

ORIGINAL ARTICLE

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# Fear and international law-making: An exploratory inquiry

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## Abstract

Emotions play an important role in cognition and have a significant and all too often neglected influence on (international) law-making processes. Fear, in particular, can be a driver of reasoning and decision-making. Fear of terrorism / immigrants / health threats / food contamination / environmental hazards – to give a few notable examples – influences the perception of risks associated with these issues and consequently impacts international policy- and law-making. International law rules and doctrines are often adopted – if not overtly justified – on the basis of fear and other emotions. This article aims to explore how fear – as both an individual and collective emotion – may affect decision-making processes, be determinative of normative outcomes, and shape security policies at the domestic and international levels. This approach deviates from traditional rationalist understandings of law and emphasizes the role of emotions in apprehending the nature and functioning of legal processes. Hopefully, this exploration will open up interesting avenues for further research on the role of emotions in international legal processes.

**Keywords:** cognition; fear; law and emotions; law-making; rationality

## 1. Setting the stage: Scenes of fear

To have recourse to emotions to explain the operation of the law remains a rather unconventional – if not altogether blasphemous – exercise in the legal profession, international law obviously being no exception.<sup>1</sup> Yet, to admit that psychological considerations can contribute to explaining normative phenomena is less eccentric an exercise than one might be tempted to think. If one is ready to concede that law is grounded on an underlying social reality and that legal acts are but the result of human activities, it would be hard to see why human beings' emotional states should not affect what they do either individually or as members of a social group. Most of the normative instruments used to counter terrorism were adopted at a time when the prevailing emotional state was fear. Likewise, many of the international instruments addressing climate change have been developed against the backdrop of a narrative of fear. While the experiences and expressions of fear may differ in particular contexts and in different areas of international law, these examples should be enough to justify an inquiry on how fear may have an influence on law-making.

It is easy to grasp how fear has shaped the normative response to international terrorism. The terrorist threat materialized on 11 September 2001 by tragically spectacular modalities. Two

<sup>1</sup>A. Bianchi, 'Fear's Legal Dimension: Counterterrorism and Human Rights', in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation – Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas* (2010), 175–92.

hijacked commercial airplanes crashed into the towers of the World Trade Centre in the heart of New York City. In less than two hours, the North and South towers, consisting of 110 floors each, collapsed. Shortly after, a third hijacked airplane crashed into the Pentagon and a fourth hijacked airplane crashed in the fields in Virginia, killing all passengers on both flights. Close to 3,000 people were killed and twice that number wounded, in what was the deadliest terrorist attack in history. The scenes and images of that day were broadcast all over the world, and caused utter shock, disbelief, and fear.

The sense of dismay and bewilderment slowly turned into fear of an identifiable and terribly concrete danger. The UN Security Council's (SC) reaction reflects this climate of fear. Resolution 1373, adopted on 28 September 2001, is somewhat paradigmatic. The SC acts as a lawmaker by enacting general and abstract rules imposing on states obligations aimed at preventing and punishing terrorism-related offences. By the same resolution the SC also created a subsidiary organ, the Counter-Terrorism Committee, entrusted with the task of monitoring the implementation by states of the obligations laid down in the resolution.<sup>2</sup> At the time, nobody called into question the legitimacy of the SC's action. Not even the General Assembly objected to it. Most likely, this was due to the widespread perception that a prompt normative response of general applicability was needed to face a serious and imminent danger. A general state of fear provided the background and justification for such normative developments to occur.<sup>3</sup>

It is stunning to realize that most of the legal measures that have turned out to encroach on human rights were adopted in a relatively short time span following the 9/11 attacks, when the prevailing feeling was fear. The joint resolution adopted by Congress to authorize the US President to use all necessary military force to counter terrorism was passed on 18 September 2001;<sup>4</sup> the Patriot Act was adopted on 26 October 2001.<sup>5</sup> The military order whereby the US President originally established military commissions is dated 13 November 2001.<sup>6</sup> In the UK, the Anti-terrorism Crime and Security Act was passed on 14 December 2001.<sup>7</sup> The military intervention against Afghanistan was launched on 7 October 2001.

By the same token, fearful representations of climate change influence law-making on the subject in several ways.<sup>8</sup> Fear frames the problem of climate change in a particular way, calling for strong and urgent action. Scholars from a range of disciplines – including sociology, political science, geography, and linguistics – have taken note of the fearful framing of climate change.<sup>9</sup> The international legal framework on climate change – the UN Framework Convention on Climate

<sup>2</sup>See P. Szasz, 'The Security Council Starts Legislating', (2002) 96 AJIL 901.

<sup>3</sup>This is indirectly confirmed by subsequent practice. When Res. 1540 on the acquisition of weapons of mass destruction by non-state actors was adopted, states stressed that their acceptance of law-making resolutions was limited to instances in which there is an urgent need to regulate by generally applicable rules subject matters that are not adequately covered by international regulation. See the statement of the representative of Algeria: '[i]n the absence of binding international standards, and because of the seriousness and the urgent nature of the threat, the response to it needs to be articulated and formulated by the Security Council': UN Doc. S/PV.4950 (22 April 2004), at 5. See also UN Doc. S/PV.4956 (28 April 2004), particularly the statements of France (at 2), Pakistan (at 3), and Spain (at 8).

<sup>4</sup>*Authorization for Use of Military Force*, Pub. L. 107-40 (S.J. Res. 23), 115 Stat. 224, 18 September 2001.

<sup>5</sup>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. 107-56, 115 Stat. 272, 26 October 2001.

<sup>6</sup>66 F. R. 5783, 16 November 2001.

<sup>7</sup>Anti-Terrorism, Crime and Security Act (2001), Ch. 24, 14 December 2001.

<sup>8</sup>Admittedly, most of the fearful representations of both terrorism and climate change that we refer to are presented mainly from a Western-centric perspective. For an insightful Global South perspective on environmentalism see R. Nixon, *Slow Violence and the Environmentalism of the Poor* (2013).

<sup>9</sup>See, for example, S. O'Neill and S. Nicholson-Cole, "'Fear Won't Do It": Promoting Positive Engagement with Climate Change Through Visual and Iconic Representations', (2009) 30 *Science Communication* 355; M. Hulme, *Why We Disagree About Climate Change: Understanding Controversy, Inaction and Opportunity* (2009), especially Ch. 6 'The Things We Fear'; B. Lomborg, 'Environmental Alarmism, Then and Now', (2012) 91 *Foreign Affairs* 24; P. Cap, *The Language of Fear: Communicating Threat in Public Discourse* (2017), especially the chapter 'Environmental Discourse: Climate Change', 41–52.

