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JEAN D'ASPREMONT LECTURES AT ROMA TRE UNIVERSITY

CONTENT. 1. International Law and The Incongruous Idea of Critique. – 2. Interpreting International Law.

Jean d'Aspremont, currently Professor of International Law and International Legal Theory at Sciences Po Law School and at the University of Manchester, conducted a visiting period at Roma Tre University between February and March of this year. During this time, he held several lectures debating his work and research in different venues. This entry will examine a seminar held within the *Dialoghi Romani* initiative and a doctoral lesson at the Roma Tre Ph.D. program '*Law and Social Change: The Challenges of Transnational Regulations*'. Both lectures were held at the Law Department of Roma Tre University.

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1. International Law and The Incongruous Idea of Critique

On the 26th of February 2024, the Law Department of Roma Tre University hosted one of the seminars organized by the *Dialoghi Romani* initiative, where academics from Roman universities come together to discuss original themes of research and debate topics of current international legal interest.[1] In each seminar, one or more guests present a topic to be discussed by the participants. The guest of the meeting was Professor Jean d'Aspremont, who discussed a forthcoming paper on an upcoming law journal founded by Professor Tarcisio Gazzini. Professor Giulio Bartolini (Roma Tre University) opened the seminar, while Professor Beatrice Bonafé (University of Rome 'Sapienza') acted as discussant.

The theme of discussion revolved around a significant criticism of the current state of critical studies and approaches in international law. In his presentation, the author claimed that the very use of the idea of critique is incongruous, inappropriate, and unjustified, to the point that there is no reason to speak of critical thinking at all in international law. Conversely, the author called for a new approach, named the 'post-critical' approach, which aims at getting rid of the shortcomings and drawbacks that critical legal thinking has brought.

The presentation began with the explanation of the interconnection between critical thinking and international law. In particular, the Professor claimed that a critical attitude toward the law has always characterized international legal thought. However, in recent decades, the idea of critique has been associated with a new approach to international law, aimed at deconstructing the liberal idea of the law. Thus, the 'crits' started a 'new approach', which shared key foundational aspects, although they have always claimed not to form a unitary school. Nevertheless, the author argued that the very idea of critique has always been around in legal scholarship. Nowadays, every international lawyer would define his or her work as critical, even though the very word 'critical' has been used to describe several scientific activities, from the way to conduct

[1] For more on this see the *Dialoghi Romani* website at <https://web.uniroma1.it/deap/en/node/6259> accessed 23 May 2024.

research to a particular type of theory of law. For instance, already in 1908, Lassa Oppenheim proclaimed that criticism should be one of the fundamental tasks of any legal scholar in interpreting international law.[2] Therefore, the author reiterated that being critical does not add much to the scholarly activity of studying international law.

Specifically, the reasons why the author claimed that the critical movement is *incongruous* rely on two significant arguments. The former is linked with history and genealogy of ideas and philosophy, while the latter intertwines with the daily practice of the international legal field. In conducting this argumentation, the author clarified that he was not refusing the scholarship the critical movement has produced, which, on the contrary, was fundamental for the advancement of international law and the development of his own ideas.

As for the first argument, the author clarified that critical thinking was born in the Enlightenment era. Scientists started to critique their object of studying, by getting rid of perceptions and necessities that came out of religion, morality, law, society, and observations themselves. Thus, the critical attitude defended by contemporary critical legal scholars is contested by the author insofar as it brings to the scientific table nothing more than what has already been brought by Kant. Moreover, modern critical thinking denotes conservativism. Under the modern critical dogma, thinkers are called to conduct a scientific trial of the object of study. In doing so, however, they reiterate prior postulations of values, rules, standards of normativity, and consolidate patterns of thought that they seek to observe and contest. Thus, critical thinking is always confined to the same elements of previous legal thinking, resulting in the continuation of the distorted features that it attempts to eradicate.

