

THE EPISTEMOLOGY OF THE SECRET

In this groundbreaking work, Jean d'Aspremont undertakes the first study of the epistemology of the secret of international law, which is a specific intellectual posture whereby international law is considered to be replete with secrets that international lawyers ought to reveal. In addition to arguing that the epistemology of the secret of international law is everywhere at work in international legal thought and practice, d'Aspremont demonstrates why this posture must be scrutinized, given how much it enables certain sayings, thoughts, perceptions, and actions whilst simultaneously disabling others, making it complicit with the worst forms of capitalism, colonialism, racism, bourgeois ideology, phallocentrism, virilism, and masculinism. This book should be read by anyone interested in how international law comes to do what it does and why it must be rethought.

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THE EPISTEMOLOGY OF THE SECRET

International Law as Revelation

JEAN D'ASPREMONT

Sciences Po, Paris and University of Manchester



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Each generation must discover its mission, fulfil it or betray it, in relative opacity.

—Frantz Fanon, *The Wretched of the Earth*, trans. Richard Philcox, p. 145

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PREFACE

This book is yet another of my attempts to inject a contrast medium into the international legal discourse with a view to having it tell us another story about its own functioning. Making the international legal discourse speak about itself is a scholarly endeavor that, despite the contemporary production of writings about international law at an industrial scale, is far from completion. In my view, fracking the international legal discourse – to use a sinister vocabulary of our era – must be continued at full thrust.¹ This is what this book seeks to contribute to.

As the completion of this book was coming to an end, some parts of the world came to show how much they have morally collapsed, even committing or supporting an abomination that I never thought humanity, in the twenty-first century, would still be capable of (watching silently). On that occasion, the doctrine of statehood,² so dear to international law(yers) and already responsible for some of the worst disasters of the past centuries, was, once again, turned into a murderous ideology³ – and so have some of the other key doctrines of international law. The epistemology of the secret of international law with which this book engages has certainly not been alien to the misery and tragedy unfolding as the final lines of this book were laid down. In fact, and this is something the notebook appended to this volume will revert to, the epistemology of the secret of international law discussed in this book has always been a linchpin of brutal and oppressive colonial enterprises,

¹ On the idea that the fissuring of the Western discourse must be continued at all cost, see Roland Barthes, *Le grain de la voix. Entretiens 1962–1980* (Editions du Seuil, 1981) p. 94 and pp. 139–140. See also Michel Foucault, *Dits et écrits, I (1954–1975)* (Gallimard, 2001) p. 1640.

² Because modern statehood has been, in my view, conducive to so much atrocity in the world since its inception, I have always felt it does not deserve a capital S.

³ Comp. with the concept of ‘ideological alibi’ of the State by Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press, 1996) p. 159.

including those enabled by international law. Shedding light on the complicity between the epistemology of the secret at work in the international legal discourse and some disturbing contemporary invocations of international law is also what this book aims at.

I am aware that persevering, book after book, with the peeling of the international legal discourse in order to grasp how the latter does what it does, especially at a time the world is distressfully caught in an essentialist, nationalist, racist, colonialist, and capitalist turn never witnessed in the lifetime of my generation, could be seen as inglorious, if not obscene.⁴ Yet, as I learnt from Homi Bhabha and Louis Althusser, it is damaging and self-defeating to construe theory – and whatever reflection or story that can pejoratively be labelled this way – as necessarily being the elite arcane language of the socially and culturally privileged.⁵ Since everything is theory the very moment we start looking at the world and open our mouth, I am convinced that theory is the most decisive site of contestation of all. Even when taking to the streets – which so often seems needed these days – one mobilizes theory. Because it is in (and with) theory that we will repel or stifle all those discourses that separate, discriminate, oppress, exploit, destroy, and exterminate people and the planet, theory must constantly be de-centered, vulgarized, de-Westernized, and surely not construed as a source of rare social capital in the hands of a small and privileged group inhabiting some imperial locations. Showing that theory is simultaneously simple and omnipresent as well as pivotal for all the battles we must urgently fight is similarly part of the ambitions of this book.⁶

Sketching out some of the broad ambitions of this book as well as the context in which it was written does not tell us much about what kind of story this book tries to tell about international law. In a nutshell, what I call in this book the epistemology of the secret of international law is a

⁴ I acknowledge that one must enjoy some bourgeois quietness and be spared by bombs as well as starvation to afford probing into discursive mechanisms like the epistemology of the secret of international law like I try to do in this book. On the relationship between scholarly works and the bourgeois way of life, see the remarks of Foucault, *Dits et écrits, I (1954–1975)* p. 685. See also Régis Debray, *Le Scribe* (Editions Grasset et Fasquelle, 1980) pp. 121 and 221.

