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Emotions and International Law

[Anne Saab*](#)

Graduate Institute of International and Development Studies, Geneva



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Emotions in international law

The study of emotions has a rich history in many disciplines, but in legal scholarship, and particularly in international legal scholarship, it remains a marginal and somewhat neglected field. This disregard for emotions does not sit easily with the various complex and pressing issues that international law aims to tackle. Counter-terrorism law, migration law, global health law, environmental law, and food safety law are not made in response only to scientific facts and evidence, but also engage with human emotions.

Emotions influence international law, and conversely international law itself may also evoke a variety of emotions for different actors. Terrorism inspires mass fear and anxiety, and counter-terrorism laws respond to these sentiments. Counter-terrorism laws at the same time can cause animosity and anger among those they target. It suffices to recall the reactions provoked by the treatment of prisoners at Guantanamo Bay. Migration, especially in large numbers, can cause feelings of resentment as the population of host states is asked to share their – sometimes limited – wealth and resources with

*Associate Professor of International Law, Graduate Institute of International and Development Studies, Geneva.

people perceived as foreign. Strict migration laws and their often devastating human impacts also arouse empathy and compassion for those who are desperate for a better life. This is illustrated plainly by the tragic and high-profile cases of Alan Kurdi, the Syrian toddler whose lifeless body washed up on a Turkish beach, and Salvadoran toddler Valeria who drowned alongside her father in the Rio Grande River trying to reach the United States.

The paucity of serious consideration for emotion in international law is driven by a presumed strict dichotomy between reason and emotion, with law resolutely grounded in the former. As far as international law does consider emotions, it tends to be in the form of shielding law from emotions or in turning emotions into scientific evidence and facts in order to be taken seriously.¹ As scholars in the emerging field of law and emotions rightly remark, there appears to be a conviction in the legal discipline that merely acknowledging the existence of emotions, ephemeral and elusive as they are, undermines the authority of law.²

This ostrich policy of effectively neglecting emotions is detrimental to the field of international law. If international law is to remain relevant in the face of urgent global issues, it must take seriously the role of emotion as a central part of, rather than an unwelcome interference with, cognition and reasoned decision-making. My intention in this reflection piece is not to argue precisely how and with what effect emotions influence international law and vice versa in every context. It is rather to argue *that* emotions influence international law, that international law influence emotions, and that international law must acknowledge and engage with emotions.

Some examples: Fear and food safety law, shame and global health law, empathy and humanitarian law

Why should emotions be considered in the field of international law? What is at stake if we as international lawyers do not take emotions seriously? I contend that international law risks losing its relevance in contributing to addressing urgent global issues if it does not begin to acknowledge the existence of emotions and to engage earnestly with emotions. Emotions are part of social life and have an influence on all actors in international law: states, individuals, communities, corporations, judges, lawyers, activists, media, and public opinion. International law is not and should not be

¹ I discuss the latter in my review of *Managing Facts and Feelings in Environmental Governance*, edited by Lorenzco Squintani, Jan Darpö, Luc Lavrysen, and Peter-Tobias Stoll (Edward Elgar, 2019) in the *Review of European, Comparative & International Environmental Law (RECIEL)* 30(1) (2021).

² Introduction to *The Edward Elgar Research Handbook on Law and Emotion*, edited by Susan A. Bandes, Jody Lynee Madeira, Kathryn D. Temple, and Emily Kidd White (Edward Elgar, 2021), p.1.

detached from social realities, and therefore should not disregard the force of emotion. I will introduce three examples in more detail to illustrate this point.

Fear and anxiety in regulating food safety

Controversies surrounding mad cow disease in the 1990s, the so-called 'beef wars' fought over hormone-treated cows, and perpetual heated debates over genetically modified foods demonstrate clearly that questions of food safety are highly emotional. Europe and the United States are the conspicuous opponents when it comes to food safety regulation. While the EU formally adopts a more precautionary approach and the US a more permissive approach, both sides generally rely on similar scientific evidence and come to similar scientific conclusions. Even in the unlikely event of having full scientific certainty in relation to a particular food safety risk, assessing that risk, weighing it against the benefits, and regulating food safety involves taking account of more than just science.

