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The Routines of International Law

ABSTRACT

This essay argues that international legal discourses, including in the interpretations of international law that populate them, function as a deeply entrenched routine composed of a great variety of professional habits. This essay grapples with one of these shared habits constitutive of the routine of international lawyers, namely what international lawyers refer to as 'methods'. Methods, it is argued here, are among the most central of all the habits constitutive of the routine of international lawyers, in that methods help the routine to conceal what it does. More specifically, this essay claims that the methods deployed by international lawyers enshroud international legal discourses with both novelty and vulnerability, thereby camouflaging the tragedy and cynicism of the routine of international lawyers. The essay ends with a few remarks on what a counter-routine methodology could look like.

KEYWORDS

International Law – Interpretation – Legal Methods – Routine – Critical Theory.

1. INTRODUCTION

This essay ventures in the routine at work in international legal discourses, including in the interpretations of international law that populate them. It is premised on the idea that international legal discourses function as a deeply entrenched routine composed of a great variety of professional habits. The habits permeating international legal discourses are disparate and concern matters as varied as the choice of subjects, the vocabularies, the sources, the literary style, the modes of referencing, the type of reasoning, the narration techniques, the cultural, historical, or symbolic referents being invoked, the problematization, the contextualization, the modes of creation of necessities and ontologies, the relation with practice, the interlocutors, the referencing, the format of outputs, etc. From this perspective, writing about international law can be construed as an activity

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saturated with professional habits[1]. Unsurprisingly, the routine of international lawyers has been subject to significant variations across traditions, languages, and time[2], as well as occasional contestations[3]. Yet, while recognizing that this routine is not uniform across traditions, languages, and time, this essay, with an emphasis on Anglo-American scholarship and practice, presupposes that international legal discourses, whether they seek to produce knowledge, clarification, practical solutions, improvements of theory, sound normative claims, law-inspired reforms, global justice, etc., operate around some shared habits[4].

This essay grapples with one of these shared habits constitutive of the routine of international lawyers, namely what international lawyers refer to as 'methods'. Methods, it is argued here, are among the most central of all the habits constitutive of the routine of international lawyers, in that methods help the routine to conceal what it does. More specifically, this essay claims that the methods deployed by international lawyers, including their so-called methods of interpretation, enshroud international legal discourses with both novelty and vulnerability, thereby camouflaging the tragedy and cynicism of the routine of international lawyers.

This essay is structured as follow. It first elucidates what is meant by international legal methods (1). It then provides a few indications about the routine which international legal methods are supposedly part of and shows that the routine at work in international legal discourses is both tragic and cynical (2). In a third section, this chapter develops its main argument and demonstrates that international legal methods help conceal the tragedy and cynicism of the routine of international lawyers, thereby allowing this routine to hide what it does and to be perpetuated *ad infinitum* (3). The last section

1. Such routine can be said to be constitutive of the field of international law. See gen. P. Bourdieu and L. J. D. Wacquant, 1992; P. Bourdieu, 1987, 805.

2. Attempts have been made to produce new «scientific» knowledge about the variations of this routine under the banner of comparative international law. See A. Roberts and others, 2015, 467; A. Roberts and others, 2018; A. Roberts, 2017. For a criticism of such attempts to universalize differences and the dangers of colonizing thinking, see J. d'Aspremont, forthcoming (a).

3. Possibly one of the most powerful contestations of this routine in the international legal literature originates in the rise of a new type of literature that offers a new form of historical-novelist narration. See eg P. Sands, 2016. More serious contestations have been witnessed with respect to domestic law. See eg F. Rodell, 1936; P. Schlag, 2017, 1043; F. Rodell, 1962, 279; P. Schlag, 2009, 803; P. Schlag, 1990a, 167.

4. It could be said that the habits composing such routines have been reinforced by the digitalization of scholarly production over the last few decades, especially since the latter led to a dramatic increase in scholarly output, thereby allowing international lawyers to repeat the abovementioned habits to an extent and at a rhythm never witnessed before. See gen. T. Altwicker, 2019, 217. On the idea that the more is produced, the less is happening in legal scholarship, see P. Schlag, 2009, 804-5.

broaches the possibility of a counter-routine methodology that enables creative action and reinvention (4).

2. INTERNATIONAL LEGAL METHODS AS MODES OF MEANING

International legal methods traditionally refer to the modes of creation of «naturalistic» realities[5] about facts or law that international lawyers mobilize in their activities. In that sense, international legal methods are associated with the modern project of finding and knowing international legal practices[6]. At a time when the project of scientificizing international law has retreated in most of the Anglo-Saxon part of the world[7], it could be said that discussions about international legal methods are what is left of the – now defunct – idea of an international legal science[8]. Yet, notwithstanding discredited ideas of an international legal science, international lawyers have continued to debate their choices of international legal methods, if only because they still harbour ambitions to produce knowledge about naturalistic realities while presuming a meta-methodological standpoint from which methods can be discussed[9].

