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Book Review of Emmanuelle Tourme-Jouannet's "What is a Fair International Society? International Law Between Development and Recognition

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for investment arbitration, together with the appropriate rules on transparency and receipt of *amicus* briefs, would address many of the concerns set out above' (at 377). This faith in legality – in appellate review modelled upon the WTO appellate board – seems naïve in light of the account of power she invokes, one where the reaction of dominant economic actors and their home states (together with investment lawyers) should be anticipated. In the concluding chapters to her book she appears to admit as much. 'Given the history of this field,' she writes, 'it would be unsurprising if new doctrine or mechanisms were to emerge to neutralise the effects of these [progressive] developments and maintain the one-sided focus on investor protection within investment treaty regimes' (at 388). The author clearly is torn between optimism and despair. This is a credible place to end up. Imagining a regime more tolerable than the present one gives rise to the substantial risk that things could get worse. Given the shrunken field of available options, there is always the chance, as Foucault reminds us, of having to begin again.

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Emmanuelle Tourme-Jouannet, ***What is a Fair International Society? International Law Between Development and Recognition***. Oxford: Hart Publishing, 2013. Pp. 252. £30. ISBN: 9781849464307.

Does international law have an answer to the question: 'what is a fair international society'? In her insightful book, Emmanuelle Tourme-Jouannet interrogates in a systematic fashion diverse areas of international law that touch upon or address, directly or indirectly, fairness, equity, or redistribution: from the law of development to minority rights to international economic law. By taking positive law as the point of departure for an inquiry about global justice, Tourme-Jouannet departs, in a refreshing way, from attempts to extrapolate from mainstream legal theory an abstract conception of global justice.¹ '[W]hat is to be addressed here are not contemporary theories of justice and the philosophical questions that the topic raises [I]t is the aim to address them here from a different angle: from within legal practice, as it were I have opted for an approach based on existing legal practice, with a view to conceptualizing and questioning it' (at 3). For Tourme-Jouannet, the question about the fairness of international legal practice leads to a number of other legal-historical questions regarding the contemporary evolution of international law. The project is 'simply to begin by identifying the principles and legal practices relating to development and recognition' (*ibid.*). In her view, adopting a historical perspective, these practices – notwithstanding their differences – reflect a joint concern with achieving global justice over the years.

In *What is a Fair International Society?*, Tourme-Jouannet reviews the history of international economic law over the last decades. She disaggregates it into two strands of international law – 'the law of development' and the 'law of recognition', which are inextricably enmeshed in today's world that is 'postcolonial and post-Cold War'. In her view, '[t]hese twin characteristics explain why international society is also riddled with the two major forms of injustice that ... afflict national societies' (at 1). These are taken to be 'first, the economic and social disparities between states ... when the first steps were taken towards decolonization Second,

¹ T. Pogge, *World Poverty and Human Rights* (2002); F.J. Garcia, *Global Justice and International Economic Law – Three Takes* (2013).

international society is increasingly confronted with culture and identity-related claims, distorting the dividing line between equality and difference' (*ibid.*). These claims are made on an individual and collective basis and address either absence or limited recognition within society. Tourme-Jouannet builds on the philosophical work of Nancy Fraser² which addresses issues of fairness in international society in the context of various postcolonial fault lines (at 4). In justifying this choice of perspective, the author points out 'that precedence has been given to the historical perspective. ... Contemporary international law and postcolonial society cannot easily shrug off a past that ... all too often leads them to reproduce discursive structures and practices of the colonial/postcolonial legacy even in what seem to be the most emancipating of present day legal techniques' (*ibid.*).

