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## **Affects, Emotions and the Cartesian Epistemology of International Law**

*Jean d'Aspremont\**

One of the most influential intellectual battles in the history of ideas in the Western world took place in the 17<sup>th</sup> and 18<sup>th</sup> centuries and pitted a French mathematician against a Dutch philosopher. The mathematician championed the idea of an absolute, autonomous, and reified ‘self’ able to secure knowledge of the world of which such ‘self’ is distinct. The philosopher, for his part, vouched for the idea that there cannot be an independent and autonomous ‘self’ distinct from the world because the individual is necessarily in-the-world, and accordingly determined by the latter’s causalities and structures of affects. This battle is well-known in philosophical circles. In fact, it is the very battle that opposed Descartes (1596-1650) and Spinoza (1632-1677).<sup>1</sup> It famously ended with the implacable victory of the French mathematician over the Dutch philosopher, thereby initiating the era of modern thought.<sup>2</sup>

Such short account of one of the main intellectual battles in the history of ideas in the Western world matters to international lawyers whose mind remains shaped by its upshot. Indeed, international lawyers still live in the Cartesian epistemological regime that came to dominate Western thought after the defeat of Spinoza’s immanent

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<sup>1</sup> On the idea that Spinoza’s thoughts were at loggerheads with many fundamentals of the nascent modern way of thinking in terms of hermeneutics, see Paul Ricoeur, *De l’interprétation. Essai sur Freud* (Seuil, 1965), at 35). On Spinoza’s distinct understanding of nature, see Philippe Descola, *La composition des mondes* (Flammarion, 2014), at 285). On Spinoza’s rejection of the modern demotion of affects and emotions, see Michel de Certeau, *Histoire et psychanalyse entre science et fiction* (Gallimard, 2016), at 94 ; and Frédéric Lordon, *La société des affects. Pour un structuralisme des passions* (Seuil, 2013), at 11. On the idea that Spinoza’s materialist philosophy was the first radical departure from the dominant idealist philosophy initiated by Platon, see Louis Althusser, *Être Marxiste en Philosophie* (Presses Universitaires de France, 2015), at 153.

<sup>2</sup> On the idea that the clash between Descartes and Spinoza probably constitutes the most important of all philosophical turns in the history of ideas in the Western world, see Frédéric Lordon, *La société des affects. Pour un structuralisme des passions* (Seuil, 2013), at 274.

philosophy. For sure, had Spinoza gained the upper hand in this critical confrontation of Western philosophy, international lawyers would most likely be unacquainted with modern subjectivity,<sup>3</sup> modern dualism,<sup>4</sup> modern coherence,<sup>5</sup> modern ontology,<sup>6</sup> and modern scientism.<sup>7</sup> In other words, had the clash between Cartesian transcendence and Spinozian immanence taken a different turn, the world would most plausibly be a very different type of place and international law a fundamentally dissimilar argumentative practice.

This short essay is certainly not the place to indulge in a counter-factual re-imagining of what international law would look like under the reign of a Spinozian epistemology. Yet, there is a specific consequence of the Cartesian turn in modern international legal thought that this essay deems relevant to emphasize, namely the exclusion of affects and emotions from international lawyers' thought categories and conceptual frameworks. In fact, the Cartesian era that followed the defeat of the Spinozian self-in-the-world paved the way for the dominance of a scientist – and capitalistic<sup>8</sup> – epistemology that completely kept affects and emotions out of positivist studies of the world. This can be explained as follows. As soon as the 'self' is construed as independent, autonomous, and able to secure knowledge of the world of which such 'self' is distinct, epistemology comes to award primacy about anything or anyone that enables knowledge of the world by such independent and autonomous 'self'. Said differently, the Cartesian victory laid the foundations for a new discursive and social hierarchy: discourses and individuals that produce necessities through realities and facts enjoy primacy over those that don't.<sup>9</sup> Since then, and until today, the real always trumps

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<sup>3</sup> See gen. d'Aspremont, Jean, *Consenting to International Law in Five Moves*, "Consenting to International Law in Five Moves", in Samantha Besson (ed.), *Consenting to International Law* (Cambridge University Press, 2023, forthcoming)

<sup>4</sup> Jean d'Aspremont, "Two Attitudes towards Textuality in International Law: The Battle for Dualism", 42 *Oxford Journal of Legal Studies* (2022), 963–984.

