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If International Judges Say So, It Must Be True: Empiricism or Fetishism?

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This Reflection approaches international law as an argumentative practice and construes the key doctrines of international law like sources or responsibility as structures of international legal argumentation. From that perspective, it offers some reflections on the contemporary inclination of international lawyers to invoke international judicial pronouncements as the ultimate validator of the fundamental structures of international legal argumentation. For most international lawyers, the key doctrines around which legal arguments must be articulated acquire their authenticity as structures of legal argumentation only once they have received the seal of international courts. The argument is made here that turning to international judges for the ultimate validation of the structures of international legal argumentation does not necessarily amount to an empowerment of the international judiciary. I argue instead that the contemporary practice of taking refuge in judicial validation should rather be construed as a self-empowerment of international lawyers themselves as it brings about a judicialization of international legal thought and leads all international lawyers to think and behave as appellate judges.

The international judge as a comforting figure

There was once a time when international lawyers could revel in idealism. Making an international legal argument was simply a mechanical operation whereby the reliance on some key doctrines – themselves derived from some key authoritative international instruments – would suffice for one to feel able to make universal claims about international law and the world. Needless to say that the life of contemporary international lawyers would have been much easier had it been possible to uphold such an idealistic configuration of legal argumentation. To the regret of some and the delight of others, this idealistic age unraveled and was supplanted by a much more skeptical

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era of practice and legal thought.¹ In the last two decades, international lawyers have grown much more aware of the indeterminacy and instability of their structures of legal argumentation.²

Yet, international lawyers have always been incredibly reactive creatures, demonstrating a formidable ability to adapt to hostile environments.³ In the new skeptical age where legal arguments are systematically deemed suspicious both ideologically and conceptually,⁴ international lawyers have found comfort in the figure of the international judge. Once a decried figure because of his conservatism or allegiance to state-centrism, the international judge now appears to be the guardian as well as the savior of the structures of international legal argumentation. Indeed, whenever they are pressed to justify the structures around which their legal arguments are supposed to be articulated, international lawyers invoke judicial pronouncements as the ultimate validator. A key doctrine of international law can no longer be put into question once it has been espoused and used by international courts. This inclination is called here the practice of taking refuge in judicial validation of argumentative structures.

The practice of taking refuge in judicial validation of argumentative structures is not difficult to pin down in the literature. Contemporary international legal scholarship is awash with judicial validation of argumentative structures. Whether one takes the design of the rules on sources in general,⁵ or on customary international law in particular,⁶ the law on state responsibility,⁷ or jus cogens,⁸ – to take but a few examples – the international judge is always held to be the ultimate validator of the structures of

¹ The outreach of critical legal thinking should of course not be exaggerated. See gen. J. d'Aspremont, "Martti Koskenniemi, the Mainstream, and Self-Reflectivity" (2016) *Leiden Journal of International Law* (forthcoming).

² As is well-known, the same phenomenon has been observed at the domestic level two decades earlier. See D. Kennedy, *The Rise and Fall of Classical Legal Thought* (with a new preface) (Beard Books, Washington DC, 2006), esp. 251.

³ It suffices to recall how the discredit of positivism in the wake of the 1st World War brought about a very rapid turn to deductive and natural law legal reasoning in the inter-war period. See R. Collins "Classical Positivism in International Law Revisited" in J. Kammerhofer and J. d'Aspremont, *International Legal Positivism in a Post-Modern World* (CUP, 2014), 23-49.

⁴ Duncan Kennedy made a similar argument with an emphasis on the ideological dimension of legal argumentation. See D. Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought", (2014), *Law Critique* 25, 91-139.

⁵ See H. Thirlway, *The Sources of International Law* (OUP, 2014), 1-30. See the remarks of J. d'Aspremont, "Book review of H. Thirlway, 'The Sources of International Law'", (2014), *German Yearbook of International Law* 57.

⁶ See e.g. Third report on identification of customary international law, A/CN.4/682, 27 March 2015, para.

