towards a critical rethinking of international law.

Finally, based on this analysis some thoughts on the political and revolutionary nature of Kafka's work, on the imminently political character of any minor literature<sup>6</sup> as compared to different politics of international law and international lawyers are developed. Is international law revolutionary in this sense? How is it revolutionary and political? Can it be revolutionary at all? And how then about our proposed project of radical rethinking of international law?

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<sup>2</sup> Gilles Deleuze and Félix Guattari, *Kafka: pour une littérature mineure* (Les éditions de minuit, 1975). Translated into English as *Kafka: Towards a Minor Literature* (University of Minnesota Press, 1986). All further references are to the English translation except if indicated otherwise.

<sup>3</sup> This notion is defined by Deleuze and Guattari through three characteristics: 'the deterritorialization of language, the connection of the individual to a political immediacy, and the collective assemblage of enunciation.' Deleuze and Guattari (n 2) 18.

<sup>4</sup> Kafka's 'The Castle' and 'Before the Law' are the two 'main reference' points. For the reference purposes the following translation of The Castle is used: Franz Kafka, *The Castle* (trans. Anthea Bell, Oxford University Press, 2009).

<sup>5</sup> This was also highlighted by others eg Jaques Derrida and Avital Ronell (trn), 'The Law of Genre' (1980) 7 *Critical Inquiry*, On Narrative 55.

<sup>6</sup> See Deleuze and Guattari (n 2) 17, 26: 'There is nothing that is major or revolutionary except the minor.'

We will thus return here to the question of the relationship between international law and literature. The previous discussion will permit for a critical reassessment of the interplay between both and their respective potentialities. This reassessment of the interplay between international law and literature will return us to the question of the use of language in international law. It will in particular be argued that the use of language restricted by disciplinary boundaries and requirements of international law is the main tool for impeding the full development of the revolutionary potential of international law that also limits the breadth of international law's interdisciplinarity.

## MINOR LITERATURE AND GENRES

### What is a Minor Literature?

The notion of minor literature<sup>7</sup> is developed by Deleuze and Guattari as 'a means by which to enter into Kafka's work without being weighted down by the old categories of genres, types, modes, and style.'<sup>8</sup>

Deleuze and Guattari's approach is based on a few fundamental principles that need to be highlighted from the outset. Firstly, they refuse a search for a structure with formal binary oppositions.<sup>9</sup> Instead they use their terminology of machinery, machines and assemblages that emphasise interconnectedness of everything and equal importance of every single element, movement, gesture. This also implies an indistinction between inside and outside and emphasis on process rather than form.<sup>10</sup> Thus, they refuse the search for some hidden and fundamental meaning, focusing instead on understanding functioning, the way a particular theme or image works within the author's oeuvre. In this sense traditional literary interpretation becomes useless.

The notion of minor literature appears in Deleuze and Guattari's discussion of Kafka's oeuvre in relation to expression. Expression needs, according to Deleuze and Guattari, be considered on itself.<sup>11</sup> The importance of expression is related to the Deleuze and Guattari's focus on functioning, processes, and procedures. As they state: 'Seule l'expression nous donne le procédé.'<sup>12</sup> The problem of expression in Kafka is addressed according to Deleuze and Guattari not in abstract but in relation to minor literatures. Minor literature is defined as 'that which a minority constructs within a major language.'<sup>13</sup> According to Deleuze and Guattari the following are characteristics of minor literature: 'the language is affected by high coefficient of deterritorialisation'; 'everything in them is political'; 'in it everything takes on a collective value'.<sup>14</sup>

Deterritorialisation is a term developed by Deleuze and Guattari in more detail elsewhere in their works published before and after their volume on Kafka.<sup>15</sup> In the present context it refers to a particular relationship between the author and the language he or she uses to write. At a

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<sup>7</sup> The notion of minor literature originates in the works of Kafka himself. However, for the sake of brevity I will refer to this notion exclusively as developed by Deleuze and Guattari without discussing whether their interpretation is faithful to Kafka's own ideas about this notion. For an example of such a discussion see Lowell Edmunds 'Kafka on Minor Literature' (2010) 33 *German Studies Review* 351; Stanley Corngold, 'Kafka and the Dialect of Minor Literature' (1994) 21 *College Literature* 89.

<sup>8</sup> Réda Bensmaïa, Foreword to Deleuze and Guattari (n 2) i, xiv.

<sup>9</sup> Deleuze and Guattari (n 2) 7.

<sup>10</sup> *Ibid*, 7-8.

<sup>11</sup> The idea is clear in the original French version: 'Mais tant que l'expression, sa forme et sa déformation ne sont pas considérées pour elles-mêmes, on ne peut pas trouver de véritable issue, même au niveau des contenus.' Deleuze et Guattari (n 2) 29.

<sup>12</sup> *Ibid*, emphasis in the original.

<sup>13</sup> Deleuze and Guattari (n 2) 16.

<sup>14</sup> *Ibid*, 16-17.

