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The International Law of Recognition: A Reply to Emmanuelle Tourme-Jouannet

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Abstract

This brief article, in offering a critical evaluation of Emmanuelle Tourme-Jouannet's fascinating project on the Law of Recognition, provides some critical remarks on the anthropomorphic moves observed in the international legal scholarship. It simultaneously reflects on the resort to philosophy as a tool for persuasive authority in the processes of creating knowledge about international law. Against this backdrop, the article, while submitting that the Law of Recognition should not be seen as yet another naïve pursuit of equality, universalism, and dignity in denial of the deceitfulness and contradictions inherent in such moral objectivism, argues that the Law of Recognition designed by Emmanuelle Tourme-Jouannet is riven with significant functional and methodological instability which frustrates the possibility of creating new knowledge about international law.

In the 21st century, it takes a lot of courage to embark on an enterprise geared towards the renewal of the project of Justice which many of the members of our epistemic community have been inclined to vest in international law. Indeed, after decades of compelling critical thinking, Justice – and more specifically the quest for universalism and equality – has often turned into a suspiciously noble smokescreen for the pursuit of different agendas, often at the undisclosed price of other ideals. In that sense, the audacity of grabbing the torch of Justice to reinvigorate the vindication of equality and universalism always deserves praise. The 'Law of Recognition' (hereafter LoR) promoted by Emmanuelle Tourme-Jouannet, by aspiring to theorize a new branch of international law that accommodates the calls of individuals and groups for the recognition of their identities and differences, is a new variant of the pursuit of Justice.[1]

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[1] It is no coincidence that the monograph inspired from the article published here and which presents her theory more comprehensively is entitled *Qu'est-ce qu'une société internationale juste? Le droit international entre développement et reconnaissance* (2011).

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It accordingly constitutes one of those remarkably audacious ventures that defy a hostile scholarly environment that has grown ever more averse to such projects.

The praise offered here should certainly not be given an ironic spin. Indeed, one should not approach the project initiated by Emmanuelle Tourme-Jouannet as yet another naïve pursuit of equality, universalism, and dignity in denial of the deceitfulness and contradictions inherent in such moral objectivism. Emmanuelle Tourme-Jouannet knows too well the compelling criticisms that have been raised against objectivism in legal thinking, and especially those associated with the pursuit of the global values inherent in Justice.[2] This reply is a good opportunity to remind the readership of this journal that, in French academia, Tourme-Jouannet features among those few scholars endowed with advanced command and knowledge of the tools and methodologies designed by critical legal scholars. She has even been remarkably conducive to making the critical project – and its deconstructive methodological instruments – more accessible to her French peers[3] who had long been daunted by the linguistic sophistication and aesthetics that such critical authors tend to cherish.[4] For all these reasons, it would be dishonest to charge her with affinity for the naive moral objectivism commonly associated with the pursuit of Justice.

There are even more reasons for not conflating LoR with the dogmatic objectivism that often riddles projects geared towards Justice. Indeed, the LoR is a project for Justice that assumes its normative condition. It is a project that remains informed by a call for normative transparency. In particular, it is an enterprise that seeks to deconstruct some mainstream international legal mechanisms while openly embarking on a new construction openly meant to serve Justice through individual and collective recognition of identities and differences. LoR rests more specifically on the assumption that the carefully honed human rights edifice and the post-colonial emancipating tools devised under the banner of self-determination have failed to deliver on their promises, thereby allegedly instilling a need for alternative routes. It similarly purports to offer an alternative to cosmopolitanism. For a project centred on Justice – that is a project centred on what I have called elsewhere the 'business of the just world',[5] such normative transparency is certainly noteworthy and ought to be well received.

Whilst the project's normative transparency should be commended, one may simultaneously experience some bittersweetness as a result of the methodological and functional fog that shrouds LoR. It is argued here that LoR comes with a distinct form of

[2] For a critical reflection on the resort to global values in international legal thinking see d'Aspremont, 'The Foundations of the International Legal Order', 18 *Finnish Yrbk Int'l L* (2007) 219. See also the reaction of van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order', 24 *Leiden J Int'l L* (2011) 277.

[3] Emmanuelle Tourme-Jouannet directs the series 'Doctrine' published by Pedone, which has published (or will be publishing) the work of scholars like Martti Koskenniemi, Nathaniel Berman, David Kennedy, Hilary Charlesworth, and Michael Reisman. For more information on the series see http://cerdin.univ-paris1.fr/spip.php?article40.