4. For a detailed study of the contribution of the International Court of Justice to the structures of legal argumentation in terms of customary international law, see C. Tams, "Meta-Custom and the Court: A Study in Judicial Law-Making", (2015) *The Law and Practice of International Courts and Tribunals*, 51-79

⁷ The modes of legal reasoning on the allocation of the burden of compensation and the possibility to take countermeasures that have been codified by the International Law Commission are often seen as a "synthesis" of what is essentially judicial practice. See e.g. J. Crawford, *State Responsibility. The General Part* (CUP, 2013), 45-93.

⁸ I have discussed the practice of taking refuge in judicial validation in relation to jus cogens in greater depth elsewhere. See J. d'Aspremont, "Jus Cogens as a Social Construct without Pedigree", (2016), *Netherlands Yearbook of International Law* (forthcoming).

international legal argumentation whose foundations no longer need to be discussed. Judicial approval provides the ultimate and unquestionable confirmation of the validity of such structures of legal argumentation. The practice of taking refuge in the judicial validation of argumentative structures is a rather contemporary phenomenon. In the age of idealism, it was not exceptional to hear scholars acknowledge that the design of the structures of international legal argumentation is very much a scholarly enterprise.⁹

It must be acknowledged that the practice of taking refuge in judicial validation of argumentative structures that is at work in international legal thought and practice can be severely obfuscated by the language of the sources of international law which is commonly used by international judges as well as international lawyers. Indeed, the actual wording deployed by international judges in their judicial pronouncements is inevitably that of the sources, which is in turn reflected in the scholarly discussions thereof. Yet, if one looks at international law as an argumentative practice rather than a set of rules, it becomes possible to see how much international lawyers, behind the formal language of sources, resort to judicial pronouncements to secure validation of the structures of international legal argumentation.¹⁰

The drivers for this practice of taking refuge in judicial validation of argumentative structures are aplenty. It suffices to mention two of them. First, such elevation of the judge into the ultimate validator of the structures of legal argumentation is often a convenient shield sparing international lawyers from having to reflect on the foundations of the main doctrines of international law. In fact, such a validating role allows the creation of an anti-foundational comfort zone very reminiscent of that found in domestic legal systems where little argumentative space is left for foundational debates. The turn to the figure of the international judge allows international lawyers to repel – or at least play down – some of the most compelling charges of structural indeterminacy or the accusations that the main structures of international legal arguments lack any foundation.

There is a second, and probably even more fundamental reason why taking refuge in judicial validation proves so popular among international lawyers. In the eyes of many of them, having the structures of international legal argumentation validated by judicial pronouncements seems the expression of a noble – and seemingly incontestable – empirical attitude. Indeed, if validation of the structures of international legal argumentation is operated by international judges, the structures of international legal argumentation come to be construed as a product of the “judicial practice.” This approach provides the impression that the key doctrines of international law are an

⁹ This is well illustrated by the candidness of Roberto Ago in his famous course on ‘the international delict’ at the Hague Academy in 1938 and where he recognises that the making of the main patterns of argumentative structure is a matter of scholarly choices. See e.g. R. Ago, *Le délit international*, (1938), *Hague Recueil* 68, 420-421. See also C. de Visscher, « *Théories et Réalités en Droit International Public* », 4e ed, (Pedone, 1970), 171.

¹⁰ For a very insightful analysis of the processes at work behind the formal language of sources used in the making of secondary rules, see F. Lusa Bordin, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, (2014), *International and Comparative Law Quarterly* 63, pp 535-567.

emanation of practice that is “out there” and which it suffices to observe, capture, and translate in formal modes of legal reasoning. Being the product of judicial practice, the structures of legal argumentation come to look as if they can be established through empirical observation of judicial practice. If so extracted from “practice” through empirical observation, the structures of international legal argumentation are found indisputable: if international judges say so, it is a fact and it must be true...

Self-empowerment and the judicialization of international legal thought

The empiricism which seems to accompany the inclination of international lawyers to take refuge in judicial validation of argumentative structures could of course be contested. The judicial validation of argumentative structures through observation of judicial practice is often the result of some normative presuppositions about the meaning of language and what constitutes practice. In that sense, it is not too difficult to take a more cynical look at the contemporary inclination of international lawyers to find refuge in judicial validation of argumentative structures. Such an attitude could occasionally look like a reification of judicial pronouncements and thus the expression of fetishism rather than empiricism. The point here is not to vindicate any better description of the deference of international lawyers to judicial pronouncements that is at work in international legal thought and practice. It seems more relevant to dwell on some of the consequences of international lawyers' refuge in judicial validation for international legal thought and practice as a whole.

