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The Epistemology of the Secret of International Law

What is called here the epistemology of the secret of international law is a specific, albeit common, intellectual posture whereby international law – and all that composes it, that is, its texts, its practices, its actors, its effects, its representations, its past, etc. – is considered to be replete with secrets that international lawyers, in whatever capacity, ought to reveal. The epistemology of the secret of international law thus corresponds to the permanent postulation that there necessarily is hidden, unknown, invisible content in international law's texts, practices, actors, effects, representations, past, etc. and that revealing such hidden, unknown, invisible content necessarily is what engaging with international law amounts to.

This book argues that, so construed, the epistemology of the secret of international law is everywhere at work in international legal thought and practice. According to the argument made in the following chapters, there is hardly any engagement with international law that does not seek to unveil some secrets of the latter. For instance, such epistemology of the secret is witnessed when a judicial body or an organ of an international organization interprets an international legal text or ascertains certain facts to which international law is applied. It is patent when an expert opinion on a question of international law or a question of facts relevant for the application of international law is provided to a court, a government, an international organization, or a private actor. It is similarly very manifest in the many ways in which most legal scholars approach the texts, practices, actors, effects, representations, past, etc. of international law. In fact, be they providing an authoritative interpretation of some given international legal rules, commenting on the decision of a court, lamenting the detrimental or unjust effects of international law, shedding light on the main patterns of international legal argumentation, deciphering the possible agendas and vested interests driving certain interpretations or practices, expressing suspicion towards all that international law promises, elucidating the dark histories of international law, bemoaning the methods practiced by international lawyers, etc., legal

scholars, just like judges, officers of international organizations, diplomats, counsels, and experts, abide by the epistemology of the secret, which is discussed in this book.[1]

This book also makes the point the epistemology of the secret of international law is intellectually questionable for holding that the hidden, the unknown, the invisible always precedes the revealed, the known, and the visible and for hiding the hidden, the unknown, the invisible, and the revealed, the known and the visible are simultaneously produced. The epistemology of the secret of international law, this book argues, also deserves to be scrutinized given how much it enables certain sayings, thoughts, perceptions, and actions whilst disabling others, being complicit, in doing so, with the worst forms of capitalism, colonialism, racism, bourgeois ideology, phallocentrism, virilism, and masculinism. Ultimately, this book submits that the epistemology of the secret of international law, despite dominating the entirety of international legal thought and practice, can be resisted and that an alternative epistemology, less ordering, less silencing, less centred on the distinction between the hidden, the unknown, and the invisible, on the one hand, and the revealed, the known, and the visible, on the other, can be envisaged.

The very notion of the epistemology of the secret, as it has just been introduced, must, at this stage, be further unpacked. As the foregoing already alludes to, there are two main components of the epistemology of the secret of international law: *secrecy* (i.e., hiddenness) and *revelation* (i.e., the act of revealing the hidden, the unknown, the invisible). An epistemology of the secret, as is understood here, *simultaneously* builds on the postulation of a secret content and a revelation of that content. To put it in more specific terms, the epistemology of the secret of international law, as is construed here, rests on two necessitarian postures. First, it postulates the necessary presence of hidden, unknown, invisible content in the texts, practices, actors, effects, representations, past, etc. of international law – what is called here *the necessity of secret content*. Second, it posits a necessity for international lawyers to reveal such hidden, unknown, invisible content – what is called here *the necessity of revelation*. These two necessities, that is, the necessity of secret content and the necessity of revelation, when taken together, put international lawyers in a position where they are constantly in search of hidden, unknown, invisible content for the sake of revealing a truth about

[1] For further illustrations about how the epistemology of the secret of international law manifests itself in international legal thought and practice, see infra Chapter 4.

international law or the world to which it is applied.[2] The epistemology of the secret examined in the following chapters, so construed, amounts to a permanent truth-telling attitude whereby international lawyers constantly seek to reveal some untold secrets about international law and the world.[3]