As for the second argument, the author demonstrated the tension between international legal scholars' search for critical credentials and their self-righteous continuous contribution to a virile, violent, capitalist, and Western-centric legal discipline. It is virile because the only possible way to 'do research' today is to build a strong argument aimed at proving every previous argument wrong and 'bringing the readers to their knees'. The violent feature is particularly evident in the practice of peer review, which manifests a disruptive attitude in dictating what is right and wrong,

[2] Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313.

despite being shielded by anonymity. It is capitalist insofar as the academic publication industry generates massive income for the main publishing houses at the expense of low-paid scholars. Lastly, it is Western-centric, as critical legal scholarship is mainly headquartered in Western institutions and reiterates the same scriptural traditions invented in the Global North, such as the footnotes. In claiming that, the author highlighted that the critical lawyers become exactly the object of their critics, making the 'critique' not only incongruous but also massively obscene.

The last part of the presentation dealt with the possible way forward. In particular, the Professor explored the feasibility of a 'post-critical' approach to international law. Outside the field of law, this is nothing new, as many philosophers and sociologists have already walked this way.[3] The aim is to envisage what post-critique international law could look like. Thus, not only should the new international legal scholarship get rid of what makes it 'incongruous', but it should also rehabilitate a whole new approach to the law and scholarship. This entails, for instance, making use of open-access platforms to share ideas, allowing narrative styles of writing, overcoming the so-called 'hermeneutic of suspicion' aimed at conceiving scholarly work as an act of constant revelation, and playing down the importance of coherence. These acts are not new as philosophical post-structuralist thought has already addressed this way forward.

After the presentation, the floor was opened to questions and comments from the audience to Professor d'Aspremont. Many observations dug into the need to differentiate between the Anglo-Saxon academia and the continental one, while others highlighted the opposition between the '*pars destruens*' and the '*pars construens*' envisaged by Professor d'Aspremont in his lecture. Specifically, Professor Bartolini remarked that in the Italian scholarly landscape, the crits did not become dominant as they did in other countries, thus the author's criticism may carry different effects depending on where it is received. Conversely, Dr. Branca noted the possible impact that abandoning critical thinking might have on teaching international law. Furthermore, Professor Riccardi remarked the disruptive consequences of the relationship between international legal scholarship and legal practice. In this regard, Professor d'Aspremont admitted that he

[3] See, *inter alia*, Gilles Deleuze, *Clinique et Critique* (Editions de Minuit 1999) and Rita Felski, *The Limits of Critique* (University of Chicago Press 2015).

conducted an exercise of 'performative contradiction', meaning that he carried out a critique of the critique. He recognized that this implies a generalization of the current academic landscape, although there are significant differences between different legal thoughts across the Western world. As for the relationship between teaching and practice, the author believes that critical legal thinking has become 'mainstream', so he refers to the whole legal scholarship, stretching 'from Antonio Cassese to David Kennedy'.

Further comments came from the intervention of Professor Bonafé. In discussing Professor d'Aspremont's ideas, the author argued that there should be a stricter delineation between critical legal thinking as a method and as a theory. Furthermore, the Italian Professor drew attention to the possible disconnection between the two parts of the presentation. She noted that in the former part, Professor d'Aspremont criticized the 'crits' as a legal movement, while in the latter the criticism encompassed the whole international legal scholarship without distinction. Professor d'Aspremont recognized that this is the consequence of the generalization on which his legal argument is based, namely the fact that critical legal thinking has become mainstream. However, he highlighted that the suggested post-critical call should be embraced despite the specific characterization of the current critical legal thinking. This call is not meant to revolutionize the current state of the art of international legal scholarship, but only to provide some reflections on what international legal science should be.

2. Interpreting International Law

On the 29th of February 2024, the Roma Tre Law Department hosted a new guest lecture by Visiting Professor Jean d'Aspremont on 'Interpreting International Law'. The guest lecture, introduced by Professor Giulio Bartolini (Roma Tre University) and discussed by Dr. Laura Di Gianfrancesco (Roma Tre University), was aimed at presenting and discussing Professor d'Aspremont's recent article 'Two Attitudes towards Textuality in International Law: The Battle for Dualism'.[4]

[4] Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42 OJLS 963.