[4] On the wording techniques witnessed in current international legal scholarship with a view to enhancing the aesthetics of texts and increasing semantic persusasiveness see d'Aspremont, 'Wording in International Law', 25 *Leiden J Int'l L* (2012) 575.

[5] D'Aspremont, 'Towards an International Law of Brigandage: Interpretative Engineering for the Regulation of Natural Resources Exploitation', 3 *Asian J Int'l L* (2013) 1.

instability in terms of both its methodology and goals. In the view of the author of this reply, such methodological twists are all informed by the anthropomorphist condition suffered by LoR. This is why this short article starts by (1) spelling out the different features of the anthropomorphist conditions affecting LoR, before (2) depicting the methodological and functional anthropomorphism on which it is all built. The following paragraphs then (3) elaborate on the cost of such methodological and functional moves in terms of creation of knowledge about international law. Whilst the functional and methodological elasticity of LoR seems to be assumed by its author, this short piece finally notes that the promoter of LoR nonetheless feels the need to seek authority for her endeavour in philosophical thinking. This article accordingly ends (4) with a few remarks on the common need in the international legal scholarship to resort to – if not to take refuge in – philosophical argument and submits that, in the case of LoR, such a quest for philosophical foundationalism should not be understood as a bellwether of the state of crisis of the discipline, but rather as another manifestation of its author's genuine enthusiasm for inter-cultural and inter-disciplinary exchanges.

1 Anthropomorphism and International Legal Thinking

My first claim about Emmanuelle Tourme-Jouannet's LoR relates to its being structurally and ontologically rooted in an anthropomorphist move. Anthropomorphism – that is the inclination, in the course of a descriptive exercise, to ascribe human forms or attributes to constructs, phenomena, practices, or dynamics which are not necessarily of a human nature – is omnipresent in LoR. Indeed, Tourme-Jouannet's attempt to theorize a new body of law meant to ensure the recognition of individual or collective identities is reminiscent of some of the innermost longings for acknowledgement of one's identity that are inherent in human nature. LoR's reconstruction of international law in a way that serves individual and collective recognition of identities is thus not just a very humanist project for international law. It also vindicates an anthropomorphic approach to (and reconstruction of) international law.

If there were not the correlative methodological and functional moves examined below,[6] such an anthropomorphism would not even be worthy of mention. Indeed, anthropomorphism is rather commonplace in social sciences. In the thinking about international law it is almost a dominant trait. In fact, anthropomorphism has been with international legal thinking since the early natural law manifestation of the very idea of international law. It is, for instance, very much present in the naturalist conceptualizations of international law found in the early scholastic systematizations of international law.[7] It can also be argued that, even after the estrangement of international law from natural law thinking,[8] international legal scholarship remained

[6] See *infra* at sect. 2.

[7] See, e.g., F. de Vitoria, *Political Writings* (ed. A. Pagden and J. Lawrance, 1991); A. Gentili, *On the Law of War* (trans. J.C. Rolfe, 1933). On Gentili see generally B. Kingsbury and B. Straumann (eds), *The Roman Foundations of the Law of Nations* (2011).

[8] In this respect see E. Tourme-Jouannet, *Vattel and the Emergence of Classic International Law* (forthcoming 2014).

replete with anthropomorphic moves. The famous doctrine of 'fundamental rights of the states' is probably the best expression of the inclination of thinkers to transpose human blueprints to their prescriptive and normative constructions of inter-state relations.[9] But the argument can be pushed further. Even today, the mainstream statehood doctrine manifests a clear anthropomorphist calling, for the access to the Eden of non-interference, immunity, territorial integrity – to name only a few of the privileges inherent in the recognition of a state being in the international legal order – is reserved to the privileged holders of the three or four keys prescribed by what I have called elsewhere the 'Montevideo illusion'.[10] This – surprisingly unchallenged – common understanding of statehood constitutes a mechanical transposition of the legal condition of individuals under domestic law where the benefits of legal personality and citizenship are formally offered to those who meet a pre-defined set of conditions, without much attention for the specificities of states and the dynamics of the international legal order. Eventually, if one sees an anthropomorphist move in any transposition of models inherited from domestic individual protection or domestic contract law, treaty law or human rights[11] could also be read in such a fashion.