<sup>15</sup> See in particular Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (trns Rober Hurley et al, 1983), the French original was published in 1972; Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (trn Brian Massumi, 1987), the French original was published in 1980.

very basic level it refers to writers writing in a language that is not theirs: 'How many people today live in a language that is not their own? Or no longer, or not yet, even know their own and know poorly the major language that they are forced to serve?'<sup>16</sup> However, at a deeper level it concerns everyone and poses the question about possibilities of a revolutionary use of any language: How to become nomad in relation to one's own language?<sup>17</sup> How '[t]o be a sort of stranger within his own language'<sup>18</sup> This particular use of language is distinct from any conventional use of language because it operates a disjuncture between content and expression. It '[o]ppose(s) a purely intensive usage of language to all symbolic or even significant or simply signifying usages of it.'<sup>19</sup>

For our purposes it is important to realise that since any language fulfils a variety of functions, it creates 'multiple centers of power'<sup>20</sup> even though we might not want to admit or recognise this. Even a 'purely' linguistic approach to language is not a-political. Once we agree on this, it is easy to understand why Deleuze and Guattari argue that everything in the minor literature is political. It's not only that each individual concern becomes immediately political<sup>21</sup> but also minor literature's very use of the language challenges all traditional centres of power, conventions and the very will to power as well as the power itself: 'to oppose the oppressed quality of this language to its oppressive quality, to find points of nonculture or underdevelopment, linguistic Third World zones by which a language can escape (...)'<sup>22</sup> This gesture or dream of 'becoming minor' emerges instead of so many attempts made by different styles, genres and literary movements 'to assume a major function in language, to offer themselves as a sort of state language, an official language'.<sup>23</sup> Deleuze and Guattari describe as revolutionary this gesture, this movement of what they define as minor literature. It is certainly revolutionary, it subverts the very foundations on which our conventional wisdoms rest, it reminds us of the Melville's *Bartleby*, of Benjamin's and Agamben's play with law that by their attempt to situate themselves outside of power, to be a-political call for a radically new politics.

Because politics and power are so closely tied with law, the notion of minor literature and the dream of becoming minor challenges if not destroys our vision of law, the very foundation of what it means to have a legal system. This in turn leads to the question about the revolutionary potential of law. Can law be truly revolutionary? Or is it necessary to abandon law to become revolutionary? We will return to these questions. First we need to consider how precisely Deleuze and Guattari depict and analyse the functioning of the Kafka's oeuvre as a minor literature. What mechanisms according to them allow Kafka to produce the minor, to become the minor? The below section depicts Deleuze and Guattari's analysis of the functioning of Kafka's works as minor literature before proceeding with an analysis of the potentialities of international law as a minor literature.

### **How it Works: Assemblages, Components, Blocs, Series, and Connectors**

To approach and understand these mechanisms that allow Kafka to operate as an author of minor literature Deleuze and Guattari look at everything written by Kafka as a single oeuvre. Their first step is to extract the components of expression (or literary machine<sup>24</sup>) from Kafka's oeuvre. These components are letters, stories and novels. In analysing each of these components the guiding idea is always an attempt to understand how each of the components functions and how they communicate with each other. Thus, they observe that letters were meant to disappear but constitute a motor part of the literary machine and put everything else

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<sup>16</sup> Deleuze and Guattari (n 2) 19.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 26.

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

<sup>20</sup> *Ibid.*, 24.

<sup>21</sup> *Ibid.*, 17.

<sup>22</sup> *Ibid.*, 27.

<sup>23</sup> *Ibid.*

<sup>24</sup> Deleuze and Guattari (n 2) 29.

in motion.<sup>25</sup> ‘The letters are perhaps the motor force that, by the blood they collect, start the whole machine working. Nonetheless, for Kafka, it is a question of writing something other than letters—a question, then, of *creating*.’<sup>26</sup> Therefore the appearance of the stories, which go further and constitute a particular mechanism that allows an absolute deterritorialisation of individual.<sup>27</sup> Stories also erase subjectivity and the duality of a subject of enunciation and a subject of statement.<sup>28</sup> Stories having their shortcomings, the need to create novels arises: ‘the story will be perfect and finished but then will close in on itself. Or it will open but will open to something that could only be developed in a novel that would be itself interminable.’<sup>29</sup> Thus, the oeuvre of Kafka is described as an assemblage producing movements that are never complete, finished, but through their communication with each other constitute a complete oeuvre whose success can be explained through the precedence of expression over content. The assemblage in question is described as a machinic assemblage. Therefore, in order to understand it, trace its movements and their emergence it is necessary to identify its building blocs that form series through connectors uniting these blocs and series. The goal is not to discover any final result or meaning produced by this assemblage but simply to understand how it functions. This is one of the central ideas that emerges from Deleuze and Guattari’s analysis for the purposes of re-thinking international law that will be addressed below: ‘It is absolutely useless to look for a theme in a writer if one hasn’t asked exactly what its importance is in the work—that is, how it functions (and not what its "sense" is).’<sup>30</sup> Of course, it is crucial to understand what are the building blocs, the connectors within the assemblage, but these are just steppingstones towards the understanding of the functioning of the machinic assemblage.<sup>31</sup> When Deleuze and Guattari describe the way different blocs and series are connected in Kafka’s oeuvre they identify two states or topographies that are used sometimes separately, but more often appear as a mixture in Kafka’s works. The first state is described as a series of blocks that revolve around the centre represented by a tower but separated from the centre and between them. This model is very similar to the image of planets revolving around a star; therefore they name it ‘astronomical model’. Blocks in this model are described as being distant and close. They are distant from the tower at the centre but also from other blocks in the circle. The proximity/closeness is created by the fact that there is always communication through the central tower. Thanks to the mediating role of the centre even blocks that are situated at the opposite sides of the circle are actually closer than it might appear. This topography is used, for example in the story ‘The Great Wall of China’ or in ‘The Castle’ to describe the relationship between the village and the castle. In the second state the blocks are also separated, but are placed on a continuous line. Each block that is also an office has a door to an infinite hallway, but doors are quite far away one from another. On the other side these blocks/offices merge, they have backdoors that are contiguous. Blocks are faraway and contiguous.<sup>32</sup> They are faraway if we look through the hallway because even offices that are next to each other have doors separated by quite a long distance. However, they are contiguous if we think about the backdoors and their emergence into a common room or place. This topography is used for example in the description of the inn’s hallway with rooms where officials from the castle stay when they visit the village. The astronomical model dominates when Kafka has to deal with transcendental law and hierarchy. The second, hallway model, is associated with the new bureaucracy of capitalism and socialism. Deleuze and Guattari describe these two states as ‘[l]evels in a celestial