Change, the Kyoto Protocol, the Paris Agreement – came into being in the context of an understanding that climate change presents a serious, imminent threat or danger. Every step forward, in terms of normative or policy action, carries with it a sense of utter inadequacy to the gravity of the situation. In a very fundamental way, then, fear contributes to the context in which international rules and policies come into being. International law is constructed as a remedial response to the threats and dangers that are feared. The words ‘dead’, ‘disease’, ‘costs’, ‘risks’, ‘catastrophic’, and ‘terminal’ depict a fearful story of climate change and its impacts. Fear is created through language, through expert opinions, and also through imagery. Simply searching for ‘climate change’ in Google images will present you with a burning planet, a sinking earth, dried out fields, polar bears clinging to shrinking pieces of ice.<sup>10</sup> International law on climate change is created against this backdrop of fear and is meant to respond to fear.<sup>11</sup>

In the field of food safety some interesting illustrations of the relevance of fear to normative activities can also be spotted. It suffices to think of the crisis sparked in the mid-1990s by the disease popularly known as Mad Cow Disease.<sup>12</sup> Human deaths caused by the disease caused a tremendous amount of panic and fear in Europe and beyond.<sup>13</sup> Measures were soon taken in the attempt to prevent the disease from spreading. As early as the 1980s when the disease was known in cows, individual states were already imposing bans on the import of cows and beef products from the UK. It was, however, not until 27 March 1996, a few days following the public admission of the UK Health Secretary of the transmissibility of bovine spongiform encephalopathy (BSE) to humans, that the EC as a whole introduced a prohibition on the export of live cows and beef from the UK. This ban became known as the ‘UK embargo’ and had a significant impact on the UK economy.

At the same time as the Mad Cow Disease crisis, another food safety feud was ongoing between the US and the EU relating to growth hormones. The US has used growth hormones in cows since the 1950s. While the US, on the basis of scientific evidence, allows the production and consumption of beef containing growth hormones, the EU is much less keen on such ‘unnaturally engineered’ foods. In 1989, the EU banned the import of beef treated with six identified growth hormones, and as of 2003 the ban of one growth hormone became permanent. Consumer anxiety was submitted as a justification for the ban.<sup>14</sup> As a response to the ban, the US brought a claim against the EU before the WTO, arguing that the EU ban on hormone-treated beef was in violation of the Agreement on Sanitary and Phytosanitary Measures (SPS), that the ban was an

<sup>10</sup>See [www.google.ch/search?q=climate+change&biw=1366&bih=657&source=lnms&tbn=isch&sa=X&ved=0ahUKEwi\\_kPLF9a\\_SAhUGJsAKHX2LA68Q\\_AUIBigB](http://www.google.ch/search?q=climate+change&biw=1366&bih=657&source=lnms&tbn=isch&sa=X&ved=0ahUKEwi_kPLF9a_SAhUGJsAKHX2LA68Q_AUIBigB) (accessed 11 April 2017).

<sup>11</sup>A fearful representation of climate change is particularly evident in human rights law: see the preamble to Human Rights Council Resolution 7/23 (2008) qualifying climate change as ‘an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights’; and the ensuing report submitted by the OHCHR to the Human Rights Council pursuant to the resolution (UN Doc. A/HRC/10/61, 15 January 2009), confirming that climate change is a major threat to human rights.

<sup>12</sup>The disease had been known to affect cows in the UK since the mid-1980s (‘BSE Crisis: Timeline’, *Guardian*, 26 October 2000). On 21 May 1995, 19-year-old Stephen Churchill died in the UK after contracting Variant Creutzfeldt-Jakob (vCJD) disease, the human variant of BSE. The young man is likely to have become ill from consuming contaminated beef. BSE is a ‘transmissible, neurodegenerative, fatal brain disease of cattle that has a long incubation period of four to five years but ultimately is fatal for cattle within weeks to months of its onset’ (see D. Freshwater and S. Maslin-Prothero (eds.), *Blackwell’s Nursing Dictionary* (2013)).

<sup>13</sup>After the first human victim, three more people died of the disease in 1995. According to the World Health Organization, 175 people in the UK and a further 49 people outside of the UK contracted vCJD between 1996 and 2011 (World Health Organization, ‘Variant Creutzfeldt-Jakob disease’ Fact sheet N°180, Revised February 2012). The many symptoms of vCJD include loss of memory, blindness, depression, and progressive loss of brain functions. There is no cure for the disease; all that can be done for patients is an attempt to alleviate the symptoms.

<sup>14</sup>H. F. Chang, ‘Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing to Fear but Fear Itself’, (2003–2004) 77 *Southern California Law Review* 743.

unjustifiable and arbitrary obstruction to trade in these products. The longstanding trade feud, also known as the ‘Beef War’, centred on questions of food safety and scientific risk assessment.<sup>15</sup>

Responses to Mad Cow Disease and beef hormones are based on valid scientific risks to human health. But ultimately, fear played an important role in shaping public sentiments and guiding political and legal positions. The widespread fear of contracting a fatal disease and fear of being seen to not respond adequately in the context of fierce public scrutiny cannot be underestimated in this context. In the *EC-Hormones* case, the EC 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.<sup>16</sup> The vehement opposition against genetically modified foods in Europe today is frequently explained by the lingering fear instilled by the BSE crisis,<sup>17</sup> even though Mad Cow Disease had nothing to do with genetic modification.

## 2. The inquiry

These are only a few examples of how fear influences international law-making. The point is not to establish whether or not such representations in the ‘scenes of fear’ described above are justified, which in the case of terrorism, climate change, and food safety certainly are. The issue is, rather, to point out the evident role that fear plays in shaping our perception of security, climate change, and food safety issues. Consequently, fear influences the way that international law develops in response to the perception of these threats. Fear has an impact on how we apprehend the world (cognition) and consequently impact on decision – and law-making. Fear may become the cause or pretext for certain narratives to be developed, and it can be instrumentally used to direct normative choices.

The central claim that this article advances is that cognition and decision-making processes are not exclusively controlled by reason. Rather, emotions are part of the cognitive process that inform and trigger the making of decisions, including law-making processes. Cognition refers to the act or process of acquiring knowledge, or the set of processes by which we come to apprehend the world.<sup>18</sup> Distinctions are commonly made between thinking (cognition) and feeling (emotion); between mind (cognition) and heart (emotion). But are these distinctions valid or useful? Is it really possible to think or to know without feeling? Or, conversely, is it possible to experience and express emotions without some kind of knowledge or perception?

Social psychologist Jonathan Haidt argues that emotions inform cognition, and that a separation between the two cannot so easily be made.<sup>19</sup> Others have made similar arguments,<sup>20</sup> going so far as to say that the ‘dichotomy between cognitive and emotional processes is obsolete’.<sup>21</sup> Martha Nussbaum has argued for a cognitive understanding of emotions, referring to emotions as ‘appraisals or value judgments’.<sup>22</sup> Law and emotions scholars have likewise addressed the connection between emotions and cognition.<sup>23</sup> Even though these authors belong to different disciplines,

<sup>15</sup>See, for an overview of the dispute, R. Johnson, ‘The U.S.-EU Beef Hormone Dispute’, Congressional Research Service, 14 January 2015.

<sup>16</sup>Appellate Report, EC – Measures Concerning Meat and Meat Products (Hormones), adopted 13 February 1998, *WT/DS26/AB/R, WT/DS48/AB/R*, DSR 1998, para. 33.

<sup>17</sup>See, for instance, M. A. Pollack and G. C. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (2009), 34.

<sup>18</sup>T. E. Lawson, ‘Cognition’, in W. Braund and R. T. McCutcheon (eds.), *Guide to the Study of Religion* (2000), 75, at 75.

<sup>19</sup>J. Haidt, ‘The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment’, (2001) 108 *Psychological Review* 814.

<sup>20</sup>R. J. Dolan, ‘Emotion, Cognition, and Behavior’, (2002) 298 *Science* 1191.

<sup>21</sup>T. Steimer, ‘The Biology of Fear- and Anxiety- Related Behaviors’, (2002) 4 *Dialogues in Clinical Neuroscience* 231.