If it were limited to two necessitarian postures, that is, the necessity of secret content and the necessity of revelation, the epistemology of the secret would be nothing more than a routine[4] that makes international lawyers constantly revisit the texts, practices, actors, effects, representations, past, etc. of international law for the sake of revealing their hidden, unknown, invisible content. Said differently, if the epistemology of the secret were only about making international lawyers reveal secrets about the texts, practices, actors, effects, representations, past, etc. of international law, it would be nothing more than a speech-producing and discipline-constituting epistemology.[5] Yet the epistemology of the secret discussed here, and the two necessities that compose it, are performing a function that goes well beyond the production of speech and the constitution of the discipline. Indeed, the epistemology of the secret of international law, as it is construed here, is an epistemology that orders what can be said, thought, perceived, and actioned through international law. Through the two abovementioned necessities, the epistemology of the secret of international law enables and disables sayings, thoughts, perceptions, and actions and, in doing so, enables and disables what can be said, thought, perceived, and actioned through international law. The epistemology of the secret of international law, in that sense, is also an

[2] On the relation between the epistemology of the secret of international law and truth, see infra Section 1.1.2.3.

[3] Comp. with the idea of an epistemology of the closet by Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2008) p. 3. Comp. with the idea of economy of truth of Michel Foucault, see Michel Foucault, *Sécurité, Territoire, Population. Cours au Collège de France. 1977–1978* (Gallimard, 2004) p. 241.

[4] On the idea of routine, which is central in the work of Pierre Schlag, see, e.g., Pierre Schlag, 'Normative and Nowhere to Go' (1990) 43 *Stanford Law Review* 167; Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank of Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 *Georgia Law Journal* 803; Pierre Schlag, 'The Law Review Article' (2017) 88 *University of Colorado Law Review* 1043. Comp. with the idea of trope developed by Hayden White, *Tropics of Discourses: Essays in Cultural Criticism* (Johns Hopkins University Press, 1978) pp. 1–3.

[5] On how disciplines legitimize themselves, see Bruno Latour, *La Science en action. Introduction à la sociologie des sciences* (La Découverte, 2005) p. 382. Comp. Pierre Schlag, 'The Aesthetics of American Law' (2002) 115 *Harvard Law Review* 1047.

ordering epistemology that dictates the possible and the impossible in international law.[6]

The rest of this chapter is meant to spell out the various dimensions of the epistemology of the secret of international law as it is understood here. The chapter first unpacks the two necessities that compose the epistemology of the secret of international law, namely the necessity of secret content and the necessity of revelation (Section 1.1) before elaborating on the ordering performed by them (Section 1.2). This chapter ends with a few observations on how the epistemology of the secret of international law, as is understood here, distinguishes itself from an ideology (Section 1.3) and an economy (Section 1.4).

1.1 A Two-pronged Epistemology

As was indicated above, the epistemology of the secret is organized around two co-constitutive and synchronic necessities: the necessary presence of hidden, unknown, invisible content in the texts, practices, actors, effects, representations, past, etc. of international law (what is called here *the necessity of secret content*) and the necessity for international lawyers to reveal such hidden, unknown, invisible content (what is called here *the necessity of revelation*). This section unpacks these two components of the epistemology of the secret one after the other. The attention first turns to the necessity of secret content (Section 1.1.2) and then to the necessity of locating, unearthing, and revealing such hidden, unknown, invisible content (Section 1.1.3). Before shedding light on the various facets of the two necessities that compose the epistemology of the secret of international law, a few important conceptual remarks are in order (Section 1.1.1)

1.1.1 Preliminary Observations

Appreciating how the necessity of secret content and the necessity of revelation do what they respectively do requires that the way they relate to one another is preliminarily elucidated, which in turn calls for a terminological observation.