Tourme-Jouannet identifies continuities and affinities in how the law has responded to the twin challenges of the end of the Cold War and decolonization. Offering a legal lens on what is frequently considered a topic for economists, the book begins by illuminating the 'international law of development which is often thought of as a creation of the French speaking world' (at 17). Evolved in the mid-1960s in response to developing countries' sense of marginalization in the post-World War II Bretton Woods economic institutions and the GATT, this is the NIEO, the New International Economic Order. The Charter of Economic Rights and Duties of States, building upon the framework set out in the UN Charter reaffirmed the principle of legal equality among states. Yet, as Tourme-Jouannet adds, 'it was adjusted to make equitable corrections for socio-economic inequalities' (at 26). 'It was no longer simply a matter of recognizing that states had equal rights but, where necessary, by transgressing formal equality, of taking account of the socio-economic inequalities between rich and poor so as to introduce affirmative measures for the poor states and so restore the possibility of materially equitable conditions' (at 26–27).

Nevertheless, despite these new legal commitments, in practice, as this book persuasively argues, the shift from formal equality to equity was difficult.

Tourme-Jouannet examines without nostalgia the period of decolonization, with its high hopes for development and equality, and especially that moment's faith in aid. This was a period characterized by a simple belief in development as 'growth' and a confidence in the state as the fundamental agent of growth. By contrast, today there is wide awareness that growth can exacerbate inequality, even in developed countries (as Thomas Piketty has recently argued, examining an impressive array of data).³

Tourme-Jouannet's own angle on the challenge of development for equality today involves tracing in international legal practice a dynamic notion of transformative justice. This notion is fleshed out in the chapters that examine the various relevant international legal regimes, as they engage with shifting predominant political and economic conceptions, from the NIEO to neo-liberalism, to today's focus on 'sustainability' and alleviation of extreme poverty and tackling of humanitarian crises (human security). The focus is always on tracing the relevant legal regimes over time, and in so doing analysing some of the ways that law constructs current reality. Central in this respect is the shift from development to the more contemporary neoliberal challenge to what she terms 'social development' and the current interest in sustainability and growth as well as the alleviation of poverty in particular as it interfaces with humanitarian crises.

After her treatment of international development law in the first part of the book, Tourme-Jouannet turns her attention in the second part to the 'law of recognition' which, in her view, along with the law of development is part of the response to the injurious pasts of third world states which are targets of development aid. By the term law of recognition, Tourme-Jouannet seeks to define a set of legal orders which seek to afford 'international recognition of their equal

² N. Fraser, *Qu'est-ce que c'est la justice sociale? Reconnaissance et redistribution* (2005).

³ See T. Piketty, *Capital in the 21st Century* (2014).

dignity and specific identity' (at 101). In a number of chapters she brings together a set of legal rules which she categorizes under this rubric. These are wide-ranging, from the UN Charter, insofar as it deals with the recognition and treatment of 'peoples'; international human rights law including the 1948 Universal Declaration, the UN human rights covenants, the European Convention on Human Rights; the OSCE Copenhagen Document; the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities; and the 2005 UNESCO Convention (at 125–128). Though the law (and related politics) of development has been on the wane since the end of the Cold War, it is this law of recognition that picks up the torch of social inequality. Of course, this campaign is also more complicated in some regard because of the new centrality of non-state actors, such as persons, corporations, NGOs, and peoples: 'the demand for recognition of historical crimes has been substantially intensified by the new perception of the identities of peoples, groups, and individuals and by the new way in which they perceive themselves nowadays through history and through the passing of time' (at 196). Tourme-Jouannet further explains the situation to which the law of recognition reacts in the following way: '[i]ndividuals and peoples experience the present effects of the crimes of the past, based on the denial of individuals ... and so suffering a deep-seated denial of recognition which is handed down the generations and is not repaired in any way. Now, the awareness of this denial that still weighs on the victims or their descendants is transformed today into a demand for justice that is, into an implication of the state's responsibility and a call for reparation of the crimes committed, which then serves as a process of recognition of the Other' (*ibid.*).

The account that Tourme-Jouannet gives of the law of recognition from the perspective of global justice helps us to understand better the contemporary relationship between international law (and legal practice) and (in)justice. '[W]hat is at play here, on a particularly crucial point, is the possibility of fitting together the legal responses given at the international level to the two most characteristic types of injustice of present-day international society' (at 210).