⁵ Homi K. Bhabha, *The Location of Culture* (Routledge, 1994) p. 28; Louis Althusser, *Initiation à la Philosophie pour les Non-Philosophes* (Presses Universitaires de France, 2014) pp. 54–60.

⁶ As this book will argue, one way to achieve this is to do away with the distinction between theory and practice that is so common in international legal thought and practice. This is also why I suggest to speak of ‘theoractice’. See *infra* Section 5.4.

specific intellectual posture whereby international law, its texts, its practices, its actors, its effects, its representations, its past, etc. are held as carrying secrets that international lawyers, in whatever capacity, ought to reveal. The epistemology of the secret of international law discussed here is thus a type of epistemology that postulates 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 is expected to be. In exposing international legal thought and practice as being articulated around an epistemology of the secret, I hope to contradict some of most common representations of international law and especially those that hold that international law conceals and hides a great deal of its meanings, origins, agendas, hierarchies, geographies, histories, etc. In contrast with such common portrayals of international law, this book shows that the secrets of international law are never pre-existing hidden actualities awaiting their revelation but are always produced by international lawyers at the moment they are made known and visible. Questioning such common representations of international law – and the secret-hunting, archaeologist, and speleologist roles that they accordingly assign to international lawyers – is yet another objective of this book.

A preface is often the place where one can say a few words about the making of the book. Whilst this constitutes a very bourgeois and self-centered thing to do, I am going to indulge in this socially accepted genre, for this is a way to expose the errancy of the thought-process that guided some of the inscriptions found in the following pages. The idea of this book came a few years ago when I (finally) ventured in the stunning and world-changing work of Michel Foucault on the *History of Sexuality*. I had always been mindful of the glaring parallels between, on the one hand, the creation of a discourse on sexuality and the setting of a certain ordering normality and, on the other hand, the normality-setting and world-making performances of international law. Yet, what specifically drew my attention then and subsequently gave me the idea of the present book is Foucault's discussion of the technology of confession as a mode of ordering.⁷ According to Foucault, following the Fourth Lateran Council (1215), Christianity put in place sophisticated *confession*

⁷ See gen. Michel Foucault, *Histoire de la Sexualité 1. La volonté de savoir* (Gallimard, 1976) p. 80; Michel Foucault, *Histoire de la Sexualité IV. Les aveux de la chair* (Gallimard, 2018) p. 100. This is part of Foucault's discussion of the pastoral organization of power. In that

techniques supported by an obligation to truth whose aim was the production of secrets about the soul with a view to having them captured and ordered by the Church apparatus. International law, this book argues, has amply tapped into this technological heritage. Indeed, the epistemology of the secret discussed in the following paragraphs is the manifestation of a specific type of epistemology whereby international law, its texts, its practices, its actors, its effects, its representations, its past, etc. always carry secrets that it behoves international lawyers to locate, unearth, and reveal. In that sense, I could have similarly entitled this book *The Confessionality of International Law* by reference to the abovementioned claim of Foucault that set my project into motion. I decided against this title, for the following discussion, although induced by the work on sexuality by the above-mentioned French philosopher, is not yet another type of Foucauldian discussion about international law, which would be a very unspectacular and banal déjà-vu as well as yet another expression of the Western-centrism of the intellectual references of international law.⁸ What is more, the intellectual companions that have driven my thoughts during the preparation of this book are aplenty and much more diverse than what such title would have implied. They come from various parts of the world and areas of the humanities, often holding substantive positions that are hardly reconcilable. Surely, such diversity inevitably creates a cacophony of sort in the references and intellectual sources of inspiration around which this book is articulated.⁹ I hope the readers will not bemoan such cacophonous theoretical references and take it as the sign that this book has been informed by a fecund, albeit disorderly, thought-forming process. I also hope that they

regard, see Michel Foucault, *Sécurité, Territoire, Population. Cours au Collège de France. 1977–1978* (Gallimard, 2004) pp. 128–134, 186–188, and p. 241; Michel Foucault, *Naissance de la clinique* (Presses Universitaires de France, 1963) p. 15; Michel Foucault, *Dits et écrits, II* (Gallimard, 2001) pp. 548–549, 560–566, 956–958, and 990; Michel Foucault, *Les anormaux. Cours au Collège de France, 1974–1975* (Gallimard, 1999) pp. 163–172. On the concept of pastoral governance in the specific context of the schooling system, see also Ian Hunter, *Rethinking the School: Subjectivity, Bureaucracy, Criticism* (Allen & Unwin, 1994) pp. 62–92.