[6] Comp. with the notion of dark precursor (*précurseur sombre*) of Gilles Deleuze; see Gilles Deleuze, *Différence et répétition* (Presses Universitaires de France, 1968) pp. 156–157. On this notion, see the observations of Ian Buchanan, *Deleuzism* (Duke University Press, 2000) p. 5.

1.1.1.1 Two Synchronous, Coincident, and Mutually Constitutive Necessities

A first preliminary observation is warranted in relation to the way in which the two main components of the epistemology of the secret of international law – namely, the necessity of secret content and the necessity of revelation – relate to one another. It must be emphasized that these two necessities do not constitute two distinct, diachronic, and self-sufficient operations. They are synchronous, coincident, and mutually constitutive. Indeed, there cannot be a necessity of secret content without a necessity of revelation, for, as will be explained below, it is the revelation that creates the hidden, unknown, invisible content.[7] Conversely, there cannot be a necessity of revelation short of the postulation of some hidden, unknown, invisible content in the texts, practices, actors, effects, representations, past, etc. of international law because it is only as long as some hidden, unknown, invisible content is postulated that a necessity to reveal it arises.

It is also important to note that, although the two necessities composing the epistemology of the secret of international law are synchronous, coincident, and mutually supportive, the rest of this section, for didactic reasons, exposes the main patterns of thought of each of the two necessities composing the epistemology of the secret of international law one after the other.

1.1.1.2 Structure and Agency in the Epistemology of the Secret

Before the two necessities composing the epistemology of the secret of international law are unpacked, it must also be preliminarily emphasized that these two necessities cannot be differentiated by associating the necessity of secret content with a question of textual structure and the necessity to reveal such hidden, unknown, invisible content as a question of agency. This can be explained as follows. On the one hand, international lawyers are not autonomous and self-determining actors but are always caught in the epistemology of the secret of international law that makes them experience both the necessity of secret content in the texts, practices, actors, effects, representations, past, etc. of international law and the necessity of revealing such content.[8] On the other hand, the

[7] See infra Section 1.1.3.2.

[8] For some critical remarks on the limitations of the modern idea of an autonomous self, see Emmanuel Levinas, *De l'existence à l'existant* (Vrin, 2013) pp. 100–101; Frédéric Lordon, *La société des affects. Pour un structuralisme des passions* (Editions du Seuil, 2013) p. 274;

epistemology of the secret is no self-sufficient and self-operating textual structure, for it always needs to be set into motion and experienced by international lawyers.[9] To put it differently, in the epistemology of the secret of international law, the revealed (the secret content) and the revealer (the international lawyers) are necessary and co-constitutive components of the epistemology of the secret of international law.[10] This means that the epistemology of the secret of international law, although articulated around the two abovementioned necessities, is a very fluid epistemology where the necessity of secret content in the texts, practices, actors, effects, representations, past, etc. of international law and the necessity of revealing such hidden, unknown, invisible content can only be approached holistically.

1.1.1.3 The Epistemology of the Secret, the Hermeneutics of Suspicion, and Paranoid Reading

The two components of the epistemology of the secret of international law, and the way they work hand in hand, can be reminiscent of what has been called, in the theory of interpretation, the 'school of suspicion'[11] or the 'hermeneutics of suspicion'.[12] The latter refers to a specific attitude of

François Jullien, *La pensée chinoise. En vis-à-vis de la philosophie* (Gallimard, 2015) pp. 25–33; Michel Foucault, *Le Discours Philosophique* (Gallimard/Seuil, 2023) pp. 31–37. On the idea that cultural techniques determine the entire course of action and contradicts the widespread belief that only the subject can carry out actions and rule over things, see Cornelia Vismann, 'Cultural Techniques and Sovereignty' (2013) 30 *Theory, Culture & Society* 83. Comp. with the idea that the modern subject is whoever subjects oneself to the reign of critique, see Laurent de Sutter, *Superfaible. Penser aux XXIe siècle* (Climats, 2023) pp. 56–58.