For the sake of this essay, international legal methods are stripped of their modern scientific connotation[10] and are approached from a literally theoretical perspective. In particular, international legal methods are construed here not as modes of producing and knowing naturalistic realities, but as *modes of meaning*, for which international lawyers show awareness. They are thus understood as conscious ways of producing meaning about facts, rules, institutions, legal discourses, theories, etc.[11]. In the current state of international legal scholarship, methods – as modes of meaning – include, for instance, the resort to qualitative or quantitative

5. On the idea of naturalistic necessity, see J. Butler, 2007, 45.

6. See eg L. Oppenheim, 1908, 313.

7. For an exception, see G. Shaffer, T. Ginsburg, 2012, 1. For an illustration, see P.H. Verdier and E. Voeten, 2015, 209. See also J. V. H. Holtermann and M. R. Madsen, 2016, 1001. It must also be noted that such a turn to empirical studies of international law is not completely unprecedented. See eg the work of the New Haven School and in particular that of M. S. McDougal, 1952, 102. See also the work of the legal process school, as illustrated by A. Chayes and A. Handler Chayes, 1995. For a claim about the virtuosity of empirical sensitivity, see J. E. Vinuales, 2014, 72–75.

8. On this project, see gen. A. Orford, 2014, 369.

9. For similar observations, see M. Koskenniemi, 1999, 351.

10. For a more general discussion of the long move away from the intuitive empiricist understanding of knowledge production as embodied by Merton, and the rejection of the idea of «outthereness», «anteriority», «definiteness» and «universalism», see gen. J. Law, 2004, 5, 22-5.

11. Cf.. Philip Allott, who understands methods as the structure of legal argument and the logic of discourse. See P. Allott, 1971, 79.

methods to measure the conditions under which international law is formed and produces effects on its addressees[12], the use of modes of inquiry developed in international relations or in economics with a view to shedding light on an unexplored level of complexity of the environment in which law operates[13], the recourse to computer-generated data about citation patterns in judicial practice or in scholarship[14], the use of narratology to discover the techniques of narration at work in international legal scholarship[15], the reliance on structuralist modes of scrutiny to unveil how international legal practice and international legal thought are articulated around opposites and allowing political and socio-economical preferences to steer legal discourses[16], the design and use of new models of authority in global governance[17], the mobilization of sociological tools to produce sociological insights about the functioning of international law[18], and the invocation of a specific «concept of law» to determine the content and contours of a study or a discourse[19]. The resort to heuristics as a critical device can also qualify as an international legal method as it is understood here[20], or even the persistent resort to so-called «positivist» methods – a common shorthand to refer to the use of the doctrine of sources and the doctrine of interpretation with a view to discovering a meaning presumed out there and knowable[21]. A few characteristics of international legal methods, understood as modes of meaning, must be mentioned here.

First, it must be highlighted that international legal methods, as modes of meaning, are not less performative than if they were operating as modes of knowing naturalistic realities[22]. By giving meaning to facts, rules, institutions, legal discourses, theories, etc. they constitute them. What is more, they constitute those facts, rules, institutions, legal discourses, or theories in the pre-interpretive terms postulated by such methods. In that sense, international legal methods, as modes of meaning, operate as acts of

12. See n 7.

13. See eg J. L. Dunoff and M. A. Pollack 2013.

14. See eg N. Ridi, 2019, 200. See also N. Ridi, «Doing Things with International Precedents: The Use and Authority of Previous Decisions in International Adjudication» (biblio.).

15. W. Rech, 2017; M. Windsor, 2015, 743; G. Simpson, 2015, 3.

16. On the use of structuralist modes of scrutiny by critical international lawyers, see S. Singh, 2014, 291.

17. N. Krisch, 2010; M. Jachtenfuchs, N. Krisch, 2016, 1; see also E. Benvenisti, 2014; E. Benvenisti, G. W. Downs, 2007, 595.

18. M. Hirsch, 2015. See also J. d'Aspremont, A. Nollkaemper, T. Gazzini, 2016.

19. B. Kingsbury, 2009, 23.

20. For a useful definition of heuristic methods of inquiry in international legal studies, see C. Dupont and T. Schultz, 2016, 3.

21. B. Simma and A. L. Paulus, 1999, 302.

22. M. Koskenniemi, 1999, 360.

translation as they translate, in their own terms, that which they give meaning to[23].

Second, international legal methods, as modes of meaning rather than modes of knowing naturalistic realities, cannot be pinned down and apprehended, thereby making their ranking, classification, and comparison very difficult. Indeed, international legal methods themselves, as modes of meaning, have no fixed meaning given the lack of a meta-meaning standpoint from which international legal methods, as modes of meaning, could be given a fixed content[24]. International legal methods, as modes of meaning, are themselves given meaning through the deployment of other modes of meaning. When deployed and given meaning through other modes of meaning, international legal methods, as modes of meaning, are constantly re-interpreted by their users and are thus left, as George Steiner showed as early as 1975, oscillating between truth and falsity[25]. In that sense, as modes of meaning, international legal methods share the same fate as any linguistic convention[26].

Third, international legal methods, as modes of meaning, are not only deployed in doctrinal works and legal theory (jurisprudence). In fact, it is submitted here that critical theory similarly resorts to modes of meanings – although it may be averse to designating them as methods[27] – by virtue of its use, for instance, of structuralist modes of discursive analysis to make binary structures of discourses collapse in a way that reveals their project of ordering[28].