Indeed we can see that there has been an explicit historicizing of claims of injustice: '[t]he law of recognition makes it possible therefore to take account of demands made in symbolic and cultural terms and no longer in terms of rationally defined material interests ... thereby suggesting that a major redistribution of the demands for justice has come about over the last 20 years' (at 202). Here one can observe a link – though Tourme-Jouannet hardly mentions it – to the simultaneous emergence of law relating to transitional justice.⁴ This body of law has considerable affinities with the regimes she identifies as part of the law of recognition.

There remains the question as to how exactly the problems of injustice connected to development and recognition are related. Tourme-Jouannet gives the following answer: 'economic and cultural factors act together and reinforce each other to become even more detrimental to states, groups and individuals' (at 205). Nevertheless, as she readily concedes, the legal responses often do not work well enough together so that acts of symbolic justice may prevent more effective remedies for economic inequality: '[t]here is a readiness to grant symbolic acts, to recognize suffering and past and present humiliation, but without looking into the causes of suffering and humiliation that are very often related to economic and social causes and which therefore call for remedies involving economic and social justice' (at 204). Indeed, critical theorists of transitional justice have made similar observations.⁵

So what is the ultimate purchase of the law of recognition? Tourme-Jouannet seems to regard it as dubious; one gets the sense that she sees the pursuit of remedies to repair cultural injuries as threatening to future development; as displacement of more significant economic issues. She exhorts that '[the] recognition of the equal dignity of cultures and the restoration of wounded identities must go hand in hand with the reinsertion of stigmatized countries, peoples and

⁴ See R. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (2014).

⁵ See R. Meister, *After Evil* (2013).

human beings into a world economy in which the rules of the game are equitable and do not counter their effects' (at 210).

Moreover, she seems to regard the law of recognitions and its various articulations of cultural rights as challenging to a more universalist view of human rights; there is the danger that an important human rights discourse is being undermined that would have the potential actually to improve the situation of the peoples in question.

Yet this seems like an old dichotomy, and a new perspective may be offered by 'humanity law'⁶ as an approach to the shift from a state-dominated international law to a persons and peoples-centred international law. Humanity law may go some way towards explaining the developments observed in this book as concerns the evolution of legal practices. It helps us to understand the changes in the subjectivization of international law, and how the advent of persons and peoples in international law complicates the hitherto state-centric view. Without understanding this change, it is hard fully to grasp the seismic shift in focus from seeing issues of economic underdevelopment from the perspective of the state to perceiving them as issues of human insecurity. Tourme-Jouannet when describing the framework of the law of recognition and the various human and minority rights instruments from a historical perspective seems to assume that the subject of the law of recognition is always the state as protector or guarantor of rights. Yet, a closer look at contemporary developments in international law reveals a more dynamic picture involving multiple actors and sometimes competing understandings of security and flourishing.

Ultimately, the question then becomes what justifies this book's distinctive lens on international law? By juxtaposing the 'law of development' and the 'law of recognition', and bringing these two distinctive legal orders together through the lens of global justice, Tourme-Jouannet focuses our attention on the extent to which international law today does or should conceive global fairness as a matter of correcting past injustices as opposed to facilitating progress towards a future social and economic ideal. This is an important question, juxtaposing past repair with future progress, which is often not examined explicitly, but to which an answer is often assumed by the various contestants in the relevant debates about international law and policy.

For Tourme-Jouannet the turn to recognition in the law is not the right answer. It is at the very least overstated, and probably mistaken. She wisely does not over-estimate the power of law to achieve global justice. Rather her approach rests on the sound proposition that greater awareness and understanding among international lawyers about how international legal doctrine and discourse interact with and embed contestable conceptions of fairness is a necessary first step towards the law's attenuation of global injustice.

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⁶ See R. Teitel, *Humanity's Law* (2012).