[9] See Jacques Derrida, *Positions* (Editions de Minuit, 1972) pp. 40–41; See also the idea that performativity always comes with a certain enactment, see Judith Butler, *Notes toward a Performative Theory of Assembly* (Harvard University Press, 2018) pp. 31–32. See also Vincent Forray and Sébastien Pimont, *Décrire le droit . . . et le transformer. Essai sur la décriture du droit* (Dalloz, 2017) pp. 222–223.

[10] On how the revealed and the revealing are interwined in the act of revelation, see the remarks of Jean-Luc Nancy, *Hegel, L'inquiétude du négatif* (Galilée, 2018) p. 79.

[11] Paul Ricoeur, *De l'interprétation. Essai sur Freud* (Editions du Seuil, 1965) pp. 38 and 42–46.

[12] Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation*, trans. Denis Savage (Yale University Press, 1970) pp. 32–36; Jonathan Culler, *Literary Theory: A Very Short Introduction* (Oxford University Press, 1997) pp. 68–69; Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (Routledge, 2006) p. 141; Rita Felski, *The Limits of Critique* (University of Chicago Press, 2015) pp. 1–5. In legal theory and international legal theory, the notion of hermeneutics of suspicion has been given a rather different twist, for it refers to the attitude whereby one interprets one's opponents'

distrust whereby an interpreter or a reader continuously experiences a cartesian[13] moment of doubt towards the truthfulness of the content that is made available to her by a given text.[14] Although the necessity of secret content composing the epistemology of the secret and the idea of suspicion both refer to the possibility of hidden, unknown, invisible content in the object being interpreted, this book, however, prefers the idea of epistemology of the secret to that of hermeneutics of suspicion.[15] Indeed, it is submitted here that the latter puts too much emphasis on the attitude of the reader or interpreter and hence on agency. For sure, as was previously indicated,[16] the epistemology of the secret of international law that is discussed here is put into motion by international lawyers. Yet the idea of suspicion obfuscates the extent to which the necessity of secret content is not only a posture of international lawyers but is also *a condition of international legal texts*.[17] In other words, the necessary presence of hidden, unknown, invisible content in the texts, practices, actors, effects, representations, past, etc. of international law is a condition of any international legal text as much as it is a posture of international lawyers. This is why the more encapsulating and less agency-focused notion of epistemology of the secret is preferred to that of hermeneutics or school of suspicion. All in all, the notion of the epistemology of the secret, as opposed to that of hermeneutics of suspicion,

arguments to be ideologically motivated wrong answers to legal questions. See, e.g., Duncan Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' (2014) 25 *Law Critique* 91. See also Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021) pp. 5–6 (for whom the hermeneutics of suspicion refers to the view that legal scholars as partisan actors who interpret legal rules, texts, or processes politically in contrast to empiricist historical research that can offer verifiable and evidence-based interpretations of past legal material). See also the remarks of Fleur Johns, 'Critical International Legal Theory', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022) pp. 3, 133, and 150.

[13] This association between the hermeneutics of suspicion and the cartesian doubt is made by Ricoeur, *De l'interprétation* p. 43.

[14] Comp. with the idea of suspicion theorized by Nathalie Sarraute, *Tropisms and the Age of Suspicion* (Calder, 1963). For her, suspicion is that of the reader towards the realism of bourgeois novels and the alleged worldliness of the novel's central character.

[15] Foucault speaks of the tendency of hermeneutics to make one think that there is language elsewhere than in language. See Michel Foucault, *Dits et écrits, I (1954–1975)* (Gallimard, 2001) p. 593.

[16] See Section 1.1.1.2.