23. R. Jakobson, 1959, 232-9; see also G. Steiner, 1998, xii.

24. See M. Koskenniemi, 1999, 360 («It follows, finally, that no special "method" exists somewhere outside the contexts of practice or theory that would lead these into some particular direction. "Method" is a style of speaking, writing and living in a relationship with others. It is not a superficial phenomenon, but it is what unifies and identifies a group of people as a community (of diplomats, practitioners, academics)»).

25. G. Steiner, 1998, 228-31. As far as international law is concerned, it must be noted that international lawyers, drawing on a claim made in the 1970s (G. Steiner, 1975) and 1980s (R. Cover, 1983, 9) and subsequently popularized in international law circles in the 1990s (M. Koskenniemi, 2005), have come to terms with the tensions in their interpretive and claim-making activities between the world as they perceive it and the world as they want it to be, and the fact that legal claims are produced by a mediation between the two. Indeed, it is now commonly accepted that the content of arguments and truth claims made by international lawyers is the result of the way in which they have mediated the tension between their perceived world and their ideal world. The conflict between the perceived world and normative world in the interpretive and claim-making activities of international lawyers is well-known and has been the object of extensive academic discussions. Such awareness is nowadays seen as the sign of a critical mindset, which is why the experience thereof has turned into a common component of legal education (see gen. J. d'Aspremont, 2016, 641).

26. M. Koskenniemi, 1999, 359-60.

27. See gen. M. Koskenniemi, 1999.

28. On the idea that critique cannot abandon the geometry of structuralism, see J. Derrida,

Fourth, for the sake of this essay, international legal methods, as modes of meaning, are construed as being deployed with some degree of awareness. More specifically, international legal methods, as they are understood here, come with some awareness that the choice of international legal methods is socially and contextually constrained[29]. As a result, modes of meaning that are not experienced and acknowledged to some degree by the international lawyer deploying them, are not considered methods. In this respect, it is recognized that international legal discourses are replete with modes of meaning that are unexperienced, unacknowledged, and of which there is no awareness. Actually, critical theory has selected as one of its main tasks the laying bare of unexperienced and unacknowledged modes of meaning. For the following sections, the modes of meaning qualifying as international legal methods are those which are mobilized by international lawyers with the awareness that they are deploying a mode of meaning and thus with the intention of using certain linguistic conventions to create meaningful rules, facts, practices, institutions, discourses, claims, etc. This element of awareness of international legal methods is not in contradiction with the idea of routine, of which international legal methods are part. The routine itself, as is explained in the next section, is not a totally unconscious and automated process as it comes with a certain awareness of its automaticity and necessity. Moreover, the routine itself may have a low level of self-consciousness whilst the habits it prescribes may themselves come with specific awareness.

Fifth, understanding international legal methods as conscious modes of meaning also entails that there cannot be such a thing as a method-less engagement with international law. Any engagement with international law comes with its own set of methods geared towards the production of meaningful rules, facts, practices, institutions, discourses, claims, etc. One's refusal to unpack one's modes of meaning does not mean that there are no modes of meaning at work, let alone that there is no awareness of such refusal. Put differently, the no-method approach is itself a method[30].

3. INTERNATIONAL LEGAL DISCOURSES AS ROUTINE

It is submitted in this essay that international legal methods, as modes of meaning, are a constituent element of the routine at work in international legal discourses. This section elaborates on the routine which international legal methods are a part of before showing, in the next section, how

1967a, 47 («la critique n'aura ni les moyens, ni surtout le motif de renoncer à l'eurythmie, à la géométrie…»).

29. See J. d'Aspremont, 2015, 177-98. See also M. Koskenniemi, 1999, 356-7.

30. D. Kennedy, 2003, 352.

international legal methods, as modes of meaning, decisively contribute to the possibility and perpetuation of this routine.

Routine refers here to the regular repetition of some given postures, moves, styles, arguments, claims, modes of meaning, etc. as a result of a deeply entrenched proclivity that makes such repetition be experienced as natural and necessary. In this sense, routine does not constitute an unconscious repetition. On the contrary, postures, moves, styles, arguments, claims, modes of meaning, etc. are repeated with much awareness given that they are actually experienced as natural and necessary. It is this awareness that makes routines so powerful and resilient. In fact, the performances dictated by routine are executed without any feeling of constraint as they are experienced as something that 'comes naturally'[31].

The idea of routine has been the object of much discussion in international legal scholarship. For instance, some critical scholars, while showing the substantive indeterminacy of international legal arguments, have also shed light on how such indeterminacy thrives behind the highly predictable formal patterns of international legal discourses[32]. This routine is what is sometimes referred to as the «legal style» of international legal discourses[33].

It must be acknowledged that legal scholars, having reflected on the idea of routine, have usually given the idea of routine a rather unfavourable spin and used it to describe what they perceive to be a rather deplorable state of affairs[34]. Pierre Schlag, for instance, has regularly equated legal scholarship with a form of routine[35] to deplore the «rehearsal of a form, a genre, – and not a self-evidently good one»[36]. He has particularly bemoaned the «imitation of the legal brief and the judicial opinion» at the heart of legal scholars' routine[37].