Discord over whether to allow hormone-treated beef or genetically modified foods for consumption is based to a large extent on fear and anxiety on the part of consumers. The idea of consuming meat or dairy products that contain remnants of growth hormones or antibiotics administered to the animals that produced these products has proven to be concerning to many people. Similar sentiments are felt towards genetically modified foods, sometimes referred to as 'Frankenfoods' by opponents. These fears and anxieties persist even when the scientific evidence of any significant risk is lacking. Resistance against any sort of 'unnatural' food, whether it is hormone-treated or genetically modified, is based not only on potential human risks, but also on possible adverse effects on the environment, ethical questions of tampering with nature, as well as the powerful position and influence of big food companies and biotechnology corporations.

In the context of international law, conflicts surrounding food safety issues are fought out for the most part within the World Trade Organization's dispute settlement procedures. However much international lawyers may like to insist on purely rational decision-making based on scientific facts and evidence, science alone does not suffice. In a trade dispute between the US and the EU on hormone-treated beef, the European Communities argued that 'public perception of what is dangerous' should be considered in addition to "scientific factors" in judging whether a measure constitutes discrimination and a disguised restriction on international trade.³ This does not mean that we must disregard or throw overboard science and reason, but it does mean that emotions such as fear and anxiety play a role in law-making in the field of food safety.

³ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998, para.33.

Shame and stigma in combating infectious diseases in global health law

Over one year since it was first discovered in the Chinese city of Wuhan, a new coronavirus that causes an illness in humans by the name of COVID-19 continues to cause unprecedented disruption across the globe. Millions of people worldwide have been infected, more than four million deaths have been recorded to date,⁴ and health care systems have been under enormous pressure. Governments all over the world have taken extreme measures – including travel restrictions, school and business closures, quarantines, and curfews – in efforts to contain the spread of the virus. While responses to this pandemic are based on the best available scientific evidence, no amount of facts and evidence can fully resolve questions of global health that ultimately require deeply emotional considerations.

Shame can form significant challenges in dealing with global health risks. This is especially evident in the fight against sexually transmitted diseases, most notably HIV/AIDS.⁵ Sexually transmitted diseases carry a great deal of stigma and feelings of shame in response to stigma can cause persons who are infected to choose not to disclose their diagnosis. This can form a real risk not only to an individual's own health if they do not seek the medical attention they may require, but also to sexual partners who may be unaware.⁶ The important insights that are available on the role of shame in fighting sexually transmitted diseases should be noted in tackling infectious diseases such as COVID-19.

Global health law, with the World Health Organization as its beacon, plays a central role in navigating the COVID-19 pandemic, as with other global health issues. Health laws and policies are informed primarily by scientific facts and evidence, but they also engage with emotions. In the same way as shame can form a serious obstruction to fighting sexually transmitted diseases, a culture of blaming and shaming may be well-intentioned to highlight the serious risks of COVID-19, but it can be detrimental in influencing people's behaviour to halt the spread of the disease.⁷ Persons may be hesitant to seek medical care or to provide a list of their recent contacts when a COVID-19 infection is associated with socially promiscuous behaviour. Devising effective responses to this pandemic,

⁴ Official figures as of 8 September 2021.

⁵ Lisa Schlein, 'WHO: Stigma, Shame Help Spread STDs', Voice of America 8 June 2019, available at: <https://www.voanews.com/science-health/who-stigma-shame-help-spread-stds>.

⁶ Phil Hutchinson and Ragheshri Dhairyawan, 'Shame, Stigma, HIV: Philosophical Reflections', *Medical Humanities* 43(4) (2017).

⁷ Laura K. Murray, 'COVID-19 and Stigma: Why shame and blame won't help fight the pandemic, and what we should be focusing on instead', Covid19: School of Public Health Expert Insights, Johns Hopkins Bloomberg School of Public Health, 13 January 2021, available at: <https://www.jhsph.edu/covid-19/articles/covid-19-and-stigma.html>.

including legal responses, necessitates acknowledging and engaging with the emotional dimensions of health risks.

Empathy, compassion, and dignity in the use of artificial intelligence in warfare

Substantial developments are ongoing in the application of artificial intelligence in warfare. One particular development that is hotly debated is the use of lethal autonomous weapons systems (LAWS), also sometimes referred to as 'killer robots'. LAWS can operate either partially or fully autonomously from human control, with for instance drones operated by humans already in use in situations of war. Proponents of the use of autonomous weapons regularly argue that the absence of human emotions allow these machines to be more accurate and less prone to making errors in judgment in extreme situations. It is precisely the lack of emotion that also incites much of the opposition against LAWS.