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, 35, emphasis added.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 36.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, 45.

<sup>31</sup> ‘This functioning of the assemblage can be explained only if one takes it apart to examine both the elements that make it up and the nature of its linkages.’ Deleuze and Guattari (n 2) 53.

<sup>32</sup> For a good visual illustration see *Ibid.*, 74.

hierarchy and contiguity of virtually underground offices.<sup>33</sup> Significantly, these two topographies do not need to be always separated. They can mix in unexpected and strange ways. From this point of view, the Castle provides the best example of mixing of two typographies. Deleuze and Guattari use them simply as analytical tools helpful to understand connections and structures put in place by some assemblages and machines.

The way Deleuze and Guattari depict the functioning of the machinic assemblage created by Kafka's oeuvre is particularly interesting. Running the danger of simplification but keeping in mind the need for brevity the findings of Deleuze and Guattari essential for the further discussion can be summarised as follows. The assemblage commences to be built through creation of machinic indexes that will become parts of the assemblage and thus the assemblage in process of being built seems to indicate some mysterious function. The best example of such machinic indexes is provided by Kafka's animalistic stories that can be read as complete finished works conveying some hidden meaning. However, if we realise that these indexes are only parts or signs of an assemblage – and thinking of Kafka's writings as a single oeuvre helps not stopping our reading at this stage – we can at some point understand how these parts fit together and what type of assemblage they compose. The assemblage at work becomes visible in novels. However, Deleuze and Guattari distinguish assemblages from abstract machines that are also sort of finished assemblages that don't function or no longer function.<sup>34</sup> The assemblages themselves can function in two ways: they can be in process of being assembled or they can work towards their own dismantling: 'Writing has a double function: to translate everything into assemblages and to dismantle the assemblages. The two are the same thing.'<sup>35</sup> Therefore there is an intimate link between abstract machines and machinic assemblages. Abstract machines can help evaluate degree and mode of assemblages: to what extent assemblages are real in the sense of their capacity to dismantle themselves and not mere abstract machines. The image of the transcendental law is an abstract machine, whereas the immanent field of justice is associated in Deleuze and Guattari with a machinic assemblage.

This brief discussion of the Deleuze and Guattari's approach to minor literature and their way of looking at how this functions within the oeuvre of Kafka served to introduce basic methodological tools that will be used to take a renewed look at public international law and its methodology. Before engaging in a more substantive discussion of what could be the outcome of applying this methodology to public international law, it is important first to elaborate on the justifications for thinking that this is at all possible and can lead to any results that make sense. Can we talk about an oeuvre, an assemblage or assemblages produced not by a single author but by a multiplicity of authors? Not by authors of literary oeuvre but by scholars (international lawyers in our case)? Since international lawyers produce written work, they also produce an oeuvre, although it is not a literary oeuvre in the traditional sense. It is more difficult to deal with the multiplicity of authors. It is possible however, to approach as a single oeuvre, not only writings of a particular international law scholar, but also writings constituting international law as such. International law abides by quite strict rules that determine its disciplinary boundaries, accepted styles, themes etc. This produces certain unity that can be analysed as a connected whole (an assemblage or a machine we'll see later). The next section of the article starts with the analysis of the three characteristics of minor literature in their application to international law. Does international law deterritorialise language? Does international law make everything political? Does everything in international law acquire a collective value? Once these questions are answered, the attention shifts to the functioning of international law in the discourse of constitutionalisation of international law. Main building blocs and connectors are identified. The usage of two topographies is also considered.

## INTERNATIONAL LAW AS A MINOR LITERATURE?

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<sup>33</sup> *Ibid*, 75.

<sup>34</sup> *Ibid*, 47.