Coming as the latest addition to Professor d'Aspremont's long-standing scientific interest for legal interpretation and legal theory in international law, and being described as a 'spin-off' to his larger monographic work on the concept of meaning,[5] the article describes two main and opposite approaches to textualism under international law. Borrowing the terminology from critical literary theory,[6] d'Aspremont refers to these two competing approaches as 'international hermeneutics' and 'international poetics'.

International hermeneutics represents the common, intuitive way legal scholarship has traditionally approached legal texts. This has been the mainstream approach to interpretation ever since Greek philosophers, particularly Aristotle. The hermeneutical approach builds on the distinction between form and substance – or between signifier and meaning – and conceives legal texts as forms carrying a pre-existing meaning. Meaning is therefore embedded in the text, which exists for the sole purpose of conveying its content. Under such an approach, the content dominates the form, for the meaning constitutes the very origin and purpose of the form that contains it. The object of the interpretive activity is thus simply to elucidate and extract such pre-determined meaning from the text: interpretation is centred on a linear quest for meaning, which starts from the text and goes backwards to find its pre-existing content.

Opposite to this traditional approach is international poetics. Such a novel approach is premised on the recognition that there is no pre-existing meaning embedded in texts, including in legal texts. Texts simply refer to other texts, in a never-ending net of inter-textual connections. This is not to say that texts have no identity: to the extent that they contain *traces*[7] of other texts, legal texts guide the reader towards other forms, which, in turn, contain traces of other forms. In this regard, meaning is always absent as it continuously slips away from the interpreter, who is consequently caught in a constant process of deferral of meaning. Under the international poetics approach, legal texts are no longer conceived as linear instruments. They are rather seen as spaces to be navigated by the interpreter through the guide of inter-textual connections. As a result

[5] Jean d'Aspremont, *After Meaning: The Sovereignty of International Legal Forms* (Edward Elgar 2021).

[6] Jonathan Culler, *Structuralist Poetics. Structuralism, Linguistics, and the Study of Literature* (Routledge 2002); Edward M Morgan, *The Aesthetics of International Law* (University of Toronto Press 2007).

[7] This notion of trace is borrowed from Jacques Derrida, *De la Grammatologie* (Editions de Minuit 1967).

of such conceptualisation, the interpretive activity becomes centred on the choice to follow a certain inter-textual pathway rather than others. By so doing, international poetics brings a significant potential for change. It also maximizes the interpreter's ethical responsibility, as it prevents the reader from hiding behind the idea of the pre-determined meaning and instead empowers him or her to select which deferral of meaning should be followed, and, consequently, which change should be pursued.

In advocating for the adoption of the latter approach to legal interpretation, Professor d'Aspremont recognized that it must be balanced with the practical need to provide interpretive solutions to actual legal problems. According to the Professor, a careful adoption of the poetics approach does not condemn the international legal interpreter to be caught in an endless process of deferral of meaning. By contrast, poetics empowers interpreters to stop the deferral of meaning once they acknowledge having referred to a sufficient number of connected texts to be able to provide a solution to the interpretive question, once again maximizing their ethical and professional responsibility. In his final remarks, the Professor acknowledged that, while hermeneutics has been traditionally described as the mainstream approach, the reality of international legal interpretation possibly confirms that international poetics has already been at work all along.

Professor d'Aspremont's presentation was then discussed by Dr. Laura Di Gianfrancesco, who focused on three issues raised by the reading of the article.