<sup>5</sup> See Jean d'Aspremont, "The chivalric pursuit of coherence in international law", 36 *Leiden Journal of International Law* (forthcoming 2023).

<sup>6</sup> Jean d'Aspremont, 'A Worldly Law in a Legal World', in Andrea Bianchi, and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP, 2021), at 110-123.

<sup>7</sup> Jean d'Aspremont, *International Law and the Rage against Scientism*, 33 *European Journal of International Law* (2022), 679–694.

<sup>8</sup> For Louis Althusser, the modern philosophical tradition initiated by Descartes and the self-centrism it promoted worked hand-in-hand with the rising bourgeoisie and the emergence of capitalist ideology. See Louis Althusser, *Initiation à la Philosophie pour les Non-Philosophes* (Presses Universitaires de France, 2014), at 196-197 and 351.

<sup>9</sup> Hayden White, *The Content of the Form. Narrative Discourse and Historical Representation* (John Hopkins University Press, 1987), 57; Louis Althusser, *Être Marxiste en Philosophie* (Presses Universitaires de France, 2015), at 244-255; Louis Althusser, *Initiation à la Philosophie pour les Non-Philosophes* (Presses Universitaires de France, 2014), at 200.

the narrative, the factual eclipses the literary, and the physical overwrites de metaphysical.<sup>10</sup> It is in this context that affects and emotions came to be deemed alien to the scientific knowledge of the world which the ‘self’ can strive for. Marking a major rupture with pre-modern philosophy, the Cartesian epistemology thus excluded affects and emotions from the positivist and scientific studies about the “real world” and left discussion of affects and emotions to (bourgeois) novels.<sup>11</sup> Such ban on the study of affects and emotions thrived unchallenged in the centuries that followed Descartes’ vanquishment of Spinoza. It took until Freud (1856-1939)’s revolutionary challenge of the Cartesian ‘self’ for the study of affects and passions to enjoy some kind of rehabilitation, albeit in a very modest, marginal, and contested way.<sup>12</sup>

It should be no surprise that this modern embargo on the positivist study of affects and emotions played a central role in the consolidation of international legal thought. Seeking to tap into the cartesian hierarchy of discourses, international lawyers, as of the 19<sup>th</sup> century,<sup>13</sup> embraced a Cartesian epistemology that is premised on the possibility for the ‘self’ to access the world-in-itself of which the ‘self’ is distinct, simultaneously foregrounding the ‘real world’ as its origin and the object of its action.<sup>14</sup> Since then, international legal studies have remained very attuned to modern modes of thinking that keep the scrutiny of affects and emotions at bay. Following a general pattern of thought inherited from Cartesian epistemology, international lawyers, subject to a few rare but highly valuable exceptions,<sup>15</sup> have thus turned a blind eye to the study of affects and

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<sup>10</sup> The invocation of “nature” as the ultimate truth-claiming criteria is a common feature of those discourses about the real. See gen. Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press, 1987).

<sup>11</sup> See the remarks of Michel de Certeau, *Histoire et psychanalyse entre science et fiction* (Gallimard, 2016), at 94. On the novel as being the new genre for the description of individual emotions, see Hayden White, *Tropics of Discourses. Essays in Cultural Criticism* (Johns Hopkins University Press, 1978), at 122-123; Paul Ricoeur, *Temps et récit, Volume 2, La configuration dans le récit de fiction* (Seuil, 1984), at 17; Lucien Goldmann, *Pour une sociologie du roman* (Gallimard, 1964), 36-52; Roland Barthes, Leo Bersani, Philippe Hamon, Michael Riffaterre, Ian Watt, *Littérature et réalité* (Seuil, 1982), at 17 and 35.

<sup>12</sup> See the remarks of Michel de Certeau, *Histoire et psychanalyse entre science et fiction* (Gallimard, 2016), at 94 and 141. On the idea that Freudian psychoanalysis, because it challenged the scientific and bourgeois order as well as the embargo on affects and emotions, was demoted to a non-science, see Louis Althusser, *Initiation à la Philosophie pour les Non-Philosophes* (Presses Universitaires de France, 2014), at 200.

<sup>13</sup> See J. d’Aspremont, “The Professionalization of International Law”, Jean d’Aspremont, A. Nollkaemper, T. Gazzini, and W. Werner (eds), (eds), *International Law as a Profession* (CUP, 2017), 19-37; see also the remarks of Jean d’Aspremont, “Belgium and the Fabrication of the International Legal Discipline”, 31 *European Journal of International Law* (2020) 1521–1530.