<sup>22</sup>M. C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001), 4.

<sup>23</sup>M. Minow and E. V. Spelman, ‘Passion for Justice’, (1988) *Cardozo L. Rev.* 37.

focus on different topics, and draw different conclusions, the common understanding is that cognition cannot be seen as being entirely separated from emotions.<sup>24</sup>

The scope of inquiry of this article is rather limited, as it looks specifically at fear with a view to providing a fairly intuitive assessment of its influence on international law-making.<sup>25</sup> Quite obviously, however, this exploration will have – prospectively – broader implications for studying the relevance of emotions to international law.<sup>26</sup>

### 3. Fear: Instructions for use

To define fear in scientific terms is not the purpose of this article. We rely on common sense and personal experience to describe its characteristic traits. The sense of bewilderment and the sudden alertness of all the senses before an identifiable danger trigger a strong physical as well as emotional reaction. If fear may cause in the single individual a sense of annihilation, paralysis and impotence, in the individual within a group it usually triggers an instinct of self-defence. The primordial instinct of self-preservation, which manifests itself in situations of extreme danger, tends to materialize in the adoption of self-help measures aimed at the preservation of the life of both the individual and the group to which the individual belongs. In one of the most awesome cinematographic representations of fear, *The Birds*, Alfred Hitchcock shows dramatically well, at a time when special effects could not make up for a director's lack of talent, the reaction fear can bring about. To escape from the calamitous flock of birds – a real and readily identifiable danger – the protagonists lock themselves in the house. Self-defence is the leading instinct. Fear alerts the senses. Pieces of furniture are moved or torn away to build up barricades and block off all the openings. Nobody thinks of leaving a way out. What matters is to escape the immediate danger. There is no future.

A further question is: whose fear are we referring to? Fear can be understood as an individual emotion, and also as a collective emotion. An individual can respond to a perceived threat, and a group of people can likewise respond collectively to a perceived threat. Fear can also be understood as a discourse, 'when it "expands" beyond a specific referent to use as a more general orientation'.<sup>27</sup> Fear then 'frames' issues and places focus on 'what will be discussed, how it will be discussed, and above all, how it will not be discussed'.<sup>28</sup> Fear in this sense can also be described as 'culture of fear'.<sup>29</sup> Fear can also be used as a strategic tool to control populations, as encompassed in the term 'politics of fear'.<sup>30</sup>

Fear can be generated through language, imagery, and expert opinions. These different presentations of fear can frame our understanding of issues, and inevitably also influence law-making

<sup>24</sup>See, *infra* Section 8.

<sup>25</sup>For a more nuanced study on the manipulative transformation of psychological states of fear, angst and anxiety into logics of power and responses thereto, in the context of counterterrorism, see Bianchi, *supra* note 1.

<sup>26</sup>Kathryn Abrams and Hila Keren have identified three 'dimensions of usefulness' in emphasizing the role that emotions play in legal processes. The first is 'illumination', or studying law from the perspective of emotions with the objective of exposing the limited rationalist assumptions of law. The second is 'investigation', or studying the way that emotions are researched and understood in other disciplines in order to devise ways to understand emotions in law. The third is 'integration', or applying the work of emotions in other disciplines to specific legal problems (K. Abrams and H. Keren, 'Who's Afraid of Law and the Emotions?', (2010) 94 *Missouri L. Rev.* 1997, at 2033 ff.).

<sup>27</sup>D. L. Altheide, *Creating Fear: News and the Construction of Crisis* (2002), 3.

<sup>28</sup>D. L. Altheide and R. Sam Michalowski, 'Fear in the News: A Discourse of Control', (1999) 40 *The Sociological Quarterly* 478.

<sup>29</sup>F. Furedi, *Culture of Fear* (1997. Revised 2002 and 2007).

<sup>30</sup>C. Robin, *Fear: The History of a Political Idea* (2004); F. Furedi, *The Politics of Fear: Beyond Left and Right* (2005); A. Gourevitch, 'Environmentalism—Long Live the Politics of Fear', (2010) 22 *Public Culture* 411. Fear also takes a central position, albeit perhaps more implicitly, in the rich literature on risk and modernity, with sociologists Ulrich Beck and Anthony Giddens as pioneers in these discussions: see U. Beck, *Risk Society: Towards a New Modernity* (1992); A. Giddens, *The Consequences of Modernity* (1990).

processes. In this section heuristic tools will be provided with a view to illustrating how individual and collective psychological states can be used to direct normative choices.

Fear inspired the narrative that led to the adoption of the Paris Agreement. In September 2015, President Hollande stated before the UN General Assembly that reaching an agreement on climate change in Paris was the last chance to save humankind.<sup>31</sup> The US decision to withdraw from the Paris Agreement in 2017 was met with great dismay across the globe, further reinforcing the rhetoric of fear.<sup>32</sup> Political demagoguery, expert opinion, and communication skills are on display on all sides with fear featuring prominently in any relevant discourse.<sup>33</sup>

Similar considerations apply to the rhetoric of the ‘war on terror’, and the choice to frame the fight against international terrorism, in both legal and political terms, as a ‘war’. Once again, it is reasonable to speculate that the choice to have recourse to the vocabulary and the legal categories of the laws of war may have been prompted by the fear of the then ‘unknown’ magnitude and striking capacity of al-Qaeda. It is of note that more recently France resorted to the same idea of the ‘war on terror’ after the Paris attacks. The consequences of framing the reaction to international terrorism in terms of ‘war’ have had a significant impact on law-making and other important decision-making processes. The US resorted to the use of force against Afghanistan, and France intensified its participation in the coalition bombing the Islamic State, adopting individual self-defence as a legal justification for such a use of force.<sup>34</sup> In terms of law-making too, the consequences are self-evident. The US resorted to a number of normative measures largely inspired by the need to react to a war-like situation and France adopted a state of emergency to cope with the terrorist threat.

Words are not the only vehicle to create narratives emphasizing fear. Images, both photographs and TV footage, may be used as vehicles to convey fears to a social group.<sup>35</sup> The US Secretary of State Colin Powell’s use of satellite imagery (later proved to be a sham) to convince the SC and the world that Iraq had developed a nuclear programme and that, therefore, military action to prevent an attack was necessary, can also be seen as an exercise in using images with a view to instrumentally use the fear generated by them. Along similar lines, TV footage and journalistic reports have often acted as a catalyst for international law-making. It is well known that the SC’s intervention under Chapter VII of the UN Charter in both Bosnia-Herzegovina and Rwanda were prompted by the strong reaction of world public opinion (and national political constituencies) to the appalling images coming from both places.

The use of imagery equally applies to the climate change narrative, and within a broader context of environmentalism since Rachel Carson’s *Silent Spring* published in 1962 and the Club of Rome’s *Limits to Growth* report of 1972. Images of doom and gloom are inherent in

<sup>31</sup>His exact words were: ‘Je vous l’assure ici et je vous l’affirme tout net: si ce n’est pas à Paris, ce sera trop tard pour le monde.’ (‘I can assure you - and let me state this clearly - that if we do not take action in Paris, it will be too late for the world.’). Full text available at [gadebate.un.org/sites/default/files/gastatements/70/70\\_FR\\_fr.pdf](http://gadebate.un.org/sites/default/files/gastatements/70/70_FR_fr.pdf) (accessed 11 April 2017).