Whereas proponents of LAWS may argue that it is useful to remove human emotions like fear, panic, anger, and vengeance from situations of war, opponents contend that the inability of killer robots to feel empathy, compassion, and dignity makes them unfit to engage in warfare. Regardless of the position that one takes in this debate, it is clear that the emotional dimension of using artificial intelligence in warfare warrants serious discussion and consideration. Professor of International Relations Rose McDermott argues that '[A]n understanding of the role of human emotion in decision-making is essential to achieve effective and accurate policy in the cyber realm'.⁸ It is also essential in thinking through the implications for international laws of war and humanitarian law.

International humanitarian law uses the concept of 'reasonable commanders' especially in assessing the proportionality principle. Reasonable commanders are reasonable not because of a lack of emotions, but precisely *because of* their ability to experience human emotions, their ability to feel empathy, show compassion, and understand the importance of dignity. From the perspective of those who resist LAWS, emotions are necessary for what is referred to as 'meaningful human control' in warfare. States Parties to the Convention on Certain Conventional Weapons established a Group of Governmental Experts on LAWS in 2016, which has held annual meetings in Geneva since. Emotions play a pivotal role in discussions about the use of artificial intelligence in warfare, and international lawyers must engage actively in these discussions.

⁸ Rose McDermott, 'Some Emotional Considerations in Cyber Conflict' *Journal of Cyber Policy* 4(3) (2019).

Why international law must engage with emotions

These three examples illustrate the embeddedness of emotions in the very issues that international law and international lawyers deal with. Even though there are few international lawyers who would deny the influence of emotions in our human world and object to the notion that law is a social construction, there is very little attention to and engagement with the emotional dimensions of international law. It matters that emotions are taken seriously because the issues that international lawyers deal with are real and important. In making and implementing international law to combat global health threats, ensure safe and adequate food, and regulate warfare in the most humane way possible, it is not only rational facts and evidence that determine the laws that are made and implemented.

Conversely, international law affects and contributes to shaping emotions, which in turn influences reactions to international law.⁹ Trying to understand the fear and anxiety among consumers of genetically modified or otherwise 'unnatural' foods might open up space for explaining and justifying food safety regulations in a more convincing manner. Trying to understand the function and impact of stigma and shame may contribute to more effective and more holistic laws and policies in the global fight against infectious diseases. Trying to understand the role of emotions in the laws of war may contribute to keeping the 'human' in humanitarian.

The resistance against engaging with emotions in international law stems from the assumption that reason and emotion are distinct and separable, and that the legal discipline is and should be grounded solidly on the side of reason. International law predominantly views emotions as cognitive biases that undermine reason and rationality. To challenge these assumptions and seriously engage the international legal discipline with emotions, we can look to the rich scholarship on emotions in other disciplines.

A false dichotomy between reason and emotion

Social psychologists and neuroscientists have convincingly argued that cognition (in the sense of understanding, apprehension, and reasoning) and emotion cannot be easily separated, and some even consider any real distinction between the two to be 'obsolete'.¹⁰ Recent discoveries in

⁹ For the influence of law on emotions, see Martha Minow, 'Forgiveness, Law, and Justice', *California Law Review* 103 (2015), p.1627.

¹⁰ Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment', *Psychological Review* 108 (2001); Raymond J. Dolan, 'Emotion, Cognition, and Behavior', *Science* 298

neuroscience advance a more integrated, hybrid approach to understanding the relationship between cognition and emotion, based on the assumption that emotions are intimately linked to conscious and unconscious as well as cognitive and bodily perceptions.¹¹ Martha Nussbaum has referred to emotions as ‘appraisals or value judgments’ and argues for an understanding of emotions as part of the cognitive process.¹² In other words: emotions influence our understanding of the world and consequently our decision-making.