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

### **Envisaging International Law as a Minor Literature**

The first characteristic of minor literature – deterritorialisation of language – resonates immediately with the experience of language in public international law. Through the fact that the dominant language of international law, namely English, is not the native language of the majority of international lawyers, a series of interrogations emerge. Does this fact make international law writings more susceptible to becoming minor literature? Does the diversity of origins of international scholars who have to operate to some degree in a position of dislocation or deterritorialisation has any influence on the minor character of international law? While this element is important to keep in mind, international law as a discipline also operates various degrees of re-territorialisation within its own disciplinary boundaries. The discipline allows only certain forms of language use. Every international lawyer learns what are the acceptable linguistic usages within the discipline. As Martti Koskenniemi concludes one of his articles: ‘When Western speech becomes universal, its native speakers – the West – will be running the show.’<sup>36</sup> Thus, the matter at stake is not as much the use of English language as a specific Western use of this and other languages of international law. The re-territorialisation in international law occurs through ‘westernisation’ of language. What ways would be leading towards a new deterritorialisation of speech and language of international law? What are the third-world zones of international law? Do international lawyers need to discover or create them? The discussion leading to these questions and the questions themselves illustrate how closely related but at the same time distant are minor use of language and the use of language in international law. The same dynamic is visible with other characteristics of minor literature.

As far as the political and collective nature of minor literature is concerned, international law seems to correspond easily to these characteristics. International law’s connection to politics is an old tradition. However, international law and international lawyers as representatives of the discipline always attempted to demonstrate that their discipline is separable and separate from politics. Despite all these efforts, it is safe to state that international law stands in a very close relationship to everything political and in it even the most personal affair is potentially political as for example human rights complains of individuals decided by treaty-monitoring bodies and human rights courts illustrate. However, the important question is whether the political of international law is political in the same sense in which minor literature is political: in a subversive, revolutionary way. As with the deterritorialisation of language the similarity or proximity is only superficial and indicates distance. The same can be said of the collective value as the final characteristic of minor literature. By its very nature international law seems to invoke and deal with everything that has collective value. However, a closer look reveals that the collective that international law takes into account is a selected club. Thus, the relationship between international law and minor literature is intriguing. They are both distant and close like the castle and the village. There is certain apparent proximity between minor literatures and international law. For some reason international law takes the appearance of minor literature or attempts to look like minor literature or to be minor literature. Or as the teacher in the Castle says to the newly arrived K. when the latter complains that he does not feel connected to local people: ‘There is no distinction between the local people and the Castle.’<sup>37</sup> However, when K. attempts to find a way, an entry point into the castle he realises that ‘[the street of the village] did not lead to Castle Mount but merely passed close to it before turning aside, as if on purpose, and although it moved no further away from the castle, it came no closer either.’<sup>38</sup> Thus, minor literature and international law do not appear as either separate or related. They are both at the same time. It is not possible to say that international law is or is not minor literature, but due to a series of intricate links minor literature reveals several aspects of international law that are usually

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<sup>36</sup> Martti Koskenniemi, ‘Histories of International Law: Dealing With Eurocentrism’ (2011) 19 *Rechtsgeschichte* 152, 160.

<sup>37</sup> The Castle (n 4) 12.

<sup>38</sup> *Ibid*, 13.



hidden. These aspects highlight both the revolutionary potential of international law as opposed to national legal systems (proximity to minor literature) as well as mechanisms that silence and de-radicalise this revolutionary potential. The important insight is not this duality between the castle and the village, between international law and minor literature. To some extent, to invoke any type of binary opposition today means not saying anything new. What is more important is to attempt an explanation about mechanisms that make such a relationship between international law and minor literature possible, mechanisms that create proximity and distance. It is equally important to ask why this happens and how this happens. How it functions and is there a way beyond this binary.

### **Genres and International Law**

The division of different types of writings in international law: articles and monographs by scholar, judgments and other judicial or quasi-judicial decisions, official documents, including treaties can be compared to genres in literature. As genres, these different types of writings are constructed in a particular way to respond to expectations of a particular audience to which they are addressed, to make the message they want to transmit more susceptible of being accepted by the audience they want to address. Each genre has its particular style or similarities in style.