<sup>32</sup>See, for instance, ‘Paris Climate Deal: Dismay as Trump Signals Exit from Accord’, *BBC News*, 2 June 2017, available at [www.bbc.co.uk/news/world-us-canada-40128431](http://www.bbc.co.uk/news/world-us-canada-40128431) (accessed 29 April 2019).

<sup>33</sup>Fear has a central place in Mike Hulme’s extensive work on representations of climate change: see M. Hulme, *Why We Disagree About Climate Change – Understanding Controversy, Inaction and Opportunity* (2009); *Weathered: Cultures of Climate* (2017). Even recently Hulme has warned against what he sees as the excessive alarmism with which climate change discourse is infused (M. Hulme, ‘Against Climate Emergency’, 17 October 2018, available at [mikehulme.org/against-climate-emergency/](http://mikehulme.org/against-climate-emergency/) (accessed 29 April 2019); and specifically on Trump’s withdrawal from the Paris Agreement: M. Hulme, ‘One Man Does Not Control the Climate’, 2 June 2017, available at [mikehulme.org/one-man-does-not-control-the-climate/](http://mikehulme.org/one-man-does-not-control-the-climate/) (accessed 29 April 2019)).

<sup>34</sup>See the statement by the French Permanent Representative to the UN (UN Doc. S/PV.7565 (20 November 2015)), at 2. A couple of months earlier, France had addressed a letter to the SC to justify its military strikes against Islamic State on the basis of Art. 51 (see Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and to the Security Council (UN Doc. S/2015/745)).

<sup>35</sup>See S. Sliwinski, *Human Rights in Camera* (2011); J. Butler, *Frames of War: When is Human Life Grievable?* (2009); R. Bleiker (ed.), *Visual Global Politics* (2018).

representations of climate change and environmental degradation.<sup>36</sup> Think only of the enormous impact of Al Gore's film, *An Inconvenient Truth*, and more recently Leonardo Di Caprio's documentary, *Before the Flood*. How can law-makers possibly not be influenced by these powerful and fear-inducing images?

Fearful language and imagery likewise play an important role also in the heated debates surrounding food safety, in particular focused on genetically modified foods. The terms 'Beef War' and 'Mad Cow Disease' reflect anxious undertones and further reinforce fear of certain foods, whether or not such fears are grounded on scientific evidence. Food activists regularly refer to genetically modified foods as 'Frankenfoods', underscoring the potential calamitous effects of tweaking with nature.<sup>37</sup> A common image associated with genetically modified foods, which applies also to beef hormones, is one of syringes stuck in food. Such images emphasize the 'unnaturalness' of such foods and augment fears and anxieties related to food safety.

The point here is not to evaluate whether the SC's action was ineffective, belated, or both. The point is also not to assess to what extent fearful representations of climate change are justifiable (or 'true'), or to judge the validity of fears related to genetically modified foods. Our aim is to highlight the role that fear and arguably other collective psychological states may have on international legal processes.<sup>38</sup> But if the link between fear and international legal decision-making processes is so obvious, why is it that it is hardly acknowledged in international legal scholarship?

#### 4. The rule of reason

Most likely the answer to our last query lies in the 'rule of reason' in (international) law. Law is still predominantly based on rationalist assumptions. We presume or posit that decisions are taken and law is made by way of rational determination: we apprehend reality in a rational way and we rationally determine what must be done. Emotions do not play a role in this; in fact, effort is made to keep emotions out of law-making and judicial reasoning as much as possible.<sup>39</sup> This is indissolubly linked to the myth of the objectivity and neutrality of the law. Also, the impartiality of judges is often times associated with the idea that judges can only be guided by rationality and the strict application of the law, and they can never be influenced by their emotions. As Scalia and Garner write '[g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions'.<sup>40</sup>

The concept of 'legal rationality' or, more simply, 'reason' plays a major role as an ordering and validating factor. Reason appears to be the way in which traditionally law is represented. It is the medium that hosts legal reasoning and interpretation, and by which legal opinions and scholarly writings are predominantly expressed. Reason reflects the law's claim to objectivity and neutrality, and it helps keep sentiment, interest, and power at bay. The entire legal world is 'enchanted' by reason.<sup>41</sup> Reason

<sup>36</sup>See *supra* note 10.

<sup>37</sup>See H. Miller and G. Conko, *The Frankenfood Myth: How Protests and Politics Threaten the Biotech Revolution* (2004).

<sup>38</sup>In the field of counterterrorism, for example, after the instinctive reaction of fear following the 9/11 attacks, leading to the adoption of legal measures which will subsequently turn out to encroach on fundamental human rights, the next phase, characterized by a collective state of anguish and anxiety, soon proved to be fertile ground for power assertions and manipulation strategies by several actors. States took advantage of the widespread collective climate of anguish and uncertainty (in which collective judgments, often times Manichean, can be easily influenced and critical spirit and the sense of individual responsibility are weakened or altogether absent) to impose repressive policies and to increase consent amongst a population rightly worried of its own security. At some point, however, in a sudden reversal of fortune, civil society turned its anxiety against the state and international organizations increasingly perceived as cynical violators of fundamental rights and liberties (Bianchi, *supra* note 1, at 179–90).

<sup>39</sup>T. Maroney 'Law and Emotion: A Proposed Taxonomy of an Emerging Field', (2006) 30 *Law and Human Behavior* 119, at 120.

<sup>40</sup>A. Scalia and B. A. Garner, *Making Your Case – The Art of Persuading Judges* (2008), 32.

<sup>41</sup>P. Schlag, *The Enchantment of Reason* (1998). Although Schlag limits the scope and import of his remarks to American law, his insights are perfectly applicable to international law as well.

functions as both a transcendental and ordering factor asserting its superiority over ‘other sources of belief such as dogma, bias, prejudice, experience, perception, revelation, and tradition’, while at the same time operating in a mundane, ‘immanent role’ as regards the systematization of legal materials. The latter are scrutinized, assembled, summarized and presented in a way, as conforming to reason. Reason represents the quest for a unifying thread by which the case law of the different tribunals can be reconciled, the stance taken by a human rights monitoring organ is connected with emergent trends in practice, the various theories on the constitutive elements of custom are brought to bear on a fragmented practice, judgments are analysed as much as possible according to the prism of reasonableness, and so on and so forth. Frames are constantly constructed and used to represent international legal processes as if they were the product of an abstract rationality which becomes the benchmark for justifying choices already made. What is required by reason often goes without saying. It has the dubious advantage of not having to justify its demands.

Contemporary simulacrum of the rule of reason, the rational choice methodology imported from social science methodologies and widely applied in legal studies nowadays presupposes that individuals (and states) will act rationally and strategically to maximize their utility on the basis of a set of preferences.

The pros of rational choice are relatively easy to spot. The versatility of rational choice and its suitability to being applied to almost any actor, to a wide array of activities and behaviour, and virtually to any domain could be regarded as an asset.<sup>42</sup> The pitfalls, however, are numerous. First, the formation of preferences remains the methodology’s ‘blind spot’ as there is hardly any ‘suggestion about how preferences come about’.<sup>43</sup> Second, when dealing with aggregated actors such as states and international organizations it is not easy to refer to them as ‘unitary actors’ characterized by individual decisions and choices. By definition, collectives have a variety of beliefs, goals and preferences that cannot be easily amenable within the narrow boundaries of individual decision-making. Finally, models conceived to explain behaviour in one context may not be easily transposed lock, stock and barrel to another dramatically different context claiming the same explanatory force. Domestic contracting theories may not be so easily brought to bear on treaty formation.