⁸ See the criticisms of Edward Said, *Reflections on Exile and Other Literary and Cultural Essays* (Granta, 2001) p. 196. See also the charge against Foucault for not including the larger world and for not accounting how modern methods of knowledge and power in France and Europe came to be defined as modernity's location by Timothy Mitchell; see Timothy Mitchell, *Questions of Modernity* (University of Minnesota Press, 2000) p. 5.

⁹ Surely my use of theoretical works amounts to a form of theoretical poaching. I borrow this metaphor from Michel de Certeau's description of Michel Foucault's work; see Michel de Certeau, *Histoire et psychanalyse entre science et fiction* (Gallimard, 2016) p. 215.

will construe such diversity of intellectual companions as a guarantee against a dry transposition, in international legal scholarship, of authors or theoretical frameworks held to belong to an alien world to international law. If anything, the following discussion is not an exercise of transposition, let alone a piece of scholarship driven by any quest for coherence and systematicity.¹⁰ It is only another mesh – of yet another fabric – added to the unsystematic net that my work seeks to compose in order to capture the unthought and the impossible in international law.¹¹

Speaking of my past unorderedly and unsystematic interventions in international legal thought and practice, I must acknowledge, notwithstanding my detestation for any quest for coherence, that the present book partly continues and prolongs my previous exploration of the meaning-centrism of international legal thought and practice and thus my charge against the belief that international legal texts, forms, and signs carry a determinate or indeterminate meaning.¹² Indeed, by shedding light on what it calls the epistemology of the secret of international law, this book zeroes in on a specific attitude of international lawyers whereby they constantly forage law, legal practices, legal institutions, and, more generally, the world as a whole with a view to locating, finding, and knowing hidden meanings, hidden indeterminacies, hidden practices, hidden rituals, hidden actors, hidden agendas and political projects, hidden powers, hidden hierarchies, hidden discriminations, hidden injustices, hidden configurations of the world, hidden configuration of subjectivities, etc. The epistemology of the secret discussed in the following chapters thus refers to an attitude of international lawyers that goes hand in hand with their belief that texts, forms, and signs always have a signification function and accordingly say something that, albeit

¹⁰ On the idea that it is not possible to think of coherence since Nietzsche's dismantling of the possibility of unity of practice and interpretation, see Michel Foucault, *Le Discours Philosophique* (Gallimard/Seuil, 2023) p. 182. See also Jean d'Aspremont, 'The Chivalric Pursuit of Coherence in International Law' (2024) 37 *Leiden Journal of International Law* 191. See also the remarks of Michelle Staggs, 'Disordering International Law' (2022) 33 *European Journal of International Law* 729.

¹¹ This is a metaphor I borrowed from François Jullien, *La pensée chinoise. En vis-à-vis de la philosophie* (Gallimard, 2015) p. 370.

¹² See, e.g., Jean d'Aspremont, *After Meaning: The Sovereignty of Forms in International Law* (Edward Elgar, 2021); Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42 *Oxford Journal of Legal Studies* 963.

hidden to them, they must locate, find, and know.¹³ Likewise, this book resembles my 2021 monograph on *The Discourse on Customary International Law* as well as my 2017 monograph on *International Law as a Belief System*, for it seeks to shed light on some central patterns of thought around which international legal thought and practice are possibly organized. Indeed, like in these previous ventures, the current book captures some key intellectual postures that enables certain claims about international law and disables others.