31. This sense of «coming naturally» is sometimes described as a denial: see P. Schlag, 1990a, 190.

32. See gen. A. Carty, 2019; D. Kennedy, 1987. See also M. Koskenniemi, 2005.

33. See also M. Prost, 2011, 153 («To be "in the truth" of international law, that is, to be validated by the members of the "invisible college", a statement must refer to a full, rightly packed, continuous, geographically well-defined field of objects; it must use a well-defined alphabet of notions; it must be located within a recognizable thematic horizon; and lastly, it must adhere to a certain aesthetics of argument (that is, a certain "style")»). See also M. Koskenniemi, 1999, 358-9.

34. Cf. T. Adorno and M. Horkheimer, 1997, xi (who argue that the great discoveries of applied science are paid for with an increasing diminution of theoretical awareness).

35. P. Schlag, 1990a, 179 («It is the highly repetitive, cognitively entrenched, institutionally sanctioned, and politically enforced routine of the legal academy – a routine that silently produces our thoughts and keeps our work channelled within the same old cognitive and rhetorical matrices»). Elsewhere he writes that legal academics are destined «to play out the myth of Sisyphus», the difference being however that Sisyphus had a real rock to push up the hill (P. Schlag, 2009, 829).

36. P. Schlag, 2009, 835.

37. P. Schlag, 2009, 807, 813.

Routine has even been construed as the antithesis of thinking; that is, as a process that produces legal scholars' thoughts on their behalf, and results in everything being thought of in advance[38].

This essay does not need to prejudge whether the routine in which international lawyers are caught stifles any possible kind of thinking[39]. It is of greater utility to emphasize two specific aspects of this routine and the role which international legal methods play therein. It is submitted here that the routine at work in international legal discourses, and which saturates international lawyers' activities, is both tragic and cynical. A few words must be said about each of these two aspects of the routine of international lawyers'.

First, the routine is *tragic* because, irrespective of whether it preserves the possibility of thinking, there is little thought that can occur outside the routine[40]. In fact the routine saturates the thinking of international lawyers, for nothing can be thought outside the routine's pre-interpretive frameworks[41]. Put differently, the routine channels what can be thought[42], anticipating any possible content[43]. It could even be said that the more conceptual the routine

38. For instance, Pierre Schlag claims that «Like most routines, it has been so well internalized that we repeat it automatically, without thinking. And like most routines, it remains unseen and unobserved – which is why it is so powerful» (P. Schlag, 1990a, 179-80). He also writes that such a routine «entails some very serious limitations on what intelligence can beget» (P. Schlag, 2009, 809). Elsewhere, he writes that «The more we awaken, the more we will find that our intellectual efforts are haunted by the possibility that we are not really thinking at all, but simply rehearsing conventional narratives of entailment. We think we are explaining and understanding, but in point of fact, maybe legal academic work is just an extraordinary intense version of connect the dots…» (P. Schlag, 2017, 1060).

39. Cf. M. Heidegger, 1976. For Heiddeger, opining, representing, reasoning, or conceiving, while important, do not constitute thinking but rather are accustomed ways of grasping thinking which have their own truth. He adds that science, for him, does not think. For him, thinking is questioning ourselves and the inherited opinions and doctrines we take for granted. It is about going beyond systems and concepts, that is the meta. For him we must think non-conceptually and non-systematically.

40. The idea of tragedy comes from Roland Barthes' idea of one's confinement to one's vocabularies being the «ragedy» of writing: see R. Barthes, 1972, 66 («l'écrivain reconnaît la vaste fraicheur du monde présent mais pour en rendre compte, il ne dispose que d'une langue splendide et more, devant sa page blanche, au moment de choisir les mots qui doivent franchement signaler sa place dans l'Histoire et témoigner qu'il en assume les données, il observe une disparité tragique entre ce qu'il fait et ce qu'il voit»).

41. The inescapability of internalized intelligibility frameworks and pre-comparative tertium in the production of discourses, and the impossibility of posing an interpretive act with a veil of ignorance, have been widely acknowledged in literary philosophy (see eg A. MacIntyre, 2007), linguistics (see eg G. Steiner, 1998, xiv), critical theory (see eg J. F. Lyotard, 1979, 59; M. Foucault, 1966, 381), queer theory (see eg J. Butler, 2007, xxvi), and in the theory of interpretation (see eg H. G. Gadamer, 2013, 55, 338).

42. P. Schlag, 2017, 1047.

43. P. Schlag, 2017, 1043.

of international lawyers is, the more the meaning that is created is determined in advance. This concretely means some perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, and narratives, are permitted and others are prohibited[44]. In that sense, the tragedy is that routine reduces what international lawyers do to a constant identity-check[45]. This is tragic because anything that can be perceived, felt, seen, described, argued, claimed, or historicized will be made within the *repertoire of possible worlds*, possible arguments, possible perceptions, possible histories, possible anxieties, possible narratives, or possible claims already prescribed by the routine[46]. The tragic character of the international legal routine, as is understood here, thus expresses a type of totalizing thinking[47].