Furthermore, as suggested by Robert Keohane, the rational choice model has to be taken with a grain of salt. Rationality must be carefully defined and not equated only to materialistic self-interest. If cleverly used, rational choice theory can shed light on causal mechanisms and the way in which they work. It may solve specific puzzles but it may also generate puzzles, as the theory in question is particularly good at asking questions and undermining conventional answers.<sup>44</sup> The risk for Keohane is the ‘sin of *hubris*’, the fatal flaw of the hero in Greek tragedies. This could be:

also the flaw of many technically highly-competent analysts, who believe that their command of mathematically difficult techniques provides them with a unique key to the nature of social reality, and who forget that rational-choice techniques are better at generating hypotheses than providing answers.<sup>45</sup>

In other words, rational choice theory should not induce ‘to ignore historical context, overlook the role of values, or dismiss variation in preferences as unimportant’.<sup>46</sup>

Economists themselves suggest exercising caution about an unconditional belief in the explanatory power of rational choice models. Amartya Sen highlighted that it is relatively easy to define broadly a person’s interests so that ‘no matter what he does he can be seen to be furthering his own

<sup>42</sup>A. Thompson, ‘Applying Rational Choice Theory to International Law: the Promise and Pitfalls’, (2002) 31 *Journal of Legal Studies* S285, S287 ff.

<sup>43</sup>N. Petersen, ‘How Rational Is International Law?’, (2009) 20 *EJIL* 1247, at 1258.

<sup>44</sup>R. O. Keohane, ‘Rational Choice Theory and International Law: Insights and Limitations’, (2002) 31 *Journal of Legal Studies* S307.

<sup>45</sup>*Ibid.*

<sup>46</sup>*Ibid.*, at 319.



interests in every isolated act of choice'.<sup>47</sup> As the saying goes: 'if all you have is a hammer, everything looks like a nail!'<sup>48</sup>

## 5. Challenging the rational paradigm

A fairly radical challenge to rational choice has been made by the recent emergence of behavioural Law & Emotions (L&E),<sup>49</sup> which mirrors, or at least echoes, the steady advance of behavioural economics, cognitive psychology,<sup>50</sup> and political psychology.<sup>51</sup> The approach has been widely popularized by such bestselling books as *Predictably Irrational*<sup>52</sup> and *Thinking, Fast and Slow*<sup>53</sup> and hardly needs to be introduced. Basically, behavioural economics and cognitive psychology take issue with the rationality model used by economists and political scientists, and set out to construct a more realistic model to explain human behaviour, paying due heed to systematic heuristics and biases contradicting the assumptions of rational choice theory. More generally, behavioural research in its different components and strands of scholarship is geared towards explaining decision-making processes of different actors in different settings.<sup>54</sup>

Standard rational choice theory assumes that preferences are independent of circumstances and that individuals deciding rationally will always decide the same. Behavioural studies have created the notion of 'bounded rationality' to show that rationality is limited by information, time and cognitive frameworks. Such limitations induce a number of biases that end up influencing decisions. Prospect theory, based on experiments carried out on individuals, has shown that people may make different decisions about probabilistic alternatives involving risks on the basis of a number of 'biases'.<sup>55</sup>

Rationality is thus 'bounded' as 'individuals are incapable of rational utility-maximization because of the way the human mind processes information and reacts to particular circumstances'.<sup>56</sup> Also human will is 'bounded', as evidenced by numerous experiments.<sup>57</sup> People adopt inconsistent

<sup>47</sup>A. K. Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory', (1977) 6 *Philosophy & Public Affairs* 317, at 322.

<sup>48</sup>A. Maslow, *The Psychology of Science: A Reconnaissance* (1966), 15.

<sup>49</sup>See, for example, R. B. Korobkin and T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', (2000) 88 *Calif. L. Rev.* 1051. For a general overview see C. R. Sunstein (ed.), *Behavioural Law and Economics* (2000).

<sup>50</sup>For an early critique of the *homo oeconomicus* see H. A. Simon, 'A Behavioural Model of Rational Choice', (1955) 69 *Q.J. Econ.* 99. On behavioural economics and psychology see D. Kahneman and A. Tversky, 'Prospect Theory: An Analysis of Decisions Under Risk', (1979) 47 *Econometrica* 263; A. Tversky and D. Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases', (1974) 185 *Science* 1124; G. Gigerenzer and P. M. Todd, *Simple Heuristics That Make Us Smart* (1999); G. Gigerenzer and R. Selten, *Bounded Rationality: The Adaptive Toolbox* (2002).

<sup>51</sup>See the seminal work of R. Jervis, *Perception and Misperception in International Politics* (1976). For a convenient synopsis see J. Goldgeier and P. Tetlock, 'Psychological Approaches', in C. Reus-Smit and D. Snyder (eds.), *Oxford Handbook of International Relations* (2008), 462. The distinctive feature of these approaches is their focus on the individuals in decision-making processes, on context broadly understood as well as on the unique character of situations in which the decision-making process takes place.

<sup>52</sup>D. Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (2008). See also by the same author, *The Upside of Irrationality. The Unexpected Benefits of Defying Logic* (2010).

<sup>53</sup>D. Kahneman, *Thinking, Fast and Slow* (2011).

<sup>54</sup>Anne van Aaken and Tomer Broude have recently introduced behavioural L&E in international law scholarship, and have suggested in their respective works that some of the insights of the theory might provide interesting avenues of research and analysis in the discipline. A. van Aaken, 'Behavioural International Law and Economics', (2014) 55 *Harvard Int'l L.J.* 421; T. Broude, 'Behavioural International Law', (2015) 163 *Univ. of Pennsylvania L. Rev.* 1099.

<sup>55</sup>On the early formulation of the theory see Kahneman and Tversky, 'Prospect Theory: an Analysis of Decision under Risk', *supra* note 50.

<sup>56</sup>T. Broude, 'Behavioural International Law', (2015) 163 *Univ. of Pennsylvania L. Rev.* 1117.