Modern literary studies accept that there is a certain degree of artificiality in this distinction between genres while maintaining its utility. In public international law the distinction between different types of writings is closely linked to the theory of sources. Some types of writings are even expressly mentioned in Article 38(1) of the ICJ Statute: international conventions, judicial decisions and ‘teachings of the most highly qualified publicists’. On the other hand, the scholarly writings on the theory of sources recognise that there exist a series of intimate links between different sources and thus different types of writings in international law. For example, a judgment can rely on articles and books published by most distinguished publicists, interpret treaties and other official documents such as General Assembly resolutions. Despite the wide acknowledgment of these links, similarly to traditional literary studies, the distinction as such is maintained and even jealously guarded by preserving styles and conventions linked to production of each particular type of writing. The discipline of international law also attempts to preserve the boundary between what is considered ‘serious’ academic writing and other literary exercises in which international lawyers might be engaged. Although these ‘other’ writings are recognised as a valuable part of the overall written production, they certainly do not have the same impact as ‘serious’ academic writing. Just a few examples will suffice. One of the leading journals in the field of public international law, namely the *European Journal of International Law*, has been publishing for a few years a poem in each of its volumes thus acknowledging that this type of writing has some role to play even in such a serious discipline as public international law. However, the poems are placed under the rubric ‘The Last Page’ thus pushing this stylistic production to the margins of the writings on international law. Even more telling is the way these poems appear in the printed edition of the journal. Although they are published under the heading ‘The Last Page’, they are separated from the other texts published in the journal by pages containing promotional material that are not included in the page counting of the journal. Thus, the poems are pushed further to the periphery and lost to the reader who does not expect anything substantively valuable after the promotional pages. The point is not to advocate for the moving of ‘The Last Page’ to ‘The First Page’ that can actually represent another margin, but to demonstrate isolation and exclusion of certain styles of writing in public international law. To put it more straightforwardly: the ICJ will not cite a poem written by a distinguished academic and will not engage itself in writing of poems, or even use poetic language in the foreseeable future. At this point the question might re-emerge: why should poetical or any other unconventional use of language matter and how can it change the structure and functioning of international law. This issue is addressed in more detail a few paragraphs below. At this stage it was important to emphasise the disciplinary boundaries of international law that are also preserved by the agreed stylistic and other conventions related to the use of language.

Thus, the disciplinary boundaries and boundaries between different types of writing within the discipline are still well preserved. However, Kafka also used his letters, stories and novels for different purposes and they fulfil different functions within his oeuvre. The important point from Deleuze and Guattari's perspective is to take all writings as a single oeuvre and attempt to understand how these different components of the writing machine function and communicate with each other. More problematic is the complete exclusion of certain types of writings from considering them as a part of the discipline of international law and imposition of very strict disciplinary conventions in writing. The remainder of the article attempts to shed some light on these issues using the example of debate on constitutionalisation of international law.

### **How it Functions**

In order to illustrate how different types of international law writings function and communicate, I will use some examples in relation to the topic of constitutionalisation of international law. This topic is selected because it encompasses several branches of international law. It will not be possible to draw a full picture within the limits of an article but some most telling features will be highlighted.

The discussion around constitutionalisation of international law was developed in the scholarly theoretical work on some fundamental topics of public international law.<sup>39</sup> It is conceived as a way of looking at the system of international law and interpreting it in a purposeful way. International law scholars articulated a variety of approaches to constitutionalisation of international law, but the structuring objective and the need to explain the purpose of international law remain present in all versions.

The need for the purposeful fulfilment of international law resonates with the theme of transcendent law and guilt in interpretations of Kafka. The search for purpose, for structure – even if a pluralist structure – and the energy and enthusiasm this topic attracts is comparable to energy and enthusiasm with which some protagonists of Kafka's novels attempt to enter in contact with law: K. in 'The Castle' with his desire to establish and maintain contact with the castle or the man from the country in the parable 'Before the Law'. The parallel is reinforced by the fact that Deleuze and Guattari demonstrate how the idea of transcendental law is linked to hierarchy and hierarchical power relations. Kafka's protagonists always come with the belief that if only they are able to reach toward a higher-ranking person, they will achieve their goal. Many versions of international constitutionalism are based on the very same belief: if only we would have a clear established hierarchy within the system of international law, problems would be solved.<sup>40</sup> International lawyers working within this stream of international constitutionalism also attempt to demonstrate how this hierarchy is emerging within the system of international law. The use of the notion of *jus cogens* is exemplary in this regard.

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<sup>39</sup> For some recent examples in a chronological order see Jeffrey L. Dunoff and Joel R. Trachtman (eds) *Ruling The World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization Of International Law* (Oxford University Press, 2009); Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23 *European Journal of International Law* 335; Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer, 2011); Christine Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, 2011); Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2012); Günther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford University Press, 2012); Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014); Poul F. Kjaer, *Constitutionalism in the Global Realm* (Routledge, 2014); Aoife. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014).

<sup>40</sup> It should be emphasised that not all constitutionalist interpretations of international law appeal to hierarchical structures or notions. Some of the authors propose an attempt to break with hierarchical reasoning in international law. The most prominent examples are works of Günther Teubner and Nico Krisch. This fact is acknowledged in my reading of international constitutionalism in the next paragraph.