Second, this routine is also *cynical* because it can never be defeated[48]. Absorbing anything it is applied to, and simultaneously being experienced as coming naturally[49], the routine can never be frustrated or contradicted. Whenever a new phenomenon is presented to the routine of international lawyers, whether in empirical, cognitive, conceptual, or theoretical terms, it is translated into a way that confirms the routine of international lawyers[50]. Indeed, methods are deployed in a way that constitutes the very object that they are looking for[51], thereby making these methods powerful self-confirming instruments[52]. At the same time, what cannot be captured within the repertoire of possible perceived worlds and translated into international legal categories – and thus what cannot be confirmed – will not be considered, let alone perceived[53]. Sometimes, what cannot be captured or explained through the

44. The perceptions of the world and the variety of factual words allowed by international law are certainly not innocent. Cf. J. Derrida, 1967.

45. Cf. T. W. Adorno, 2007, 5 («the appearance of identity is inherent in thought itself, in its pure form. To think is to identify. Conceptual order is content to screen what thinking seeks to comprehend»). Cf. also H. Bergson, 2014, 229 and 240.

46. See, contra, H. G. Gadamer, 2013, xxiii («the way we experience one another, the way we experience historical traditions, the way we experience the natural givenness of our existence and of our world, constitute a truly hermeneutic universe, in which we are not imprisoned, as if behind insurmountable barriers, but to which we are opened»).

47. J. F. Lyotard, 1979, 70-1. Theodor Adorno made a similar claim about the voracity of any concept that he sees as creating a totality which draws everything into it, tolerates nothing outside its domain, and translates everything in its own terms, even contradictions to it (cf. T. W. Adorno, 1997). On this aspect of Adorno's work, see also the remarks of F. Jameson, 2007, 20-1 and 25-34).

48. The idea of cynicism is borrowed from J. F. Lyotard, 1979, 25.

49. Cf. H. G. Gadamer, 2013, 418 («understanding is always a genuine event»).

50. A good example is provided by the law of statehood, which can adjust to any type of practice and makes it self-confirming: see the remarks of J. d'Aspremont, forthcoming (b).

51. It is a feature of all discourses. Cf. T. W. Adorno, 2007, 20.

52. The same has been said of sciences in general. Cf. H. Bergson, 2014, 251.

53. ««Translatability» in the disciplinary practices and legal categories, as well as disciplinary

routine will be conveniently reduced to an expression of pluralism[54]. The routine is also cynical because international lawyers come to forgot that they have built the routine and subjected themselves to it while, later, under the power of the very routine they have built, they even come to forget their earlier forgetfulness about their building of the routine and their subjection of themselves thereto[55]. The routine thus creates forgetfulness about its own creation and its alienation of international lawyers' freedom. This is the cynicism of the routine at its peak.

The role of methods, understood as modes of meaning, must be examined against the backdrop of the tragedy and cynicism of the routine of international lawyers as it has been described here. The purpose of the next section is to show that international legal methods are instrumental in concealing the tragedy and the cynicism of the routine.

4. INTERNATIONAL LEGAL METHODS: CREATING THE EXPERIENCE OF NOVELTY AND VULNERABILITY

This section argues that international legal methods, understood here as modes of meaning as was advanced in section 1, allows the routine of international lawyers, as construed in section 2, to be tragic and cynical. In particular, this section makes the point that international legal methods, as modes of meaning, prompt international lawyers to experience their perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, narratives, etc. as both novel and vulnerable, thereby concealing the tragedy and cynicism of their routine. According to this argument, it is by enshrouding international legal discourses with both novelty and vulnerability that international legal methods camouflage the routine's tragedy and cynicism. These two specific contributions of international legal methods to the routine of international lawyers are examined in turn.

4.1. Innovation and Tragedy

First, it is submitted that international legal methods, as modes of meaning, obfuscate the tragic dimension of the routine of international lawyers in enabling a constant experience of innovation[56]. Indeed, when deployed,

imagination is the condition of entry into the repertoire of possible perceived worlds: see gen. J. F. Lyotard, 1979, 13.

54. On the idea that pluralism is a problem-avoidance move that ceases to make demand on the world see M. Koskenniemi, 2007, 1-30, at 23.

55. Cf. M. Heidegger, 2010.

56. For some critical remarks on that aspect of legal methods in the international legal literature, see J. d'Aspremont, 2015, 191-4.

international legal methods are supposed to produce perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, narratives, etc. that are novel and unprecedented. Actually, producing novel facts, novel processes, novel practice, novel patterns, novel views, novel approaches, novel frameworks, novel binary structures, novel perspectives, novel discourses, novel anxieties, novel crises, novel contradictions, novel oxymorons, novel histories, novel stories, novel literature, etc. is the declared goal of any mobilization of methods by international lawyers[57]. Whether they consist of a descriptive or analytical framework, interpretative paradigm, discursive move, mode of scrutiny, or new concept of law or authority, international legal methods are all meant to contribute to an experience of novelty[58]. Nowadays there is even a widely shared expectation that, if methods do not produce enough novelty, they must be either refined or renewed[59] until sufficient novelty is produced[60].