<sup>57</sup>The terminology of bounded rationality, willpower and self-interest is used extensively in the literature and is borrowed from the taxonomy proposed by C. Jolls, C. R. Sunstein and R. H. Teiler, 'A Behavioural Approach to Law and Economics', in C. R. Sunstein (ed.), *Behavioural Law and Economics* (2000), 13.

behaviour over time due to weakness of will and other reasons, and they make mistakes. By the same token, self-interest is also bounded so as to modify the substance of individual preferences. Rational choice theory presupposes that actors are always guided by maximization of their material self-interest, whereas behavioural economics experiments suggest that people are often influenced by altruistic and social preferences, and concern for the well-being of others.<sup>58</sup> Moreover, people expect to be treated fairly by others, so much so that fairness would be embedded in human rationality. Intentions would also be important and trust and reputation would be dependent not just on outcomes but also on intentions. Behavioural L&E integrates all these elements such as intentions, ideas and beliefs into economic analysis, and attempts to preserve the idea of strategic behaviour by adjusting game theory to such behavioural insights.<sup>59</sup>

'Neuroscience and law' instead focuses on the physical processes that take place in the brain to explain human behaviour, including the operation of decision-making processes. The traditional view has long been that the brain is compartmentalized and functionally specialized. In particular, cognition and emotion would be juxtaposed and believed to concern different areas of the brain, respectively the lateral prefrontal cortex and the amygdala. However, this view has been challenged lately by a more integrated vision of such processes that emphasizes the high degree of connectivity of the brain (both structural and functional).<sup>60</sup> This would seem to indicate that cognitive and emotional interactions would activate at the same time certain 'hubs' in the brain characterized by a regulatory function of integrating and exchanging information between the different brain areas.<sup>61</sup> The finding that 'at some point of processing, functional specialization is lost, and emotion and cognition conjointly and equally contribute to the control of thought and behaviour' takes away much of the determinism inherent in the functional distinction between cognitive and emotional processes at the level of the brain.<sup>62</sup>

Although somewhat allied against the tyranny of the traditional rational paradigm, behavioural L&E and 'neuroscience and law' do not radically depart from it and do not deal, but occasionally, with emotions. On the one hand, behavioural L&E by characterizing deviations from rational behaviour as 'bias' ends up reinforcing the centrality of the rational paradigm which is assumed to be the norm.<sup>63</sup> On the other hand, 'neuroscience and law' by its 'exclusive focus on the brain – as the traditional locus (and image) of human cognition and response – accords with the pre-existing frame of law as a rational system'.<sup>64</sup> Furthermore, it 'is based on measurable indices and replicable methods that confer the epistemological benefits of "hard" science'.<sup>65</sup> 'Law and emotions' scholarship does not involve the same scientific method, and does not view emotions – and behaviour reflecting emotions – as a deviation from rationality, but as an additional influence on cognition.<sup>66</sup>

## 6. Cognitive processes and emotions

The prevailing rational paradigm obscures the potential for using emotions as a heuristic tool to explain normative decision-making processes in specific political and societal settings. Yet, even intuitively, to exclude the relevance of emotions to choice and decision-making processes is

<sup>58</sup>E. Fehr and K. M. Schmidt, 'The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories', in S. Kolm and J. Mercier-Ythier, *Handbook of the Economics of Giving, Altruism and Reciprocity*, Vol. 1 (2006), 621.

<sup>59</sup>C. F. Camerer, *Behavioral Game Theory: Experiments in Strategic Interaction* (2003).

<sup>60</sup>See *infra* Section 6.

<sup>61</sup>L. Pessoa, 'On the relationship between emotion and cognition', (2008) 9 *Neuroscience* 148. More extensively, by the same author, see *The Cognitive-Emotional Brain: From Interactions to Integration* (2013).

<sup>62</sup>J. R. Gray, T. S. Braver and M. E. Raichle, 'Integration of emotion and cognition in the lateral prefrontal cortex', (2002) 99 *Proc. Nat'l Acad. Sci. USA* 4115.

<sup>63</sup>Abrams and Keren, *supra* note 26, 2020.

<sup>64</sup>*Ibid.*, 2020.

<sup>65</sup>*Ibid.*

<sup>66</sup>See, *infra* Section 8.

unrealistic. This is confirmed by recent neuroscience studies that draw attention on the impact of emotions on cognition. The impact of anxiety on cognition and behaviour has been recently analysed by researchers.<sup>67</sup> Threats of shock and anxiety disorders, for instance, may lead to harm-avoidant, loss aversion decision-making. Behaviour can thus become conservative and more cautious, and under threat of shock there may be premature responding before all options are actually disclosed.<sup>68</sup> By the same token behavioural economics accords an increasing importance to emotions in the determination of choice and the perception of utility outcomes.<sup>69</sup>

The dichotomy between emotions – associated with chaos, female, subjectivity – and rationality – associated with order, male, objectivity – seems to be giving way to a more holistic conception of cognition. In such perspective, emotions can no longer be considered as deviations from rationality, but rather a ‘distinct and significant supplemental means of apprehending the world’.<sup>70</sup> The fact that emotions are closely intertwined with cognitive processes, make them relevant to assessing how reality is apprehended and processed, and how decision-making processes are triggered and implemented. This investigation does not only concern individuals but also groups and large social communities. This point is essential to understanding the ‘social situatedness’ of emotions. Emotions do not only originate and end in the private sphere of individuals. They can be shaped and informed by the interaction of the individual with the wider community, and they can represent and give expression to shared experiences.<sup>71</sup>

Incidentally, law – in and of itself a social phenomenon – can be used as a vehicle ‘for expressing society’s collective responses. In this role, law serves to mirror, project, or in some cases support or amplify, an emotion that is already present’.<sup>72</sup> The well-known debate about criminal law and punishment being a means of expressing society’s reprehension and disgust at such deviant behaviour as hate crimes is an apt example of this.<sup>73</sup> Law can be used in a variety of different ways to modify and contain or channel emotions in a given context. Law, for instance, can be used to rationalize and possibly to satisfy such a powerful emotion as vengeance.<sup>74</sup> Most prominently for our purposes, law can be used to counter fear, to reassure and appease constituencies, or even to take advantage of the widespread collective climate of anguish and uncertainty to impose repressive policies and to increase consent amongst a population rightly worried of its own security.<sup>75</sup>

The collective dimension of emotions and their being embedded in society and culture represent an interesting connection to cognitive sociology, with its emphasis on the relationship between individual and society, the mind and the social.<sup>76</sup> It would be curious indeed if a cognitive

<sup>67</sup>O. J. Robinson et al., ‘The impact of anxiety upon cognition: perspectives from threat of shock studies’, (2013) 7 *Frontiers in Human Neuroscience* 1.

<sup>68</sup>*Ibid.*, at 11.

<sup>69</sup>D. Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’, (2003) 93 *Am. Econ. Rev.* 1149, at 1457.

<sup>70</sup>Abrams and Keren, *supra* note 26, at 2000. The authors draw an interesting parallel to Nussbaum’s theory (see M. C. Nussbaum, *Love’s Knowledge. Essays on Philosophy and Literature* (1990)) that to read literature helps lawyers orientating in the philosophical inquiry of ethical questions. Likewise, to know better the emotional world would be instrumental to better apprehend the different dimension of human experience and decision-making (*ibid.*, at 2033).

<sup>71</sup>Abrams and Keren, *supra* note 26, at 2071.

<sup>72</sup>*Ibid.*, at 2051.

<sup>73</sup>D. M. Kahan, ‘The Progressive Appropriation of Disgust’, and M. C. Nussbaum, ‘The Secret Sewers of Vice: Disgust, Bodies and the Law’, both in S. A. Bandes (ed.), *The Passions of Law* (2010), respectively at 63 ff. and 19 ff.

<sup>74</sup>R. C. Solomon, ‘Justice v. Vengeance: On Law and the Satisfaction of Emotion’, in Bandes, *supra* note 73, at 43 ff.

<sup>75</sup>A. Bianchi, *supra* note 1.