This notion is often put forward as a proof of at least partly constitutional or constitutionalising nature of international law.<sup>41</sup> However, the concept itself is difficult to grasp. The authors themselves do not discuss it in too much detail and do not explain how precisely the concept of *jus cogens* is able to set a firm priority of some constitutional values. If we look at the way the concept of *jus cogens* functions in practice, we will notice the following: As the law in Kafka's novels and stories, it remains inaccessible, always there for everyone as for the man from the country in the parable 'Before the Law' but always delayed in its promise. All wronged parties attempt to call *jus cogens* forward, to hear their testimony or plea: Belgium in the name of victims of international crimes in the *Arrest Warrant* case,<sup>42</sup> Bosnia and Herzegovina in the name of victims of genocide in the *Genocide Convention* case,<sup>43</sup> Italy and Greece in the name of victims of forced labour and war crimes in the *State Immunities* case.<sup>44</sup> But *jus cogens* are already gone or not yet here as all the bureaucrats in 'The Castle', like Klamm they are elusive. You can get a glimpse of them through the keyhole or a hidden hole but you can never actually speak to them. They might appear as an illumination when we do not know whether things are really getting darker around us or whether our eyes are merely deceiving us. But even this illumination appears only when it's too late and it does not bring the expected. However, when you do not expect them, *jus cogens* are there although nobody needs them and they do not bring about anything: like in the *Belgium v. Senegal* case,<sup>45</sup> like in the *Kosovo advisory opinion*.<sup>46</sup> Other versions of international constitutionalism mirror the disillusionment or rather a realisation to which Kafka's protagonists come: that justice is not hierarchy but contiguity, that it is always 'in the office next door', that we all are functionaries of justice. This is a particularly powerful vision in Günter Teubner's societal constitutionalism where he argues that each social system produces its own constitution, also in the transnational sphere.<sup>47</sup> However, by framing his search, his discovery in constitutionalist terms<sup>48</sup> as many others he reveals his need for the abstract machines of transcendental law that he produces because of his attachment to immanent justice, he reveals his desire for justice in the form of transcendental law. This effort could be compared using the topographies of Deleuze and Guattari to a hallway constituted of blocs that are themselves astronomical models. The hierarchy might not be immediately visible, but it reappears in new forms and under new names. Thus, for example the language of centre and periphery used by some scholars<sup>49</sup> in

<sup>41</sup> For some examples see Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 *Leiden Journal of International Law* 611, 616-7 in particular; Anne Peters, 'Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law* 579, 598 in particular.

<sup>42</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, [2002] ICJ Rep 3, 23 para 56.

<sup>43</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep 43, 111, para 161.

<sup>44</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep 99, para 93 and 95 in particular.

<sup>45</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep 422, 457, para 99.

<sup>46</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep 403, 437, para 81.

<sup>47</sup> See for example Teubner (n 39) 7-8.

<sup>48</sup> The very conceptual framework developed by Teubner is couched by himself in constitutional terms: 'If one wishes to conceive at all of a 'global constitution', the only possible blueprint is that of particular constitutions of each of these global fragments – nations, transnational regimes, regional structures- connected to each other in a constitutional conflict of laws.' *Ibid*, 14.

<sup>49</sup> Andreas Fischer-Lescano is a prominent example in this regard, but this language can also be identified in Teubner. See in general Andreas Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung des Menschenrechte* (Velbrück Wissenschaft, 2005); Günter Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Günter Teubner (ed) *Global Law Without a State*

their effort to provide a new reading of constitutional developments at the global level slightly re-arranges the astronomical model but fundamentally keeps the shape in place. Perhaps there is no tower in the centre of the new model, but the hierarchical structuring is maintained through the definition of periphery in opposition to and as being situated at a distance from the centre.<sup>50</sup> Thanks to the idea of pluralism the peripheral blocks are disconnected between them precisely like blocks in the astronomical model but kept together through their relationship to the centre, through their distance from the centre.

This brief analysis makes apparent a very intimate relationship in discussions around constitutionalisation of international law between abstract machines of transcendental law linked to hierarchy and machinic assemblages of immanence of justice and desire linked to contiguity. As in Kafka's work, there are two movements: first the assemblage in process of constituting itself and then the assemblage in process of dismantling itself that continue reappearing and replacing each other. The transcendental abstract machine of law does not exist separately or independently of the immanence of the machinic assemblage of justice. They are both necessary elements of the same assemblage: 'the transcendence of the law was an abstract machine, but the law exists only in the immanence of the machinic assemblage of justice.'<sup>51</sup> The connectors between the abstract machine of law and the immanence of the machinic assemblage of justice are international lawyers themselves. Their desire for justice transforms itself into theories about international constitutionalism expressed in terms / blocs of the traditional vocabulary anchored in transcendence and hierarchy, these blocks revolving around the invisible centre. What makes modern visions of transcendental law peculiar is the void or the unknown at the centre. In the contemporary debates scholars like Teubner or Fischer-Lescano are more interested in the periphery and its dynamics. The centre and its functions become forgotten and obscured. However, it remains omnipresent at least as a structuring element: the point of attraction around which other peripheral blocs revolve. Thus, the lawyers build an abstract machine of the hierarchy of desires for justice, the desire for justice drives them towards transcendental law and its hierarchy. In doing so, at times they realise as Kafka's protagonists that justice is an immanent field, they realise its contiguity but because of the law's preference for content over expression, they continue to build hierarchical transcendental structures in the immanent field of justice. Also because of the disciplinary preference for finished abstract machines it is difficult to continue working with assemblages that dismantle themselves without proposing something that is assembled, finished as an abstract machine. Similarly, because by definition an abstract machine is something that does not work yet or does not work any more, it is easy to speculate about its significance without paying attention to the functions.