There are myriad ways in which international legal methods actually produce novelty. It is not relevant to review them here. What matters here is that by producing an experience of novelty, international legal methods prevent international lawyers from experiencing the tragedy of their routine. In fact, the experience of novelty is substituted for that of tragedy. As a result, the perceptions, definitions, findings, images of the world, anxieties,

57. The contemporary literature is driven by constant expectation of a renewal of methodological choices. Indeed, in the community of international lawyers, revolution is valued. It constitutes a source of self-recognition for their architects as well as a welcome means for the rejuvenation of legal arguments and the rise of new research space. Such revolutions are supposed to occur through the discovery of new facts or behaviours, or through the adoption of new conceptual frameworks. Thus, in both cases, revolutions come about by virtue of revolutionary methodological packages, be they descriptive, evaluative, or explanatory. It is the possibility of describing new factual developments, shedding light on new facets of a phenomenon, or providing new evaluative or explanatory tools, that is applauded by the community of international lawyers as a welcome revolution.

58. Comp with H. G. Gadamer, 2013, xxiii («Things that change force themselves on our attention far more than those that remain the same. That is a general law of our intellectual life. Hence the perspectives that result from the experience of historical change are always in danger of being exaggerated because they forget what persists unseen. In modern life, our historical consciousness is constantly overstimulated»).

59. See the remarks by S. R. Ratner and A. M. Slaughter, 1999, 291, 301-2.

60. It must be acknowledged that there are geographical variations in the need for permanent novelty. For instance, methodological revolution is a more structural dynamic in US legal scholarship than in European legal scholarship, which could be seen as more stable. In Europe, it is even fair to say that methodological revolutions are sometimes regarded dimly. Young international lawyers are often judged on the basis of their ability to reproduce the methodological packages in force and not on their capacity to devise a new methodological framework. This being said, and although more conservative and more resistant to methodological change, even in the European tradition, methodological revolutions are valued.

arguments, histories, claims, narratives, etc. made by international lawyers are estranged from the pre-established *repertoire* of possible worlds, possible arguments, possible perceptions, possible histories, possible anxieties, possible narratives, possible claims, etc. prescribed by the routine of international lawyers, notwithstanding the fact that they are all made within it[61]. In other words, by generating novelty in perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, narratives, etc., international legal methods obscure the fact that novelty is only the continuation of the pre-interpretive frameworks of the routine[62]. Through the experience of novelty enabled by international legal methods, the totalizing repertoire of the routine of international lawyers can operate covertly and the identity-check be repeated at whim.

4.2. Vulnerability and Cynicism

Second, it is submitted that international legal methods, as modes of meaning, conceal the cynical dimension of the routine of international lawyers by generating a feeling of vulnerability[63]. In fact, international legal methods are conducive to an experience of the vulnerability of their perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, or narratives. This experience of vulnerability displaces the invincibility of the routine[64] and makes them feel that their perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, or narratives can be corrupted at any moment by their own preferences[65] and are constantly at the mercy of objections pertaining to their postulated values, paradigms, universality, etc. By virtue of such an experience of vulnerability, international lawyers simultaneously come to appreciate that any slight alteration in their methods entails changes of their perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, or narratives.

61. See eg D. Kennedy, 2000, 335; D. Bederman, 2002, 7-9; G. Shaffer, T. Ginsburg, 2012, 11.

62. A. McIntyre, 1988, 352-3.

63. This is a feeling that informed the symposium on methods directed by Steven Ratner and Anne-Marie Slaughter: see S. R. Ratner and A. M. Slaughter 1999.

64. On the experience of contingency, see F. Johns, 2019.

65. G. Steiner, 1975, 47 («Each communicatory gesture has a private residue. The "personal lexicon" in every one of us inevitably qualifies the definitions, connotations, semantic moves current in public discourses… The language of a community however uniform its social contour, is an inexhaustibly multiple aggregate of speech-atoms of finally irreducible personal meanings»).

A discourse's organization of its own vulnerability has been a common move in Western discourses, at least since the Enlightenment[66]. It could even be said that modernity has always nurtured competition between theories with a view to preserving the vulnerability of the discourses they produce[67]. In that sense, international legal methods' perpetuation of the vulnerability of international legal discourses do not constitute any kind of unusual discursive practice. This being said, what matters to highlight here is that this very feeling of vulnerability enabled by international legal methods is what allows the routine of international lawyers to conceal that it absorbs anything subjected to it in a way that reinforces it. More precisely, because they experience the vulnerability of all their perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, narratives, etc. as well as the vulnerability of the products thereof, international lawyers stops short of seeing that their routine can never be frustrated, defeated, or contradicted. International lawyers are thus constantly on high alert, ready to defend their vulnerable position against external objections, while failing to appreciate that they are being subdued by an internal invincible force, that of the routine. Under the guise of vulnerability, the routine discreetly and continuously deploys its invincible totalizing thrust and constant identity checks.

5. WORKING AGAINST A TRAGIC AND CYNICAL ROUTINE: THE POSSIBILITY OF COUNTER-ROUTINE METHODOLOGY

This essay has argued that international legal discourses amount to a deeply entrenched routine composed of a great variety of professional habits. The point has also been made that, among the many habits that constitute this routine, international legal methods enable the routine of international lawyers to conceal its totalizing repertoire of possible worlds, possible arguments, possible perceptions, possible histories, possible anxieties, possible narratives, possible claims, etc. as well as its invincibility through the generation of a constant experience of novelty and vulnerability.