And yet the present book simultaneously entails a major rupture from my work of the past years. In fact, for last the decade, my scholarship was primarily targeting the modern patterns of thoughts that shape international legal thought and practice¹⁴ and especially modern coherence,¹⁵ modern ontology,¹⁶ modern textuality,¹⁷ modern historicism,¹⁸ modern comparativism,¹⁹ modern consensualism,²⁰ modern institutionalism,²¹

¹³ Such continuity between my earlier critique of meaning-centrism and traditional hermeneutics was noted by one of the anonymous peer-reviewers in the following terms: 'The critique of meaning as pre-given lies at the root of the current project which now extends this aspirational poetics of meaning into a fully-fledged theory of the epistemology of international law as predicated upon a dialectic of the hidden and the visible, the secret and the revealed. These binaries in turn dictate in juridical form what can be spoken and what is excluded, an imperialism of the sayable around which the fragile profession of international lawyering coheres self-protectively.'

¹⁴ Comp. with the idea that the various forms and expressions of modernism have been misunderstood by legal studies and misapplied to the analysis of law. See Peter Goodrich, 'Law and Modernity' (1986) 49 *The Modern Law Review* 545 at 548.

¹⁵ See d'Aspremont, 'The Chivalric Pursuit of Coherence in International Law' 191.

¹⁶ 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* (Oxford University Press, 2021) pp. 110–123.

¹⁷ d'Aspremont, 'Two Attitudes towards Textuality in International Law' 963.

¹⁸ Jean d'Aspremont, *The Critical Attitude and the History of International Law* (Brill, 2019); Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7 *London Review of International Law* 89.

¹⁹ Jean d'Aspremont, 'Comparativism and Colonizing Thinking in International Law' (2020) 57 *Canadian Yearbook of International Law* 89.

²⁰ Jean d'Aspremont, 'Consenting to International Law in Five Moves', in Samantha Besson (ed.), *Consent in International Law* (Cambridge University Press, 2023) pp. 117–134; See also Jean d'Aspremont, 'Current Theorizations about the Treaty', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd edn (Oxford University Press, 2020) pp. 46–58.

²¹ Jean d'Aspremont, 'The Love for International Organizations' (2023) 20 *International Organizations Law Review* 111. See also Jean d'Aspremont, *The Experiences of International Organizations: A Phenomenological Approach to International Institutional Law* (Edward Elgar, 2023).

modern temporality,²² modern institutionalism,²³ modern scienticism,²⁴ and modern subjecthood²⁵ at work in international law. In contrast, the present book, as will be illustrated by Chapter 2, scrutinizes an attitude that has its roots both in Greek philosophy as well as religious modes of governance developed and practiced in the Middle Ages in the tiny part of the world called Europe. In that sense, this book constitutes a venture in the history of ideas that goes back much further than my previous studies of modern thought.²⁶

The very resort to a book to speak about the epistemology of the secret in international law warrants an observation. The book – and before it the codex – has long been a tool used by monotheist religions for the sake of a revelation.²⁷ In that sense, the book, as an object, has long been a tool meant to carry secrets and unknown truths for the reader whose reading thereof could possibly enable their knowledge about what God has to tell them about their existence and their being in the world. With the rise of the bourgeois novel²⁸ and the popularization of reading within the proletariat,²⁹ the book did not lose its function of carrying secrets that

²² Jean d'Aspremont, 'Time Travel in the Law of International Responsibility', in Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press, 2022) pp. 252–276.

²³ d'Aspremont, 'The Love for International Organizations' 111; d'Aspremont, *The Experiences of International Organizations*.

²⁴ Jean d'Aspremont, 'International Law and the Rage against Scienticism' (2022) 33 *European Journal of International Law* 679.

²⁵ Jean d'Aspremont, 'The Law of Statehood as a Constellation of Hybrids', in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds.), *Research Handbook on Secession* (Edward Elgar, 2022) pp. 29–41. Comp. with Jean d'Aspremont, 'The International Law of Statehood and Recognition: A Post-Colonial Invention', in Thierry Garcia (ed.), *La reconnaissance du statut d'Etat à des entités contestées: Approches de droits international, régional et interne* (Pedone, 2018) pp. 15–28.

²⁶ Comp with Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Pierre Legendre, *De la Société comme Texte. Linéaments d'une Anthropologie dogmatique* (Fayard, 2001) esp. pp. 62–67; Alain Supiot, *Homo Juridicus. Essai sur la fonction anthropologique du Droit* (Editions du Seuil, 2005) p. 283.