This short reply is certainly not the place to dwell on the extent to which anthropomorphism has shaped the categories by means of which we think about international law nor the reasons for such inclinations. The point here is rather the following. If it can be said that anthropomorphism has been with us since the inception of modern international law, there is no idiosyncrasy in the anthropomorphism permeating LoR. The outlandishness of the anthropomorphism of LoR – which makes it noteworthy – is to be found elsewhere. It is not only that the international law vindicated by LoR is constructed following inter-individual blueprints – ones that are meant to replace the mainstream anthropomorphic state-centric conceptual categories with another type of anthropomorphic architecture grounded in the acknowledgement of being – it is also that LoR makes the acknowledgment of individual and collective being the very essence of international law. There is no doubt that recognition has an ontological character in LoR. Indeed, recognition is the 'value-fact'[12] that not only informs the choice of the construction materials but also shapes the very concept of international law envisaged by Tourme-Jouannet. It can accordingly be argued that LoR suffers a two-fold anthropomorphist condition, once at the level of its function, once at the level of the choice of conceptual building blocks.

It is no coincidence that the two dimensions of the anthropomorphism of LoR – namely the conceptual and the ontological – manifest themselves in two specific

[9] See generally Poirat, 'La doctrine des "droits fondamentaux de l'Etat"', 16 *Droits* (1992) 83.

[10] D'Aspremont, 'Non-State Actors in International Law: Oscillating between Concepts and Dynamics', in J. d'Aspremont (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011), at 1, also available as Amsterdam Law School Research Paper No. 2011-06, Amsterdam Center for International Law No. 2011-05.

[11] For a critical exploration of the anthropomorphic foundations of human rights law through the lens of modem communications theory see Nagan and Hammer, 'Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights', 47 *Virginia J Int'l L* (2006–2007) 725.

[12] Greenberg, 'How Facts Make Law', 10 *Legal Theory* (2004) 157; UCLA School of Law Research Paper No. 05-22, available at: http://ssrn.com/abstract=797125.

methodological and functional moves. The author of LoR is probably very aware of the above-mentioned two-fold anthropomorphist condition of its projects as well as its corresponding methodological and functional consequences. Yet, in the view of the author of this article, the methodological and functional twists brought about by the two-fold anthropomorphist condition suffered by LoR probably has cognitive consequences that may not have been fully realized by its promoter. This is what this note briefly describes each of these moves (at 2) before saying a few words on its consequences for the production of knowledge about international law (at 3).

2 Methodological and Functional Volatility in the LoR

It is submitted here that the anthropomorphist condition of LoR has led its author to ground the project on dynamic foundations. In particular, LoR's anthropomorphism can be seen as requiring both methodological and functional instability, both of them making the project very volatile. Each of these types of volatility deserves a few observations.

A *Methodological Instability*

For the sake of the following paragraphs a distinction is made between conceptual methodology and investigational methodology. Conceptual methodology is understood here as the choices behind the conceptual framework through which the materials researched are apprehended and constructed, whilst investigational methodology refers to the techniques of researching such materials. Said differently, the former boils down to the techniques of capture of the materials, whereas the latter refers to the tools by means of which the materials that have been excavated are treated. It is argued here that at the level of both conceptual methodology and investigational methodology, LoR is left fluctuating.

1. Instability of the Conceptual Methodology in LoR

The LoR is interchangeably described and envisaged as a set of rules, a set of practices, or a set of converging discourses. Calls for the recognition of identities and cultures heard in the international arena and discourses about the need to recognize identities, cultures, and practices accommodating such calls are immediately transposed in a 'new body of law'. As the author of the LoR contends, 'We should speak of international recognition law to describe a set of legal institutions, discourses, practices and principles that had not previously been sufficiently theorized and brought together, although they have the same subject matter, which places them apart from others in that the subject matter arises specifically from the need for recognition'.[13] The materials that feed in LoR are thus caught in a very elastic net. This conceptual elasticity manifests itself in a great semantic instability by virtue of which the very concept of LoR is itself left in full flux. Such elasticity makes the LoR rest on dynamics foundations, in that any rule, practice, or discourse echoing the idea of recognitions feeds in,

[13] Jouannet, Guest Editorial, 9 *ESIL Newsletter* (Feb. 2013).

allegedly underpinning its existence. In that sense, LoR bespeaks what we could call a gluttonous methodology, for anything that bears some kinship with the project is swallowed up to allow the latter to swell and grow firm. This is not without a paradox, as such a conceptual instability is at the service of the stability of the project: it allows the project to obtain sufficient mass to be viable and worthy of theoretical cogitation. Such gluttonous methodology is not without precedent either. Global administrative law has also resorted to such techniques with a view to gaining critical mass.[14] Albeit common in contemporary international legal thinking, such moves are not without their problems, especially since they entail the diminished ability of legal scholars and professionals to speak about the same thing. Indeed, such moves simply dilute speeches' interconnections, thereby frustrating the possibility of knowledge in social sciences.