<sup>14</sup> See gen. Jean d’Aspremont, “International Law and the Rage against Scienticism”, 33 *European Journal of International Law*, (2022) 679–694; Anne Orford, “Scientific Reason and the Discipline of International Law”, 25 *European Journal of International Law* (2014) 369-385.

<sup>15</sup> For some exceptions, see Anne Saab, ‘Emotions and International Law’, *ESIL Reflections* 10:3 (2021); A. Bianchi and A. Saab “Fear and international law-making: An exploratory inquiry”, 32 *Leiden*

emotions, considering that they are of no relevance for studies and practices that claim to be rigorous and grounded in the real world.

The same goes with the study of legal practices of international disputes settlement to which the journal in which this short essay appears is commonly devoted. Indeed, when they study, discuss, theorize, evaluate, and contest practices related to the settlement of international disputes, international lawyers commonly zero in on such practices' hermeneutic validity, substantive or procedural coherence, legitimacy, power, congruence with the rule of law, or their world-making implications. In doing so, and in accordance with the Cartesian spirit of the discipline, they systematically turn a blind eye to the affects and emotions that can possibly inform the settlement of international disputes. Surely – and this is nothing spectacular or revolutionary to say – international disputes and their settlement through legal categories and within legal settings are saturated with individual and collective affects and emotions of all kinds. No doubt – to take a Cartesian type of phraseology – that such affects and emotions play a very critical role in how such disputes are ignited, performed, and experienced, how their settlement is strategically designed and textualized, and above all, how the stories of the legal practices pertaining to international dispute settlement are narrated and read by international lawyers.<sup>16</sup> In that specific regard, there is certainly room to recount all

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Journal of International Law (2019), 351-365; A. Bianchi, 'Fear's Legal Dimension: Counterterrorism and Human Rights', in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation – Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas* (2010), 175–92; Gerry Simpson, *The Sentimental Life of International Law. Literature, Language, and Longing in World Politics* (OUP, 2021); E. Kidd White, "Images of reach, range, and recognition: Thinking about emotions in the study of international law" in Susan A. Bandes, Jody Lynce Madeira, Kathryn Temple and Emily Kidd White (eds), *Research Handbook on Law and Emotion* (Edward Elgar, 2021), 492–512; R. Sutton, "How the emotions and perceptual judgments of frontline actors shape the practice of international humanitarian law" in Susan A. Bandes, Jody Lynce Madeira, Kathryn Temple and Emily Kidd White (eds), *Research Handbook on Law and Emotion* (Edward Elgar, 2021), 477–491; R. Sutton and E. Paddon Rhoads, "Empathy in frontline humanitarian negotiations: a relational approach to engagement", *7 International Journal of Humanitarian Action* (2022) 23; R. Sutton, "Read the Room: Legal and Emotional Literacy in Frontline Humanitarian Negotiations", *24 Yearbook of International Humanitarian Law* (2021), 103-139. I have myself attempted to sketch the rudiments of a theory of emotions in relation to international organizations. See Jean d'Aspremont, *The Experiences of International Organizations. A Phenomenological Approach to International Institutional Law* (Edward Elgar, 2023). See also Jean d'Aspremont, "The Love for International Organizations", *20 International Organizations Law Review* (2023).

<sup>16</sup> References to emotions occasionally surface in judgments and advisory opinions of the International Court of Justice. See e.g. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 121 ("it ... cannot remain indifferent to, certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access"); ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures, Order, 16 March 2022, para 20 ("The Court regrets the decision taken by the Russian Federation not to participate in the oral proceedings on the request for the indication of provisional measures, as set out

international lawyers’ stories about international dispute settlement as a big story of affects and emotions settlement.

And yet, notwithstanding bemoaning the uninterrupted reign of Cartesian epistemology over international legal thought, I believe that undoing the Cartesian embargo on affects and emotions is more onerous than what is usually assumed by those legal scholars that valuably and insightfully ventured into the study of affects and emotions. Indeed, a mere call for a turn to affects and emotions in international legal scholarship, let alone in the study of legal practices related to the settlement of international disputes would have little critical and disruptive purchase if it were to be only a fancy variant of scientific and explanatory theories of actors’ actions and interpretations. In other words, if affects and emotions are simply mobilized to causally explain behaviours and hermeneutical postures, a turn to affects and emotions would be no less Cartesian than the rest of international legal thought. In fact, it would still be premised on an absolute, autonomous, and reified ‘self’ able to secure knowledge of the world as well as of the affects and emotions that causally inform the ‘self’'s actions and interpretations. By the same token, such turn to affects and emotions would still be driven by the presupposition that affects and emotions constitute things-in-themselves that can, provided the right methods are applied, be apprehended by the ‘self’ and known to the ‘self’. If a turn to affects and emotions is so construed in international legal studies, it is then nothing more than another variant of crude Cartesian epistemology and of the modern scienticism that the latter helped consolidate.