It must be acknowledged that the tragedy and cynicism of the routine that has been depicted throughout this essay may prove disheartening, at least for those who come to appreciate that most of their thinking and meaning-giving activities are made within the repertoire of possible worlds, possible

66. Immanuel Kant long said that we were bound to experience the world through pre-exisiting mold and that knowledge was always perspective-dependent. See gen. I. Kant, 1999. See also D. Hume, 2018.

67. Cf. T. W. Adorno, 2007, 4 («No theory today escapes the marketplace. Each one is offered as a possibility among competing opinions; all are put up for choice; all are swallowed»).

arguments, possible perceptions, possible histories, possible anxieties, possible narratives, possible claims, etc. prescribed by this routine. It is also true that there probably is little that one can do to counter a routine that is both totalizing and invincible given that it is, at the same time, a pre-condition of the possibility of thinking, meaning, and communication[68]. In fact, legal thinking is an emanation of routine[69] and there is a great deal of idealism in any belief in some kind of non-routine legal thinking. Non-routine thinking seems to be no option[70].

Yet, the image which this essay seeks to leave the reader with – one of international legal discourses being entrenched in a tragic and cynical routine with the help of international legal methods – is not meant to be grim. There are at least two particular reasons why the entrenchment of international legal discourses in a tragic and cynical routine should not lead to utter despair. First, the tragedy and cynicism of the routine in which international legal discourses are embedded do not diminish what international lawyers do, let alone their capacity to intervene in the problems of the world and their attempts to do something good about it. Second, and more fundamentally, international lawyers, despite being inextricably caught in their routine, are not condemned to inaction and barred from reinvention of their thought categories. The final section of this essay focuses on this second reason for resisting despair and, specifically, argues that one should not underestimate the scope that international lawyers have for creative action and reinvention of their thought categories within the tragic and cynical repertoire of their routine. Despite being complicit in the tragedy and cynicism of the routine, it is argued in the final stage of this essay that international legal methods can be instrumental in preserving creative action and allowing international lawyers to reinvent their thought categories despite the routine. In developing this specific argument, these concluding remarks seek to demonstrate that the tragedy and the cynicism of the routine of international lawyers ought not to be the dismal end of this essay.

68. On the idea that language colonises the self which does not possess language but is possessed by it, and that it cannot be otherwise, see gen. J. Derrida, 1996, 47-51.

69. See however M. Heidegger, 1976.

70. It must be acknowledged that there have been attempted to break away from routine thinking. Mention can be made here Henri's Bergson suggestion to deconceptualize thinking and to articulate the latter around intuition, movement, and duration in a what that is unbridled by concepts (cf. H. Bergson, 2011, 219-44). It is interesting to note in this respect that Adorno recognized the value of Bergson's attempt to invent non-conceptual cognition but claims that Bergson fails by lack of rigour. For his part, Adorno has called for non-identity thinking, that is a thinking about the inexistent. Cf. T. W. Adorno, 2008, 1, 6, 185-91. George Steiner, instead, pinned his hopes of the altering effect of experience on the very categories through which it has been created. Cf. G. Steiner, 1997, 23 («Any experience modifies consciousness. Be it subliminal or traumatic, there is psychic or physical material happening which does not alter the complex of our identity»).

The point made about the possibility, notwithstanding the routine, of creative action and the reinvention of thought categories is developed as follows. If international lawyers cannot possibly be outside the routine, they must *imagine* such an outside and what it could possibly look like[71]. Only the imagination of an outside of the routine can bring about creative action and the reinvention of international lawyers' thought categories. Yet, because they cannot be outside the routine, the imagination of an outside will have to take place from within the routine. It is submitted here that building an outside of the routine from inside the routine is precisely where international legal methods, instead of reinforcing the tragedy and cynicism of the routine, can provide decisive assistance. Indeed, international lawyers can decide to deploy international legal methods in a way that ceases to generate the experiences of novelty and of vulnerability, and thus erodes the routine's tragedy and cynicism. This is what is referred to here as a *counter-routine methodology*. Counter-routine methodology is neither anti-routine nor outside the routine. It is simply an attempt to imagine *an outside of the routine from within the routine* with a view to enabling creative action and the reinvention of international lawyers' thought categories. Obviously, that reinvention can never be complete as it is a reinvention from within. The following remains premised on the idea that there can never be an outside of the routine[72]. And yet, it is argued here that strict obedience to routine and its methods ought not to be the fate of international lawyers.

A few of the concrete characteristics of such a counter-routine methodology must now be mentioned. Nothing more than a cursory overview of the moves that constitute this counter-routine methodology can be offered here.

First, counter-methodology requires acquiring familiarity with one's own modes of meaning and the arbitrariness thereof[73]. More specifically, it is about reviving the estrangement that comes with the child's «why» question and re-experiencing the arbitrariness of the methodological conventions around which discourses are organized and meaning produced[74]. In fact, it is only once one appreciates the arbitrariness and conventionality of methods that one can start contemplating an outside of the routine and venture into a reinvention of thought categories. In that sense, counter-routine methodology starts with a very childish questioning.