The first issue related to the very dualism of approaches described by the author. In sketching out the distinction between these two approaches, the article does recognize that these approaches stand at the opposite edges of a spectrum, with several shades of grey in between. Dr. Di Gianfrancesco noted that among these shades of grey, the article notably identifies a third approach, which it refers to as the 'soft variant' of international hermeneutics. This variant, which has today become the mainstream approach in contemporary international legal scholarship, is based on the recognition that the meaning of legal texts is not pre-determined, but to some extent *created* in the process of interpretation by the transformative power of the reader. According to the discussant, this conceptual shift already has significant implications for the interpretation of legal rules. Conceiving meaning as something pre-determined to be simply extracted from the text or conceiving it as the product of a creative effort of the interpreter makes a

difference, for instance, when it comes to evolutionary interpretation: this soft hermeneutics already allows texts to be liberated from the cage of the 'fixed' original meaning and to change over time, which appears to be the very exigency pursued by the international poetics approach. The discussant accordingly asked the speaker to elaborate on the reason why this third approach is considered to still be part of the traditional hermeneutics approach and insufficient to ensure a dynamic evolution of legal texts.

The second and third issues concerned the identification of the boundaries of the international poetics approach and its relationship with the constraints indicated by the universally accepted method of interpretation in international law, i.e. the rules of treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). While appreciating the idea of texts as legal spaces which open multiple interpretive possibilities, Dr. Di Gianfrancesco asked the Professor to elaborate on the boundaries between permissible and impermissible interpretation. In particular, taking into account that the article identifies ethical responsibility as a tool for guiding interpreters, the discussant wondered which ethical approach should be adopted and whether ethics might be considered sufficient as a boundary to safeguard the exigencies of legal certainty and predictability of the law. In this latter respect, the discussant noted that these were the very exigencies that led the International Law Commission, in the 1950s and 60s, to elaborate and identify rules for treaty interpretation, which were later incorporated in the VCLT and customary law, thus raising the question of how the international poetics approach relates to those rules, and whether the rules themselves can accommodate this new approach.

Professor d'Aspremont replied to the discussant's remarks by further clarifying several questions raised by his arguments.

First, the author acknowledged that the dualism of approaches he described is to some extent a simplification of the multiplicity of available approaches. Although the soft variant of hermeneutics is indeed the most accepted approach by legal scholars nowadays, the Professor contended that such an approach is still conceptually linked to the idea of meaning. Although this approach recognizes a partially creative role for the interpreter, it remains attached to the idea of an original meaning embedded in the text, from which the interpreter subsequently departs through its transformative activity.

In this respect, such soft variant does not radically abandon the idea of meaning, but rather continues to place meaning at the centre of its activity. The poetic attitude goes, instead, one step further, and to some extent also reduces the creative role of the interpreter. While the interpretive results of these approaches may not necessarily be distinct, they are based on two different attitudes towards the notion of meaning.

Second, Professor d'Aspremont addressed the question of boundaries by contending that the international poetics approach is not necessarily concerned with interpretive constraints. Whereas poetics revolves around the inter-textual connections indicated by textual traces, still such traces are potentially infinite, as they result from the interaction between reader and text and from the reader's inclination to constantly find new traces to build his or her own interpretive pathway. In this regard, there is no 'correct' trace to be found, but a constant deferral of meaning, created by the individual experience of text-reading. Similarly, there is no universal definition of ethics: the interpreters' engagement of their ethical responsibility rests on their personal conception of ethics. The author accordingly advocates for an abandonment of the vocabulary of objectivity when it comes to legal interpretation.

This also has repercussions for the role of the rules of treaty interpretation. While interpreters are socially bound to formally refer to such rules to justify their interpretive solutions and have to use the language of the VCLT to persuade others of the correctness of their interpretation – Articles 31 and 32 VCLT being a 'discursive protocol' for international lawyers – these rules too are themselves part of the inter-textual pathway enabled by each legal text.

Professor d'Aspremont concluded his guest lecture with a final remark addressed to Ph.D. students wishing to use the works of philosophers and legal theorists in their scientific research. He suggested young scholars to consider these authors as 'intellectual companions', by transposing their ideas and using their work functionally, without being afraid of betraying their original thought.