2. Instability of the Investigational Methodology in LoR

Instability in LoR does not stop at the conceptual framework through which the materials nourishing LoR are collected and constructed, but extends to the investigational methodology. In other words, the techniques of investigation of LoR are equally left fluctuating. Throughout the LoR, claims of empiricism – usually serving descriptive purposes – are followed by normative moves. More precisely, facts and existing rules are elevated into empirical reality, which is in turn used to vindicate the discourses about the emergence LoR whilst, conversely, discourses are turned into positive normativity. In that sense, LoR comes with an investigational framework where the descriptive and the normative, the *is* and the *ought*, the *lex lata* and the *lex ferenda,* are constantly flirting with one another. The constant oscillation between the descriptive and the normative creates a high degree of volatility at the level of the investigational methodology.

Like the elasticity at the level of conceptual methodology, such an investigational methodological instability is not unprecedented. On the contrary, it is a very common technique found in international legal literature. Global administrative law is again a good – and highly inspiring – example of such a dialectical methodology. The problem with such volatility is that it comes with a great fluidity about what it is that LoR seeks to achieve, and with it the risk of falling short of achieving any of its self-assigned objectives. This is what I call the functional elasticity and is the object of the next paragraphs.

B *Functional Elasticity*

It is submitted here that LoR is at times infused with an ambiguity as to what it is that it seeks to achieve. The aspirations of LoR are occasionally fluctuating. LoR principally purports to reconstruct international law and allow it to succeed where international human rights and self-determination have failed when envisaged from the vantage point of Justice. Sometimes this ambition is slightly scaled down and LoR is envisaged

[14] For some remarks on the methodological moves in Global Administrative Law see d'Aspremont, 'The Politics of Deformalization in International Law', 3 *Goettingen J Int'l L* (2011) 503; See also d'Aspremont, 'Droit Administratif Global et Droit International', in C. Bories (ed.), *Le Droit Administratif Global* (2012).

as an attempt to acknowledge the birth of a new branch of international law. If that is its ambition, it must be noted that LoR, whether envisaged as a paradigm shift or more simply as a new branch of international law, is not always given the means to achieve one of these two types of revolution. Indeed, LoR continues to be built on old foundations, that is the traditional conceptual categories of the formal theory of sources, collective and individuals rights, legal personality, exequatur and recognition of foreign judgments, etc. In this respect, one is thus left with the impression that LoR goes too far and at the same time not far enough. The foregoing certainly does not mean that LoR should be considered as yet another sexy and catchy scholarly enterprise oscillating between a promised paradigm shift and the consolidation of the current paradigm, like there have been too many in a professional community in need of constant and self-legitimizing rejuvenations.[15] Indeed, LoR has been subtly built by Emmanuelle Tourme-Jouannet in full awareness of such an elasticity which is assumed entirely. It is this elasticity that allows her to offer a new perspective through which to reflect upon international law and the international lawyer. It is therefore not without merit. Yet, as is explained in the next section, elasticity always comes at a price.

3 Instability and the Possibility of Knowledge

It is argued here that the price for the above-mentioned instability is often overlooked. Indeed, in the view of the author of this reply, methodological and functional moves often constitute a dent in the ability to generate knowledge about international law. Indeed, like other forms of instability,[16] the volatility mentioned above never allows the reader – and any consumer of legal scholarship – to delineate clearly or grasp an ever-changing and unstable argument. At the same time they come at the expense of the depth and intelligibility of scholarly debates that can take place on the very project the promotion of which is sought.

It is true that creating knowledge about international law and allowing debate among the members of the interpretative community of international law may not have been the intention of the author of LoR. It must also be acknowledged that such an expectation manifests the strong inclination of the author of these lines to evaluate scholarly exercises on the basis of their cognitive or deliberative virtues.[17] Moreover, it is very unlikely that Emmanuelle Tourme-Jouannet – who, as was indicated in the introduction, stands out in the French tradition of international law for her knowledge of the objections to the quest for objectivism and the critiques of international law – would either ignore or deny the foregoing. This means that LoR is not necessarily grounded in a cognitive or deliberative enterprise geared towards the revolution of knowledge or debate about international law.