Second, counter-routine methodology and the creation of an outside entails the use of methods in a way that resists the mirage of novelty. Instead of

71. See gen. J. Derrida, 1996.

72. See however the call for thinking about the non-existent by T. W. Adorno. Cf. T. W. Adorno, 2008, 1 and 6.

73. H. Bergson, 2011, 5.

74. T. Eagleton, 2005, 88-9.

generating the experience of novelty and relying on a past from which the product of international legal methods would constitute a progressive departure, international legal methods must be deployed independently from a linear concept of time that distinguishes an old and a new. This means engaging in timeless perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, or narratives without any evaluation on the basis of a past referent. In that sense, international legal methods must be wielded outside of a linear temporal distinction between old and new and carry their own temporality which ought not to be consistent and uniform[75].

Third, counter-routine methodology and the creation of an outside entails the use of methods in a way that does not pass judgement on the vulnerability of the perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, or narratives that are produced. Because such perceptions, definitions, findings, images of the world, anxieties, arguments, histories, claims, narratives, etc. are produced through modes of meaning, saying that they are vulnerable adds nothing but, instead, reinforces the cynicism of the routine. This does not mean falling back on objectivism and dogmatism. It simply means accepting that international legal methods are modes of meaning and nothing more, thereby making any judgement of vulnerability incongruent. In that sense, international legal methods must not be in constant search of the salvation of the meaning they produce. International legal methods must simply be *non-self-judgmental*.

The requirements that international legal methods be childish, timeless and non-self-judgmental, when taken together, entail a fourth characteristic of the counter-routine methodology envisaged here. Indeed, if international legal methods questions conventionality, are kept out of a linear concept of time that distinguishes old and new, and are stripped of all self-evaluation of vulnerability, they find themselves *un-situated in disciplinary terms*. More concretely, this means that, because the product of international legal methods should be childish, timeless, what international legal methods produce in terms of meaning should no longer be apprehended by reference to a disciplinary heritage. In other words, from the perspective of the counter-routine methodology defended here, international legal methods question disciplinary conventionality, are outside of the disciplinary timeline and are not working for disciplinary improvement or refinement. Likewise, because international legal methods, according to the counter-routine methodology

75. A radical move in this direction has been offered by Henri Bergson for whom the indivisibility of time ought to be discontinued and thinking located in the divisibility of time. His suggestion is thus not to embrace timelessness but to promote the divisibility of time. Cf. H. Bergson, 2014, 198.

put forward here, should not be self-judgmental, the product of international legal methods should no longer be evaluated in disciplinary terms or by reference to what it adds to the discipline's main paradigms. To put it bluntly, international legal methods ought to be neither international nor legal. They should just be *a-disciplinary* methods. It is important to stress that the a-disciplinarity of the counter-routine methodology envisaged here is no plea for interdisciplinarity. On the contrary, the a-disciplinarity of methods can be construed as a plea against self-labelled interdisciplinarity which reinforces the disciplinary order among discourses[76]. The a-disciplinarity of the counter-routine methodology simply involves the use of methods that claim no epistemic affiliation or disciplinary pedigree at all.

This fourth and last feature of the counter-routine methodology contemplated here calls for a final observation which will draw this essay to a close. The a-disciplinarity of the counter-routine methodology envisaged here – just as its childishness, a-temporality, and its non-self-judgmental character – ought not to be deemed forbidding. Rejecting the totality of a disciplinary discourse does not require courage[77] but instead risk-taking. Indeed, one should not underestimate the risk that comes with the counter-routine methodology as it is understood here. The risk that such counter-routine methodology creates is not one of a disconnection with one's peers and of a disruption of communication by a discontinuation of one's shared intelligibility frameworks. Rather, the risk is one of being caught by a vertigo condition and the feeling that no intelligibility framework can ever stand its ground and convincingly produce meaning[78]. Yet, it is argued here that such risk is not peril but a chance[79]. It is the vertigo that comes with counter-routine disciplinarity that provides the opportunity to think anew one modes of meaning and more fundamentally one's choice about the kind of decency one's is ready to fight for.

This final observation is meant to make this essay end on a hopeful note. Although non-routine legal thinking is no option, these few concluding remarks have claimed that international lawyers have the possibility to resort to childish, timeless, non-self-judgmental, and a-disciplinary methods in order to imagine an outside of the routine from within the routine, thereby enabling creative action and the reinvention of international lawyers' thought categories. Whether they deem the deployment of such counter-routine methodology worthwhile is their own personal choice. That choice is primarily

76. On the idea that dialectical constructions reinforce dualism, see B. Latour, 1997, 77.

77. In the same vein, see T. W. Adorno, 2008, 31.

78. On the moment of anxiety that comes with deconstruction, see J. Derrida, 1990, 920-1046, at 954-6.

79. On the value of disorder, cf. H. Bergson, 2011, 10-1.

a choice about how one best invests oneself in the routine of international law and what one achieves therewith. Such a choice is ultimately what picking and defining one's methods is all about.

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