#### BEFORE THE LAW OF THE DISCIPLINE

When I look at the way international law functions, I remember Kafka's 'The Castle'. It has an appearance of an astronomic model with a centre (the castle) that gives an impression of a height around which everything moves thus conveying an impression of a hierarchical system. However, the closer you come to it, the more you realise that the castle is actually 'an extensive complex of buildings (...) crowded close together. If you hadn't known it was a castle you might have taken it for a small town.'<sup>52</sup> The tower itself 'now turned out to belong to a dwelling',<sup>53</sup> is not really a tower. You also realise that the most insignificant of

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(Ashgate, 1996) 3, 10 in particular. The fact that the vision of center and periphery is fundamental to their reading of constitutionalisation at the global level is clearly stated in Andreas Fischer-Lescano and Günther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1012-3 in particular.

<sup>50</sup> Interestingly, Fischer-Lescano who seems to adhere to the second stream associated at the first sight with contiguity acknowledges more clearly his need for the astronomical model by keeping *jus cogens* at the center of his analysis. See Fischer-Lescano, *Globalverfassung* (n 49) generally and 216-30 in particular.

<sup>51</sup> Deleuze and Guattari (n 2) 51.

<sup>52</sup> The Castle (n 4) 11.

<sup>53</sup> *Ibid.*

personages can have as much impact as the most high-ranking bureaucrats. Thus, as in the Castle, the hierarchical structure mixes up with the contiguity and fluidity of immanence. However, public international law has difficulties fully recognising the immanent field of justice, its machinic assemblage and its dismantling function. International law has learned to resist and counter these later aspects of its functioning under the guise of abstract machines. The language and associated disciplinary boundaries are one of the most important tools in this process. International lawyers being trained within and constrained by disciplinary conventions have only limited possibilities of expressing their ideas in a way that avoids abstract machines, transcendental law and hierarchical astronomical models. International lawyers are constrained in their use of language both externally – by what is perceived as a proper use of language in international law – and internally – by their self-perception as specialists of international law.

The revolutionary character of minor literature emerges from the deterritorialisation of language and a particular use of language that this implies. This particular use of language extracts expressive, intensive capacities of language whereby the enunciation precedes content and statement. The language of international law operates into the opposite direction re-territorialising any possible deterritorialisation that may have occurred, taking expression and enunciation for granted and focusing on statement and content. Only if this use of language by international law and international lawyers is disrupted can it fully develop its minor and truly revolutionary potential. How is it possible that Kafka's works pre-figured the structure and functioning of international law and legal systems and we find his works as relevant as ever today? Deleuze and Guattari demonstrate that Kafka's use of language through his oeuvre plays a fundamental role. For the moment, disciplinary boundaries and conventions do not allow international lawyers to fully embrace the minor and thus the revolutionary. The disciplinary boundaries and conventions create the impression that the blocs of international law compose an astronomical and hierarchical model. The intimate links with minor literature demonstrate that all these blocs that form a circle around the centre have in fact back doors that paradoxically are contiguous and emerge into an infinite immanent field of revolutionary, the very same field that assemblages of minor literature occupy and dismantle. International lawyers simply did not yet have the courage to step out of these doors into this field. International lawyers only had some glimpses of the field through keyholes or tiny openings in the back doors.

What would enable the discipline of international law to turn away from continuing maintenance of hierarchical structures and astronomical models? What would enable the full embrace of the immanent field that appears through the backdoors of offices of international law? What would such a move entail for the future of international law as a discipline? In order to be able to open up a discussion on possible answers to these questions we need to return to the specificities of the minor literature's use of language where enunciation precedes content. Deleuze and Guattari provide several examples of Kafka's use of language in this way. However, I would like to turn here to an example that is also analysed by Deleuze as a purely expressive, a-grammatical use of language, but is not taken from Kafka. This example is preferred because it captures some main points in a very short sentence. The example in question is the phrase: 'I would prefer not to.' uttered at several occasions by Herman Melville's character Bartleby in the story 'Bartleby, the Scrivener: a Story of Wall Street.' The peculiarity of the formula resides in the fact that it is neither a negation, nor an affirmation. As Deleuze points out in his analysis: 'The formula is devastating because it eliminates the preferable just as mercilessly as any nonpreferred.'<sup>54</sup> For a legal system structured around binaries, a system that requires an either 'yes' or 'no' answer to the majority of questions, this is a very challenging statement. Again, as Deleuze emphasises: 'if he [Bartleby] said no ..., or if he said yes ..., he would quickly be defeated and judged useless ...'<sup>55</sup>

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<sup>54</sup> Gilles Deleuze, 'Bartleby; or, The Formula' in *Essays Critical and Clinical* (trn Daniel W. Smith and Michael A. Greco, Verso, 1997) 68, 71.