Lawyers and legal scholars rarely deny the relevance of emotions outright. Nevertheless, they maintain a strong presumption that law must be based on reason and that emotions should have no part in law. Gerry Simpson relies on Kant to emphasize the dominant ‘orthodox, post-enlightenment’ perception of the separation of the mind ‘into a calculating instrument of reason and a chamber of passion’. He moreover highlights the ‘unmistakably gendered’ tendency to ‘regard the emotions as inferior and subordinate’.¹³ Pierre Schlag has written brilliantly on the misplaced (or unreasonable) devotion to reason in the American legal tradition, a powerful critique that can equally be applied to international law.¹⁴ There is a presumption that law seeks the truth, the one correct answer, based on indisputable facts and evidence. This approach to law is particularly evident in courtroom settings. The International Court of Justice hears cases, is presented with facts and arguments from two sides of the dispute, deliberates, and finally provides a reasoned decision or opinion.

Legal scholars from various approaches – including feminist scholars and critical legal scholars – are challenging the mainstream rationalist approach in law. There have been encouraging developments in recent decades of strands of legal scholarship acknowledging the socially constructed nature of law. The field of international law today is unquestionably more open to engaging with a whole range of more eclectic approaches and themes, including emotions. Andrea Bianchi has written about fear, counterterrorism measures, and human rights;¹⁵ Vesselin Popovski contributed a chapter on emotions and international law in an edited volume on emotions in international politics;¹⁶ and Nele Verlinden

(2002); Thierry Steimer, ‘The Biology of Fear- and Anxiety- Related Behaviors’ *Dialogues in Clinical Neuroscience* 4 (2002).

¹¹ Emma Hutchinson and Roland Bleiker, ‘Theorizing Emotions in World Politics’ *International Theory* 6 (2014), p.496.

¹² Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001), p.4.

¹³ Gerry Simpson, ‘The Sentimental Life of International Law’ *London Review of International Law* 3(1) (2015), pp.10-11.

¹⁴ Pierre Schlag, *The Enchantment of Reason* (Duke University Press, 1998).

¹⁵ Andrea Bianchi, ‘Fear’s Legal Dimension. Counterterrorism and Human Rights’ in *International Law and the Quest for its Implementation – Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas*, edited by Laurence Boisson de Chazournes and Marcelo Kohen (2010).

¹⁶ Vesselin Popovski, ‘Emotions in International Law’ in Yohann Araffin, Jean-Marc Coicaud, and Vesselin Popovski (eds), *Emotions in International Politics* (Cambridge University Press, 2015).

has written about emotions in international humanitarian law.¹⁷ Andrea Bianchi and I recently co-authored a piece on fear and international law-making, inviting fellow international lawyers to engage with the role and function of fear in international law.¹⁸ With these welcome openings, the time has come for a more comprehensive and systemic attempt to create a space to study the place and influence of emotions in international law.

Much valuable and innovative work has already been done by pioneering scholars in the field of law and emotions that seeks to challenge the idea that emotions should have no influence on law. Law and emotions scholarship was initiated in the US and focuses primarily on domestic legal settings, with an early emphasis in areas such as criminal law and family law, in which emotions play a particularly evident role. The publication of Susan Bandes' book *Passions of the Law*, an edited volume that brings together new thinking on various emotions in a range of legal settings, marked a pivotal moment in bringing law and emotions scholarship to the fore.¹⁹ Law and emotions scholarship has been developing slowly but surely ever since, exploring various emotions in a range of areas of law and wider geographies.

Kathryn Abrams and Hila Keren in an influential article on law and emotions have proposed two arguments challenging the strong rationalist assumptions that continue to prevail in legal practice and scholarship. The first is a descriptive claim that emotions influence law, whether or not legal actors recognize this influence. The second is more normative, upholding that the influence of emotions on law may carry positive outcomes, and that efforts to exclude emotions from legal reasoning are misplaced and have adverse effects.²⁰ In the recently published *Research Handbook on Emotion and Law*, the editors emphasize that 'understanding emotion is an essential part of building a fairer, more effective system'.²¹

Emotion *and* reason, not emotion *or* reason

The persistent and false distinction that the legal discipline maintains between reason and emotion can be explained by a deep-seated concern that allowing emotions into the legal domain amounts to

¹⁷ Nele Verlinden, 'To Feel or Not to Feel: Emotions and International Humanitarian Law' in *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, edited by Mats Deland, Mark Klamberg, Pål Wrange (Routledge, 2018).