Provided they are cognisant of the phenomenon with which this Reflection grapples, most observers will probably construe the practice of taking refuge in judicial validation as bringing about an empowerment of the international judge. According to such an account, international lawyers bestow wide-ranging powers on international judges in terms of the design of the structures of international legal argumentation. If indeed judicial validation empowers the international judge to make the structures of international legal argumentation, it is not certain that one ought to be wary of such empowerment. After all, someone has to be empowered – and checked – and international judges' creating or validating actions in terms of structures of legal argumentation are certainly easier to monitor than those of other professionals of international law.

It is submitted here that the empowerment inherent to the recognition of a validating role to international judges, nevertheless, may not be the one most observers are inclined to capture. The practice of taking refuge in judicial validation of argumentative structures comes with a deceitful distribution of powers. It is more specifically argued here that the practice of taking refuge in judicial validation does not empower the figure which we think it empowers. Rather than an empowerment of international judges, the practice of taking judicial validation of argumentative structures should be construed as an empowerment of international lawyers themselves.

The idea that the practice of taking refuge in judicial validation of argumentative structures empowers those indulging in judicial validation rather than the international

judges to which such validating powers are supposedly delegated can be explained as follows. The argument is that taking refuge in judicial validation comes with a certain type of self-representation. By virtue of this specific self-representation, international lawyers all think and behave as an appeal judge that reviews legal arguments made by a lower court. Said differently, as a result of the practice of taking refuge in judicial validation of argumentative structures, thinking about international law becomes ruling from the bench.¹¹ The practice of taking refuge in judicial validation thus reduces legal thought to judicial legal argumentation. It brings about what could be called the 'judicialization' of international legal thought.¹² It simultaneously amounts to the internal point of view brought to an absurd extreme¹³ as a result of which thinking about international law means comes to an exercise of speculation about what a virtual international judge would make of the arguments of others.

It does not seem controversial to claim that the judicialization of international legal thought, which accompanies the contemporary practice of taking refuge in judicial validation of argumentative structures, constitutes an impoverishment of international legal thought at all levels. This is not only because refuge in judicial validation is a move of convenience that allows one to turn a blind eye to foundational questions as was highlighted above. It is, above all, because international lawyers, by virtue of the judicialization of international legal thought that accompanies the practice of taking refuge in judicial validation of the structures of international legal argumentation, cease to make demand on international law other than for the sake of judicial engineering. The judicialization of international legal thought condemns them to be dexterous technicians¹⁴ on the assembly line of judicial legal argumentation. The result is an international law that is stripped of all the intellectual avenues it can offer to think about the world.

While deploring the impoverishment of international legal thought inherent to the practice of taking refuge in judicial validation of argumentative structures, the previous paragraphs should not be read as a heretical outburst against the practice of taking refuge in judicial validation and the judicialization of international legal thought that comes with it. In other words, the aim of these few observations is not to repudiate international lawyers' practice of taking refuge in judicial validation of argumentative structures. It may be that such shortcuts are necessary to preserve the possibility of legal argumentation, especially since a return to the above mentioned idealistic age of legal argumentation seems no longer possible. Yet, accepting the inevitability of the phenomenon does not mean that one should not take a hard look at the practice of taking refuge in judicial validation of argumentative structures and the judicialization of legal thought that comes with it. It is one's responsibility, especially as a thinker or a

¹¹ P. Schlag, *Laying Down the Law* (New York University Press, 1996), p. 142.

¹² Pierre Schlag prefers to speak about the 'juridification' of legal thought. See P. Schlag, *Laying Down the Law* (New York University Press, 1996), p. 139 and pp. 141-142.

¹³ *Ibid.*, p. 135.

¹⁴ For some critical remarks on the move from idealist international lawyers to technician international lawyers, see A. Carty, *Philosophy of International Law*, (Edinburgh University Press, 2007), 9-14.

teacher, to promote thinking in non-judicial terms. After all, international law would be gravely impoverished if reduced to mooting and thinking as an appeal judge.