<sup>55</sup> *Ibid.*

I will not dwell on the meaning of the sentence to which a lot of analysis was devoted<sup>56</sup> but rather suggest that it expresses something that is not recognisable yet by law: feeling, emotion, more specifically desire. A particular type of desire: desire not to have to choose between ‘yes’ or ‘no’, desire not to decide, thus positioning itself fundamentally outside of the realm of the legal. Law, even human rights law, has difficulty acknowledging, recognising, and giving place to this desire. Emotions cannot be easily (if at all) captured in terms that privilege content and reason as the legal language does. Minor literature by privileging expression over content opens up a space for expression and recognition of desire and other feelings and emotions. At this stage it is important to emphasise that this does not mean that reason and emotion are somehow separate. On the contrary, law like any other area of human activity that focuses too much on reason attempting to define it in opposition to emotion commits a serious mistake. It is important to recall studies that postulate interdependence of reason and emotion or rather approach human cognition in a holistic manner.<sup>57</sup> What is vital to realise at this stage is that the language of law as we know it today and as it is enforced by disciplinary conventions not only privileges reason over emotion but even makes the expression of emotions impossible, inaccessible to law or law inaccessible to these expressions of emotions. This tension is particularly visible in international law because of its apparent or real proximity to minor literature. Many international lawyers feel and can sense this proximity. However, when they attempt to express this feeling using the language of international law, they are not able to do so and are driven back by the language they use away from revolutionary, immanence of justice and desire towards conventional abstract machines and transcendental law. From this limiting function of the disciplinary conventions in the use of language the following consequence follows. By limiting the acceptable styles and usages of language international law limits the number and nature of acceptable arguments. Therefore, despite a relatively broad range of possible outcomes available and potential open-endedness of international law<sup>58</sup> the stylistic conventions of international law as a discipline exclude and thus limit significantly the number of acceptable avenues and outcomes. Most importantly, legal language allows for an easy disregard and exclusion of anything related to feelings and emotions. This is particularly problematic for international law that is situated in such a close relationship to minor literature and its preference for expression over content. After all, international law as a promise of justice can never accomplish and do justice to this promise if it cannot open itself up to the expressions of the sense and feeling of injustice of those who suffer. The example of the victims and relatives of victims of the massacre of Distomo is telling in this regard. This massacre led to Greece’s intervention in the *Germany v Italy* case before the ICJ. This intervention represented the culmination of a long series of court cases where victims and relatives of victims of the massacre were seeking recognition of their suffering resulting from what was labelled as ‘one of the most savage civilian, non-Jewish massacres of World War II.’<sup>59</sup> However, the ICJ does not mention at all any detail of the events that took place in the village of Distomo. It only refers to them as ‘a massacre ... involving many civilians.’<sup>60</sup> A paragraph in the dissenting opinion of judge Cançado Trindade gives a glimpse into the suffering and feelings that are at play here for victims and their relatives:

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<sup>56</sup> For a particularly insightful analysis see Deleuze, *supra* note 54 and Giorgio Agamben, *Potentialities. Collected Essays in Philosophy* (1999), chapter 15 ‘Bartleby, or on Contingency’, 243-71.

<sup>57</sup> See for example Martha Nussbaum, *Love’s Knowledge. Essays on Philosophy and Literature* (1990) 75-82 in particular.

<sup>58</sup> On this see Martti Koskeniemi ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’ (2012) 26 *International Relations* 3, 20-1.

<sup>59</sup> Elena Vournas, ‘Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for Jus Cogens Violations’ (2001-2002) 21 *New York Law School Journal of International and Comparative Law* 629, 636.

<sup>60</sup> *Jurisdictional Immunities of States* (n 44) 115, para 30. In French, the language is slightly more expressive: ‘(...) les forces armées allemandes perpétrèrent un massacre dans le village de Distomo, tuant de nombreux civils.’

From the edges of the road, vultures got up from low height, slowly and unwillingly, when they heard us approach. From every tree, along the road and for hundreds of metres, human bodies were hanging, stabilised with bayonets, some of whom were still alive. They were villagers who were punished in this way: they were suspected for helping the partisans of the area, who attacked an SS detachment. The smell was unbearable. Inside the village, the fire was still burning in the ashes of the houses. Hundreds of people, of all ages, from elders to newborns, were lying on the ground. They [the Nazis] had torn the uterus and removed the breasts of many women; others were lying strangled with their intestines still tied around their necks.<sup>61</sup>

The absurdity of the outcome of this case is obvious from the point of view of victims but made invisible and acceptable through the careful use of language. Cases and outcomes similar to the *Germany v Italy* case make the longing, the desire of international lawyers that drives the discussion on constitutionalisation of international law even stronger. This is their way of making sense of absurdity, justifying the existence of the discipline of which they are an integral part. This is also one of the explanations for the growth of scholarship on issues related to constitutionalisation of international law.

As demonstrated in the first part of this article, international law is situated in proximity to minor literature. On the other hand, due to the high level of abstraction at which it operates that presupposes quite strict rules governing the usage of language within the discipline, it has a very strong capacity to evacuate, silence, and ignore expressions of feelings, emotions and related uses of language. As a result, international lawyers have to deal with a very perplexing internal contradiction when they feel the proximity of the immanent field of justice but have to operate within a system and language that privileges abstract machines and transcendental law, a system that privileges content over expression. The proliferation of writings on topics related to constitutionalisation of international law is one of the results of this contradiction. The only way out of this contradiction seems to be in the deterritorialisation of language similarly to the minor literature and thus opening up of the disciplinary boundaries towards the expressive use of language. The question that such an opening of the language raises concerns the very survival of international law as a discipline. However, we will never be able to know what it means for international law to embrace the minor and revolutionary until this attempt is made.

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<sup>61</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, [2012] ICJ Rep 99, 247 para 186.