<sup>76</sup>E. Zerubavel, *Social Mindscapes: An Invitation to Cognitive Sociology* (1997), relating cognition to socially and culturally mediated mechanisms of perception. Zerubavel’s and other cognitive sociologists’ aversion to neuroscience has been recently called into question. In particular, Karen Cerulo has invited cognitive sociologists to engage with neuroscience, with a view to better understanding the different dimensions of cognitive processes: see K. A. Cerulo, ‘Mining the Intersections of Cognitive Sociology and Neuroscience’, (2010) 38 *Poetics* 115.

sociology approach to (international) law were to disregard the emotional dimension of cognition and the numerous interactions between the operation of the individual's mind in its broader societal context.<sup>77</sup> Just as we do not think and learn 'alone',<sup>78</sup> as individual units with no social context, why should one presuppose that what we feel is not equally shaped or influenced by the society we live in? Individuals and groups alike can experience fear, as many other emotions. The way in which fear is felt and its consequences on decision-making are experienced is a variable that can be strongly influenced by all relevant circumstances, including the predisposition of individuals and the culture of the group to which they belong.

In neurosciences similar developments have occurred. In his ground-breaking work *Descartes' Error*, neuroscientist Antonio Damasio paved the way for developing an integrated approach to studying the processing of emotions and reasoning by brain systems.<sup>79</sup> According to Damasio the Cartesian dissociation of body and mind, the habit of thinking of mental activities, on the one hand, and of physical and emotional states, on the other hand, as distinct or juxtaposed has unduly influenced the Western vision of the world. Based on the study of patients who had suffered brain damage and as a consequence had their ability to feel emotions, to reason, and to take decisions significantly impaired, Damasio developed a keen interest in assessing how emotions can play an important role in shaping rationality and in influencing decision-making processes. Scientifically, this would be the result of the inter-connectivity and inter-related functions of several brain systems. The fact that the same brain systems process both feelings and rationality induce a reconsideration of the traditional Cartesian perspective on body and mind. Also, in his later work, Damasio has attempted to show how the mind and its activities, including reasoning, and the way in which the body feels are indissolubly linked.<sup>80</sup>

In a similar vein, neuroscientist Lisa Feldman Barrett has recently argued for shifting the focus from brain to mind, a mind that 'is not a battleground between opposing inner forces – passion and reason – that determine how responsible you are for your behaviour. Rather, your mind is a computational moment within your constantly predicting brain'.<sup>81</sup> There is no separation between emotions and cognition in the brain; emotions are just not neatly wired and produced mechanically by certain regions. Several brain areas are in fact involved in producing emotions that are then shaped by individual previous experiences and by the surrounding culture. The complexity of the human brain and its being wired to its physical and social surroundings 'ultimately produc[es] different kinds of minds'.<sup>82</sup> In her theory of constructed emotions, Feldman Barrett insists on the relevance of our surroundings and culture on the wiring diagram of our brain that does not operate statically as 'a set of instructions for a single kind of mind with universal mental organs'.<sup>83</sup>

Referring more specifically to law, Feldman Barrett notes that the bias against emotion is still present in most legal systems. The widespread bias that the 'human mind is a battlefield for reason and emotion', and that cognitive control and rationality must prevail over '[e]motions . . . seen as rapid, automatically triggered reactions spewing from your ancient, inner beast',<sup>84</sup> is still prevailing in contemporary legal culture. The idea is that:

<sup>77</sup>The notion of 'sociological imagination', developed by C. Wright Mills (*The Sociological Imagination* (1959)), refers to the capacity individuals should have to think imaginatively of themselves and their experiences in the broader context of society, thus transcending their individuality and situated point of view.

<sup>78</sup>P. Fernbach and S. Slovic, *The Knowledge Illusion. Why We Never Think Alone* (2017).

<sup>79</sup>A. Damasio, *Descartes' Error. Emotion, Reason and the Human Brain* (1999).

<sup>80</sup>See, among others, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (1999); *Self Comes to Mind – Constructing the Conscious Brain* (2010); and the all too recent *The Strange Order of Things* (2018).

<sup>81</sup>L. Feldman Barrett, *How Emotions Are Made – The Secret Life of the Brain* (2017), 282.

<sup>82</sup>*Ibid.*, at 285.

<sup>83</sup>*Ibid.*, at 284.

<sup>84</sup>*Ibid.*, at 222.

[y]our amygdala spies an open cash register. But then, as the story goes, you rationally consider your likelihood of jail time, which causes your prefrontal cortex to slam on the brakes and stop your arm from dipping into the drawer.<sup>85</sup>

While '[t]he illusion of a two-system brain is a byproduct of a century-old, flawed experimental design', it is true that 'our laws maintain the illusion'.<sup>86</sup> The very 'standard of the reasonable person, and the social norms behind it, is not merely reflected in the law – it is created by the law'.<sup>87</sup> The simplistic approach based on the brain compartmentalization may have thrived on the need for the law to rely on simple, single causes to explain people's behaviour. In fact, from the perspective of contemporary neurosciences, behaviour is the result of numerous concurring factors including the interaction of several neuronal networks within our brain as well as our interaction with other individuals around us that may affect the way in which our brain reacts and produces further predictions.

### 7. The impact of fear on legal decision-making: Recent examples

In addition to the examples foregrounded at the outset to provide illustrations of the impact of fear on decision-making, one could add more recent examples where the interplay between the societal dimension of fear and law-making comes to the fore again. It suffices to point to the widespread alarm generated by the refugee crisis stemming from the conflict in Syria and neighbouring Iraq. The flow of asylum seekers trying to get into Europe from the Mediterranean Sea or from Turkey through Greece sparked a political crisis and spread fear across Europe on a most threatening alleged invasion of asylum seekers. Regardless of the figures actually involved, the rhetoric of fear widely used by politicians and the media alike spurred a widespread sentiment that the demise of Europe as a political and cultural entity was at risk. Even the President of the European Council identified 'the migration and refugee crisis' with 'an existential challenge for the EU',<sup>88</sup> thus fueling the heated debates in the domestic politics of the member states on the risk of seeing a huge flux of asylum seekers disrupt social equilibrium and national identity.

As a result of the ensuing tension, the EU, rather than assessing critically the efficacy of its asylum policy as expressed in the Common European Asylum System, reinforced some of its more controversial tenets such as 'maintaining the policy of containment of refugee outside the EU through indiscriminate migration control and, second, strengthening possibilities to send asylum seekers to third states without examining their protection claims'.<sup>89</sup> Most significantly, however, the EU rushed to strike a deal with Turkey in March 2016 that can be fairly considered as a hasty normative response to the 'crisis' of asylum seekers arriving in Greece from Turkey.<sup>90</sup> This response dictated by the fear that the flux of asylum seekers might become uncontrollable (most likely coupled with the fear of an ever increasing criticism towards the EU's inability to affectively tackle the crisis) was hardly considerate of the risks for asylum seekers to be sent back to Turkey, a country previously considered non-safe by the EU and by the Council of Europe. It was also presumably inconsistent with the requirement of Article 78(1) of the Treaty on the Functioning of the EU that the EU asylum policy must be consistent with the 1951 Geneva Convention and its 1967 Protocol.<sup>91</sup>

<sup>85</sup>*Ibid.*, at 223.

<sup>86</sup>*Ibid.*, at 224.

<sup>87</sup>*Ibid.*, at 225.

<sup>88</sup>Report by President Donald Tusk to the European Parliament on the outcome of the December European Council, Statement 16/17 of 19 January 2016, § 2.

<sup>89</sup>V. Chetail, 'Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System', (2016) 5 *European Journal of Human Rights* 584, at 588.

<sup>90</sup>EU-Turkey Statement, Press Release 144/16, 18 March 2016.