[17] See the idea of George Steiner that speaking always conceals and leaves things unspoken. See George Steiner, *After Babel: Aspects of Language and Translation*, 3rd edn (Oxford Univeristy Press, 1998) pp. 47, 231, and 240.

allows one to provide a more nuanced and multifaceted account of the discursive practices of international lawyers.[18]

It is noteworthy that the notion of hermeneutics of suspicion has sometimes been described and deplored in critical and queer literary theory as amounting to a mode of 'paranoid reading'.[19] In such literature, paranoid reading has been construed as an attitude towards a text that builds on negative affects, a faith in the possibility of exposure, as well as a constant attempt to ward off humiliation and bad surprises, with a view to deciphering what it is that the text secretly does.[20] Such idea of paranoid reading warrants a terminological observation, given the common denominator it shares with the notion of epistemology of the secret as is understood here. It is submitted here that the idea of paranoid reading, albeit very compelling to describe the hermeneutical presumption of hidden, unknown, invisible content that composes the epistemology of the secret of international law and which is shared with the abovementioned hermeneutics of suspicion, similarly foregrounds too much the attitude of the reader compared to what the text itself does. As is construed here, the epistemology of the secret of international law cannot be reduced to an attitude of the reader but also amounts to a condition of international legal texts. This is why the notion of epistemology of the secret is preferred to that of paranoid reading.

1.1.2 The Necessity of Secret Content

The first of the two necessities composing the epistemology of the secret of international law is the necessary presence of hidden, unknown, invisible content in the texts, practices, actors, effects, representations, past, etc. of international law. This is what is called here *the necessity of secret content*.[21] The necessity of secret content corresponds to the

[18] I owe this argument to one of the anonymous peer-reviewers.

[19] See the criticisms of the hermeneutics of suspicion (which she calls a mode a paranoid reading) by Eve Kosofsky Sedgwick, 'Paranoid Reading and Reparative Reading; or, You're So Paranoid, You Probably Think This Introduction Is about You', in Eve Kosofsky Sedgwick (ed.), *Novel Gazing: Queer Readings in Fiction* (Duke University Press, 1997) pp. 1–38. See the comments of Heather Love, 'Truth and Consequences: On Paranoid Reading and Reparative Reading' (2010) 52 *Criticism* (2010) 235.

[20] Contra Sedgwick, 'Paranoid Reading and Reparative Reading' p. 19.

[21] Comp. with the idea of a metaphysics of presence, that is, the idea that signs are always calling on a pre-existing meaning that they make permanently present. See Jacques Derrida, *De la Grammatologie* (Editions de Minuit, 1967) p. 103; Jacques Derrida, *Marges de la Philosophie* (Editions de Minuit, 1972) pp. 187–188.

permanent postulation of a *presence*. By virtue of such postulation, any of international law's text, practice, actors, effect, representations, past, etc. is supposed to be inhabited by content that is hidden, unknown, invisible to international lawyers.[22] Caught in the necessity of secret content, judges, counsels, experts, legal advisers, scholars, all come to presuppose the necessary presence of secrets in the texts, practices, actors, effects, representations, past, etc. of international law.[23]

The various patterns of thought at work in the necessity of secret content are the postulations of a content that is meaningful (Section 1.1.2.1), in permanent surplus (Section 1.1.2.2), truthful (Section 1.1.2.3), textual (Section 1.1.2.4) and prefigured (Section 1.1.2.5). They are examined in turn.

1.1.2.1 A Meaningful Content

The necessity of secret content at the heart of the epistemology of the secret of international law is premised on the idea that the texts, practices, actors, effects, representations, past, etc. of international law all have a meaningful content, albeit some of it is hidden and ought to be revealed. Ascribing a meaningful content to a text, a form, a practice, a representation, an actor, a past, etc., as the necessity of secret content does, is actually a very common epistemological posture in international legal thought and practice.[24] Such pattern of thought is what I have called elsewhere the meaning-centrism of international legal thought and practice.[25] It corresponds to a well-known and widely studied intellectual attitude that is also named logocentrism.[26] According to such posture,

[22] Comp. with the Cornelia Vismann's idea that the authority of the archive in which law grounds itself exists primarily in its invisibility and immateriality, which it creates through secretion and exclusion from the repository. See Cornelia Vismann, *Files: Law and Media, Technology*, trans. Geoffrey Winthrop-Young (Stanford University Press, 2008).