If cognitive or deliberative revolution is not the ambition of LoR, there is probably little at which one can really take a dim look. LoR is a highly interesting exercise that

[15] D'Aspremont, *supra* note 4, at 596–599.
[16] *Ibid.*, at 589–590.
[17] *Ibid.*, at 599–602.

is worth indulging oneself in. In that sense, this short reaction could be left at these few considerations. Yet, there seems to be one last point deserving attention. It pertains to the justificatory narrative which shrouds the argumentative art deployed in LoR. Indeed, if the ambition of LoR is not to defy nor to revolutionize the mainstream patterns in which knowledge and debates about international law are constructed, one may wonder why Emmanuelle Tourme-Jouannet still feels a need to anchor her project in a strong philosophical tradition. It is this quest for the authority and the justifying power of philosophy in international legal thinking to which the final remarks of this modest reply are dedicated.

4 The (Re-)Turn to Philosophy as Argumentative Tool for Persuasiveness

It has been claimed – convincingly in the eyes of the author of this short reply – that the turn to philosophy usually ushers in a crisis of a discipline which, in turn, can pave the way for a paradigmatic revolution.[18] In that sense, turning to philosophy can be understood as the characteristic of a discipline that has lost faith in its foundational paradigm. Although I generally concur with such contention, it must be acknowledged that, if applied too strictly to the thinking about international law, this contention could mean that international law has always been in search of a (new) constitutive paradigm. Indeed, if one excludes those families of the interpretative community of international law which have developed an allergy to philosophical and theoretical scholarship, international legal thinking has always witnessed the mushrooming of philosophical debate – a tendency which has generally been positively received. This inclination of international legal scholars to dip into (and let themselves be temporarily inspired by) philosophical reflections should, however, not be exaggerated. Indeed, too often, arguments borrowed from philosophy or theory have a purely cosmetic function. As I have argued elsewhere, such inroads into philosophy and theory are most of the time meant to buoy up the aesthetics of our scholarly works and magnify the erudition of their authors with a view to increasing semantic authority in the context of generalized 'wordfare'.[19]

This is certainly not the place to appraise whether LoR's choice of philosophical insights is, from a philosophical standpoint, the most appropriate and the one that corresponds best to the fundamentals of the project. Rather, it is of greater relevance to emphasize that resort to philosophy – and especially the philosophy of recognition – in the LoR should not be interpreted as a cosmetic measure. The use by Tourme-Jouannet of the works of Charles Taylor, Axel Honneth, and Nancy Fraser – to name but a few of the interesting thinkers she draws on – cannot be reduced to a purely

[18] T. Kuhn, *The Structure of Scientific Revolutions* (4th edn, 2012), at 91: '[t]he proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research'.

[19] See d'Aspremont, *supra* note 4, at 576.

decorative narrative, as is too often the case in international legal scholarship. Her reflection upon (and use of) the philosophical insights of these works genuinely nourishes her conceptual and methodological choices. Moreover, as a result of its functional instability,[20] LoR cannot be charged with fomenting a paradigm crisis that is so often associated with the turn to philosophy. Because the turn to philosophy in the LoR is neither cosmetic nor suspected of fomenting paradigmatic revolution, it certainly constitutes a welcome addition. Indeed, it will help international lawyers to be exposed to fascinating philosophical works they may not be familiar with. In doing so LoR manifests the strong interest and genuine enthusiasm of its author for inter-disciplinary and inter-cultural exchanges[21] – an aspiration that informs many of other her projects.[22] That international lawyers design the categories through which they construct law and its practices in a way that reflects their areas of interest is, however, not a new phenomenon.[23]

[20] See *supra* at sect. 2.

[21] For another manifestation of such interest see Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law', 58 *Maine L Rev* (2006) 291.

[22] On the series 'Doctrines' with Pedone see *supra* note 3. On the series 'French Studies on International Law' with Hart see www.hartpublishingusa.com/books/series.asp.

[23] For some observations on the extent to which personal areas of interest inform paradigmatic choices see d'Aspremont, 'Subjects and Actors in International Law-Making: Conflicting Cognitive Choices for International Norm-Generating Processes', in C. Brölmann and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (forthcoming 2013).