It is argued here that any turn to affects and emotions in international legal scholarship, including in the studies of legal practices pertaining to the settlement of international disputes, should eschew two specific moves that necessarily obliterate its originality and critical potential. First, a turn to affects and emotions in international legal studies should resist any return to an explanatory epistemology, one that postulates the centrality of individual or collective experiences<sup>17</sup> and that seeks to causally explain behaviours and interpretations through affects and emotions.<sup>18</sup> Second, and most

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in the above-mentioned letter of 5 March 2022”); ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, I.C.J. Reports 2021, para 29 (“The Court regrets Kenya’s decision not to participate in the oral proceedings held in March 2021”).

<sup>17</sup> On experience being the main source of knowledge since the advent of Modernity, see Michel Foucault, *Dits et écrits, Tome 1 (1954-1975)* (Gallimard 2001) 758; François Jullien, *L’incommensurable* (L’observatoire 2022) 182. See also Georges Canguilhem, *Idéologie et Rationalité. Dans l’Histoire des Sciences de la Vie* (Vrin 1977) 53.

<sup>18</sup> For an early contestation about causal laws and the demonstration that causality is always very precarious, see David Hume, *A Treatise of Human Nature* (OUP 2011) (originally published in 1739-1740). More recently, see Michel Foucault, *L’archéologie du savoir* (Gallimard 1969) 34 ; Michel Foucault, *Dits et écrits, Tome 1 (1954-1975)* (Gallimard 2001) 607, 824 ; Paul Ricoeur, *Histoire et*

fundamentally, any turn to affects and emotions in international legal studies ought to be premised on the idea that affects and emotions are always constituted.<sup>19</sup> Indeed, legal scholars flirting with a turn to affects and emotions should appreciate that affects and emotions, like facts of the world, are always the products of what discourse makes sayable, thinkable and experienceable.<sup>20</sup> Avoiding these two Cartesian moves entails that affects and emotions should be used by international lawyers, not to create any kind of explanatory knowledge of international law and international dispute settlement but to narrate, in an unconventional way, how international lawyers build their conflicting claims and intervene in the problems of the world that they constitute.<sup>21</sup> This means that a turn to affects and emotions should be nothing more than a means to produce new stories about how international lawyers think, argue, and govern the world from which, as Spinoza taught us, they cannot be distinguished.<sup>22</sup>

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*vérité* (Editions du Seuil 1955) 33-34; Paul Veyne, *Comment on écrit l'histoire* (Editions du Seuil 1971) 195.

<sup>19</sup> For an early challenge of crude Cartesian empiricism and the claim that scientific facts are always constituted by scientific theories, see Gaston Bachelard, *Le nouvel esprit scientifique* (PUF, 1934), at 10-16.

<sup>20</sup> Michel Foucault, *Naissance de la clinique* (PUF, 1963), at 165-168; Michel Foucault, *Le Discours Philosophique* (Gallimard/Seuil, 2023), at 245-247 ; Pierre Bourdieu, *Ce que parler veut dire. L'économie des échanges linguistiques* (Fayard, 1982), at 100 and 150; François Jullien, *L'incommensurable* (L'observatoire, 2022), at 30-32.

<sup>21</sup> On the idea that actions of human beings are “lived narrativizations”, see Hayden White, *The Content of the Form. Narrative Discourse and Historical Representation* (JHU Press 1987) 54. Comp with the definition of narrative of Michael S. Roth, ‘Foreword: “All You’ve Got is History”’ in Hayden White, *Metahistory. The Historical Imagination in 19<sup>th</sup> Century Europe* (JHU Press 2014) xv : “A narrative is a rhetorical strategy through which we mold our experience into a meaningful whole that can be communicated to others”.

<sup>22</sup> Jean d’Aspremont, “A Worldly Law in a Legal World”, in Andrea Bianchi, and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP, 2021), at 110-123.