¹⁸ Andrea Bianchi and Anne Saab, 'Fear and International Law-Making: An Exploratory Inquiry', *Leiden Journal of International Law* 32(3) (2019).

¹⁹ Susan Bandes, *Passions of Law* (NYU Press, 2000).

²⁰ Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?' *Missouri Law Review* 94 (2010).

²¹ Introduction to *The Edward Elgar Research Handbook on Law and Emotion*, p.1.

thwarting reason. Engaging directly with emotions in international law often invites critiques that law should not be driven by subjective emotions but by objective facts and evidence. These are critiques that I have myself experienced in my early endeavours into this field, with regular questions about what emotions are and how I could ever measure their effect, as well as concerns that an engagement with emotions would undermine or reject the value of reason and of 'objective' facts and evidence. The editors of the *Research Handbook on Emotion and Law* portray this sentiment accurately in their introduction to the book when they write: 'The emergence and growth of Law and Emotion as a field of study has been slowed by the belief that merely by acknowledging emotion, scholars and jurists would undermine the rule of law.'²²

The palpable uneasiness with acknowledging and engaging with the role of emotions in law reveals the difference between law and emotions scholarship and behavioural law and economics. Behavioural law and economics questions rational choice theory and seeks to explain human behaviour in terms of cognitive biases that are not in line with rational theory. But ultimately this popular field of study remains grounded in rationalist assumptions. Cognitive biases are seen as deviations – and indeed often undesirable deviations – from rational behaviour. Cass Sunstein's influential work on fear and environmental law shows the same line of thinking. While Sunstein recognizes the relevance of fear for law, he views fear as a cognitive bias leading to a deviation from rational behaviour.²³

Seeking to explore the role of emotions in international law is not an effort to disregard or to discredit reason. Unlike behavioural law and economics, law and emotions scholarship does not view emotions as cognitive biases, but as part and parcel of cognition, and as central to reasoned decision-making. Scientific facts, evidence, cultural and social influences, political and historical contexts, and emotions in all their subjectivity and ambiguity determine how we understand and perceive the world. And this perception and understanding of the world – our cognition – shapes the law. In this understanding, then, international law cannot offer adequate responses to urgent global issues – climate change, migration, global health crises, food safety, war and humanitarian crises – while ignoring the messy and subjective realities of the world.

Refusing to engage with emotions because of concerns – however justified – that soft, subjective, intangible feelings will threaten the hard, objective, tangible rational foundations of international law is in my view a refusal to engage with the world as it is. International lawyers and legal scholars must

²² Ibid.

²³ Cass Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge University Press 2002), p.87.

learn from social psychologists and neuroscientists, as well as from colleagues who have been carving out space for emotions in the legal discipline. We must acknowledge that emotions are not biases or untruths that need to be weeded out, but rather ought to be understood and embraced as a central component of reasoned decision-making.

Towards an international law that takes emotions seriously

Gerry Simpson ends his wonderful piece on 'The Sentimental Life of International Law' by writing that: 'Maybe all I have done is to argue for an international law that keeps an eye on its own emotional life and one that adopts a form of life that resists tears but stays close to them.'²⁴ The point that Simpson makes here is crucial and is in fact doing a great deal. Taking emotions seriously – 'keeping an eye on its own emotional life' – may seem like a minor action but it is a significant and very necessary step in acknowledging the relationship between emotions and international law. This is the first descriptive phase that has taken law and emotions scholars several decades to establish, and still the dominant position in the legal discipline remains one that neglects emotion. Acknowledging emotions does not equal dismissing reason and rationality. Uncovering and seeking to understand and engage with the role of emotions in various areas of international law does not equal turning international law into a tearful endeavour.

The main point I want to make is that we as international lawyers must start paying serious attention to emotions because we engage with emotions, we respond to emotions, we influence emotions. My intention, like Simpson's, is to argue that emotions influence law and that law influences emotions. International lawyers must acknowledge the presence of emotions in their practice and study, and the influence of emotions must be assessed and dealt with head on, rather than swept under the rug as if emotions do not exist in law. Continuing to neglect the role of emotions as part and parcel of reasoned decision-making risks sidelining international law in the complex realities of the world.

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²⁴ Gerry Simpson, 'The Sentimental Life of International Law', p.29.