<sup>91</sup>*Ibid.*, at 592.

The point once again is to emphasize that fear is often a cause for the hasty adoption of not very well thought out normative responses to face a perceived threat or danger. Likewise, the fear generated by the wave of terrorist attacks in Paris in November 2015 prompted an immediate normative response, namely the adoption of a state of emergency, which derogated from several human rights. Once again fear appears to have been the primary trigger for the state of emergency. President Hollande acknowledged fear in his speech to the nation on the very day of the Paris attacks, and stated that the Nation would react to the fear and defeat the terrorists.<sup>92</sup> The state of emergency declared on the basis of a 1955 statute was notified to the Council of Europe on 24 November 2015, together with a notice of derogation under Article 15 of the ECHR.<sup>93</sup> The state of emergency was regularly renewed until November 2017. At the end of October 2017, the French Parliament adopted a law on enhancing domestic security and the fight against terrorism, by which – controversially – some of the security measures provided for by the state of emergency regime have been turned into legislation and thus made permanent.<sup>94</sup>

## 8. Fear & co.: Emotions and the law

In the panoply of movements and schools of thought of an interdisciplinary nature that have recently emerged in legal scholarship, epitomized by the acronym Law & ..., ‘Law & Emotions’ has acquired some prominence, particularly in domestic law.<sup>95</sup> The gist of Law and Emotions is not simply to challenge rationalist accounts of law and law-making processes. Rather, they want to stress ‘the vital role of the emotions in human life and in the life of the law’.<sup>96</sup> Primarily focused on domestic law and on particular areas such as criminal law, family law, financial regulation and security markets, ‘Law & Emotions’ has offered interest insight also on the relevance and impact of fear on different aspects of the law. It suffices to think of Cass Sunstein’s work on the alteration of risk perception under conditions of fear,<sup>97</sup> or Simon’s study on the use of security laws to create a culture of fear.<sup>98</sup>

<sup>92</sup>President Hollande’s statement is available at [www.elysee.fr/chronologie/#e11544,2015-11-13,declaration-du-president-de-la-republique-a-la-suite-de-des-attaques-terroristes-a-paris](http://www.elysee.fr/chronologie/#e11544,2015-11-13,declaration-du-president-de-la-republique-a-la-suite-de-des-attaques-terroristes-a-paris) (accessed 11 April 2017).

<sup>93</sup>The notice of derogation can be read at [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=N5hF4XrW](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW) (accessed 11 April 2017). The request had been regularly renewed until it was eventually withdrawn at the end of October 2017 with a public announcement by French President Macron before the European Court of Human Rights.

<sup>94</sup>*Loi no 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, in *JORF no 0255 du 31 octobre 2017, texte no 1*, available at [www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/texte](http://www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/texte) (accessed 13 February 2018).

For a comment in English on the government bill that led to the statute see C. Haguenu-Moizard, ‘The French Antiterrorist Bill: A Permanent State of Emergency’, *VerfBlog*, 9 August 2017, available at [verfassungsblog.de/the-french-antiterrorist-bill-a-permanent-state-of-emergency/](http://verfassungsblog.de/the-french-antiterrorist-bill-a-permanent-state-of-emergency/) (accessed 29 April 2019).

<sup>95</sup>On ‘Law and Emotions’, besides the already cited Abrams and Keren, *supra* note 26; Maroney, *supra* note 39; and Bandes, *supra* note 73; see H. Conway and J. Stannard (eds.), *The Emotional Dynamics of Law and Legal Discourse* (2016); T. A. Maroney, ‘A Field Evolves: Introduction to the Special Section on Law and Emotion’, (2016) 8 *Emotion Review* 3; R. Grossi, ‘Understanding Law and Emotion’, (2015) 7 *Emotion Review* 55; S. Bandes and J. A. Blumenthal, ‘Emotions and the Law’, (2012) 8 *Annual Review of Law and Social Science* 161; C. R. Sunstein, ‘Probability Neglect: Emotions, Worst Cases, and Law’, (2002) 112 *The Yale Law Journal* 61; B. Lange, ‘The Emotional Dimension of Legal Regulation’, (2002) 29 *Journal of Law and Society* 197; E. A. Posner, ‘Law and the Emotions’, (2001) 89 *Georgetown Law Journal* 1977; ‘Symposium on Law, Psychology, and the Emotions’, (2000) 74 *Chicago-Kent L. Rev.* 1423; P. Harris and M. M. Schultz ‘“(another) Critique of Pure Reason”: Toward Civic Virtue in Legal Education’, (1993) 45 *Stan. L. Rev.* 1773.

<sup>96</sup>Abrams and Keren, *supra* note 26, at 2073.

<sup>97</sup>C. R. Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (2005).

<sup>98</sup>J. Simon, *Governing through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007).

Rather than an act of adherence to the above-mentioned scholarly movement, the present article merely represents an attempt to illustrate how one particular emotion – fear – may be relevant to understanding some international decision-making processes.<sup>99</sup> Our decision to focus on one individual emotion was prompted not so much by the finding in neuroscience research that different emotions may be regulated differently and trigger various areas in the brain and, therefore, may require separate analysis.<sup>100</sup> Our choice was simply determined by the fact that in our separate work we had come to the conclusion that this particular emotion had an influence on law-making at both domestic and international levels.

Rather than generalizing our findings and turn them into a general theory, for the time being we are simply inviting international legal scholarship to start looking at the role of certain emotions in international legal processes. The peculiarities of the international legal system, as compared to a domestic law setting, may warrant accurate consideration of such specificities. Different methodologies may be used to assess the relevance of the intuition about the influence of emotions on law-making processes in different areas and in relation to different emotions.<sup>101</sup>

The idea that emotions are alien to law-making and, more generally, to any kind of decision-making is utterly unrealistic. To portray such processes as exercises in abstract rationality is both naïve and simplistic. Not only do emotions play a role in shaping our perception of events and our reaction to them as individuals; they also play a major part in determining social identities and culture, in shaping beliefs and collective attitudes. The fear that emotions may alter the rationality and impartiality of the law is unfounded. Feelings and sentiments are not chemical defects that one finds on the losing side.<sup>102</sup> The idea that there is alchemy between law and life is not so strange after all;<sup>103</sup> it is rather an inescapable truth! And if emotions are part of life – as they surely are – then they must be part of law as well. It is the belief in law without emotions that one must fear the most.

<sup>99</sup>This claim corresponds to the utility function that Abrams and Keren (*supra* note 26, at 2034) refer to as ‘illumination’.

<sup>100</sup>J. LeDoux, *The Emotional Brain: the Mysterious Underpinnings of Emotional Life* (1998), 106.

<sup>101</sup>*Ibid.*

<sup>102</sup>*Sherlock*, BBC TV, Series 2 Episode 1 ‘A Scandal in Belgravia’, first broadcast on BBC 1 on 1 January 2012. Sherlock Holmes (actor Benedict Cumberbatch) tells his criminal opponent Irene Adler, who had just given herself away by falling in love with him: ‘Sentiment is a chemical defect found in the losing side.’ This statement (and the accompanying scene) well epitomizes the cultural and gender bias affecting the role of emotions in all domains of life (detective investigation, scientific work, legal reasoning etc.).

<sup>103</sup>A. Sachs, *The Strange Alchemy of Life and Law* (2009).