²⁷ Guglielmo Cavallo, 'Between Volumen and Codex: Reading in the Roman World', in Guglielmo Cavallo and Roger Chartier (eds.), *A History of Reading in the West*, trans. Lydia G. Cochrane (Polity Press, 1999), pp. 64–88.

²⁸ Roland Barthes, Leo Bersani, Philippe Hamon, Michael Riffaterre, and Ian Watt, *Littérature et réalité* (Editions du Seuil, 1982) pp. 23, 28, and 34–35. See also Section 2.5.

²⁹ Reinhard Wittmann, 'Was There a Reading Revolution at the End of the Eighteenth Century', in Guglielmo Cavallo and Roger Chartier (eds.), *A History of Reading in the West*, trans. Lydia G. Cochrane (Polity Press, 1999) pp. 284–311. See also Martyn Lyons, 'New Readers in the Nineteenth Century: Women, Children, Workers', in Guglielmo

the act of reading would reveal to the reader. Scholarly books, which proliferate nowadays, are no exception to that, for they similarly aim at revealing secrets to their readers. Hence, writing a book about the epistemology of the secret of international law is doing exactly what books have always been doing: carrying secrets for the sake of a revelation.³⁰ In that sense, this book, as it discloses a specific epistemology espoused by international lawyers, is caught in the very epistemology of the secret that it describes. Whether that creates some form of tautology or a performative contradiction does not really matter, unless one naïvely believes in the mathematical order of ideas.³¹ In fact, this book does not seek to expunge the epistemology of the secret from international legal thought and practice.³² Because this book inevitably is a manifestation of the epistemology of the secret with which it grapples, its modest ambition, as was already highlighted above, is solely to make international law tell us a new story about its own functioning.

A final terminological observation is in order. Although the following chapters will commonly refer to ‘international legal thought and practice’ – mainly to avoid overusing the concept of discourse³³ – in order to designate all that is said, thought, perceived, and actioned through international law, it must be repeated one more time that

Cavallo and Roger Chartier (eds.), *A History of Reading in the West*, trans. Lydia G. Cochrane (Polity Press, 1999) pp. 313–343.

³⁰ See the unease of Roland Barthes about criticizing what books do through writing a book, see Roland Barthes, *La préparation du roman. Cours au Collège de France (1978–1979 et 1979–1980)* (Editions du Seuil, 2015) p. 426.

³¹ In the same vein, see Jacques Derrida, *Positions* (Editions de Minuit, 1972) pp. 21, 35, and 56; Jacques Derrida, *L'écriture et la différence* (Editions du Seuil, 1967) p. 46; Roland Barthes, *Le degré zéro de l'écriture* (Editions du Seuil, 1972) p. 66; Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (Johns Hopkins University Press, 1978) pp. 142–143 and 252–253; Paul Ricoeur, *La mémoire, l'histoire, l'oubli* (Editions du Seuil, 2000) p. 399; Jean-François Lyotard, *La Condition Postmoderne* (Editions de Minuit, 1979) p. 107; Edward Said, *The World, the Text, and the Critic* (Harvard University Press, 1983) p. 26; Michel Foucault, *Les mots et les choses* (Gallimard, 1966) p. 12; Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978–1979)* (Gallimard/Seuil, 2004) p. 37.

³² See contra Roland Barthes, for whom one should not seek to find secrets in literary texts, Roland Barthes, *Le bruissement de la langue. Essais critiques IV* (Editions du Seuil, 1984) p. 159; Roland Barthes, *Critique et vérité* (Editions du Seuil, 1999) p. 78. See also contra Bernard Harcourt's calls for resistance to the epistemology of the secret at work in the datafication of contemporary societies in Bernard Harcourt, *Exposed* (Harvard University Press, 2015) pp. 251–283.

³³ For an attempt to steer clear of the concept of discourse, see d'Aspremont, *The Experiences of International Organizations*.

I categorically reject the distinction between thought (theory) and practice.³⁴ In my view, there is neither thought (theory) nor practice but only 'theoractice'.³⁵

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³⁴ No intellectual figure embodies better the impossibility of distinguishing between theory and practice than Frantz Fanon. On Fanon's life as that of both an intellectual activist and an activist intellectual, see Adam Shatz, *The Rebel's Clinic: The Revolutionary Life of Frantz Fanon* (Farrar, Straus and Giroux, 2024).

³⁵ See *infra* Section 5.4.