[23] Comp. with the claim of Rita Felski for whom suspicion has been routinized in modern thought. See Felski, *The Limits of Critique* p. 47.

[24] It must be acknowledged that departing from meaning-centrism was not necessary for these critical works to fulfil their ambitions. For instance, one does not need to de-necessitate meaning-centrism to show the false necessities that these forms induce and rely on or to shed light on their contingency.

[25] I have examined this pattern of thought elsewhere. See Jean d'Aspremont, *After Meaning: The Sovereignty of Forms in International Law* (Edward Elgar, 2021). See also Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42 *Oxford Journal of Legal Studies* 963.

[26] On the idea of logocentrism, see Derrida, *De la Grammatologie* pp. 13, 21–23; Jacques Derrida, *L'Ecriture et la différence* (Editions du Seuil, 1967) p. 23. Such logocentrism of

international law's texts, forms, practices, representations, actors, past, etc. are thought as necessarily having a meaningful content that is always the cause and the origin of such texts, forms, practices, representations, actors, past, etc. It entails that the texts, forms, practices, representations, actors, past, etc. of international law are made of an aggregate of things, ideas, norms, facts, etc., which constitute their meaningful content.

It is probably not difficult to fathom why such postulation of a meaningful content is key to the epistemology of the secret of international law as a whole. In fact, were the texts, practices, actors, effects, representations, past, etc. of international law thought as having either no content at all or no meaningful content, there would not be any secret to reveal for international lawyers and hence no epistemology of the secret possible. This is why the epistemology of the secret of international law can be understood as yet another offspring of international law's more general meaning-centrism.[27]

Whilst the postulation of a meaningful content in all of international law's texts, forms, practices, representations, actors, past, etc. proves a rather intuitive epistemological move, especially for meaning-centric international lawyers, it is important to highlight that such postulation has not gone uncontested. For instance, it has been argued that texts, forms, and simply any representation always postpone meaningful content and defer the latter by constantly passing on the job of signification to other texts, forms, and representations, thereby condemning meaningful content to be permanently absent from forms, texts, and representations.[28] It has also been argued that the postulation of a meaningful content amounts to the failure of the text, form, or representation

Western thought has also been captured through the idea of the eternal journey of the sign as a representative of what it is supposed to represent. See Catherine Malabou and Jacques Derrida, *La Contre-Allée* (La Quinzaine Littéraire, 1999) pp. 44–45. See also Jullien, *La pensée chinoise* pp. 115–119.

[27] Elsewhere I have argued that the meaning-centrism of international law has entailed three main modes of thinking, namely originist thinking, deliverability thinking, and reifying thinking. See d'Aspremont, *After Meaning* pp. 10–14.

[28] Derrida, *De la Grammatologie* pp. 11–126; Derrida, *Marges de la Philosophie* pp. 1–29; Jacques Derrida, *L'écriture et la différence* (Editions du Seuil, 1967) p. 411. On this aspect of the work of Derrida, see the remarks of Peter Salmon, *An Event Perhaps* (Verso, 2020) p. 12. See also Geoffrey Bennington, *Jacques Derrida* (Editions du Seuil, 1991) p. 56. Comp. with Roland Barthes, *Le bruissement de la langue. Essais critiques IV* (Seuil, 1984); Roland Barthes, *S/Z* (Editions du Seuil, 1970) pp. 9–11. For an earlier, albeit less radical, contestation of the idea that language is the instrument of a pre-existing thought, see Edward Sapir, *Language: An Introduction to the Study of Speech* (Ishi Press, 2014) pp. 14–17.