The European Journal of International Law Vol. 24 no. 2

The International Law of Recognition: A Rejoinder to Jean D'Aspremont

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I would like to thank Jean d'Aspremont most sincerely for his reply to my article. I find that he very astutely points out weaknesses inherent in the work and raises issues that are essential for international law scholars today. His criticisms will enable me to take my own thinking forward and to clarify aspects I have not developed or that remain insufficiently examined. So as to make the discussion easier to follow, I shall address his criticisms in much the same order as they were raised.

1 On the Anthropomorphism of the Approach I Adopted

I ought to begin by saying that I entirely agree with the criticism levelled at the anthropomorphic character of our doctrinal and legal constructions. The fact that we do have an anthropomorphic vision of international law relates to its history and to the language of scholars and practitioners of international law, which we have inherited and to which we are captive most of the time. When speaking of the law, we express ourselves by means of a set of categories and 'pre-concepts' of legal science that are misleadingly self-evident and intellectually short-sighted. This is a state of affairs that needs to be acknowledged and of which I am very much aware. Indeed, I thought I had shown so in my own books, and so I now find myself in the role of 'the biter bit'. In accepting the criticism, though, I must still respond to the criticism levelled specifically at my study. Jean d'Aspremont claims, 'There is no doubt that recognition bears on an ontological factor in LoR. Indeed recognition is the "value-fact" that [not] only informs the choice of the construction materials but also shapes the very concept of international law envisaged by Emmanuelle Tourme-Jouannet'. I do not believe this is true and I shall try to make this point clearer.

What I call the 'law of recognition' shows that, through that law, international actors but also scholars of international law nowadays endorse socio-cultural presuppositions about recognition – that is, respect for cultural differences and self-esteem – and that those presuppositions are the inevitable output of the dominant values of our age, values which the majority of us hold to be morally superior to values of the past. It is in this that a paradigm is created, but it is not at all an ontological paradigm; it is a *cultural and social* construction of our time that has taken on the value of an objective

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reality – which it is not – by 'slipping under the radar' of our immediate awareness and by influencing our behaviour and our discourse. It is a social construction that has gradually come to be perceived as natural, good, objective, and self-evident. Now, I would argue, recognition is in no manner good or bad *per se*, and I do not believe it to be either universal or timeless. But – and this may be the source of the misunderstanding? – that does not disqualify it even so. As with any cultural and social phenomenon that is translated into legal discourse, recognition has ambivalent effects. It has a positive impact in certain domains when the rules of recognition satisfy aspirations in terms of securing respect, and when the rules seek to end the hitherto ignored suffering that is experienced by individuals and groups as situations of injustice; recognition has a negative impact when, say, it raises expectations that law cannot satisfy or when it serves as an excuse for ignoring the expectations of individuals and groups which are more classically framed in economic and material terms. This is why I was anxious to emphasize that such a development is inevitably problematic and invites us to be constantly critical in our outlook.

2 On the Consequences in Terms of Method

Jean d'Aspremont argues that the method I use remains 'volatile', 'unstable', and 'gluttonous', resulting in 'impoverished' knowledge of law. This is an important and very interesting criticism which provides me with an opportunity to say that I stand by my methodological choices that have guided this study without agreeing with the consequences Jean d'Aspremont draws from them. I am quite aware that jurists may be deeply sceptical about my characterizing as law a series of texts, discourses, and practices that seem to be different in their nature and scope and about the doctrinal construction purporting to bring these elements together under the heading of 'law of recognition'. On this subject, I would like therefore to clarify several points about my methodological choices.

A *Constructivism and the Volatility of the Method*

I have tried to bring out the principles of the international law of recognition by starting from an empirical observation of the legal practices of existing international law, that is, from texts referring clearly and *explicitly* to a need for recognition. I cited them and commented on them to that end. In doing so, I construed them as the contingent product of a given historical period, the post-colonial and post-Cold War period, corresponding to what in philosophy are called the 'particular (empirical) circumstances' of justice. This empirical study of normative law inevitably implies combining an empirical approach and a normative or constructivist approach. No methodological perspective can escape this. One must simply be aware of it, and Jean d'Aspremont is perfectly right in pointing this out. However, there is another risk which one can try to avoid and which I think I eluded. But perhaps I failed to explain myself clearly and so I would like to clarify this point, which is an essential one for research work. We are all caught up within the logic of our own reasoning to the extent that researchers end

up losing all lucidity with respect to the model by which they represent international law, with the result that they come to believe that it is no longer a model but reality itself. Imperceptibly, the model proposed by researchers ceases to be a representation of reality and is presented instead as reality itself. This is as much of a risk for anyone advancing a renewed idea as it is for anyone combatting the idea. And so, models and counter-models become entirely normative as their true nature as models grows fainter, which is very much a cause for concern.

B *The Question of the Legal Nature of Texts and Therefore of the Identification of the 'Law of Recognition' as an Object*

I deliberately omitted this question of the legal nature of the texts and practices discussed, knowing in advance that this would not satisfy some jurists, for two main reasons:

- It was not my purpose to make a detailed analysis of the legal rules at issue, nor to study how legally binding they are, since the purpose of the article (and also of the book it is taken from) lay elsewhere: the aim was to begin by identifying the legal principles and practices relating to recognition by casting light on the legal combats and fundamental ethical and economic issues surrounding them. The aim was also to evoke the question of justice in a study of international law, without any polemical intent, as may sometimes be thought within the discipline of international law, but simply by showing how in ethical terms one can contemplate questions that cannot be reduced to their legal and technical aspects and how such questions can be discussed without necessarily falling foul of the arbitrary character of ideology or of the moralization of law.[1]
- But I also left aside the question of the legal nature of recognition so as to leave it to readers to make their own choices in accordance with their own conceptions of the nature of international law. However essential it may be for jurists to see some more technical future research into the nature and the extent of the legal character of the principles, texts, and practices set out as forming the 'law of recognition', it will depend in any event on the conception people have of law and of the legal nature of phenomena in general, given that no conception, to my mind, can lay any firm and final claim to being the truth in this domain. There is no one true definition of the international legal rule. Such a definition remains out of reach. That is why I deliberately included in the 'law of recognition', which some commentators might call soft law or unofficial law, speeches and reports alongside conventions, unilateral instruments, and the general principles of law. In this way, everyone according to their own conception of what it is that makes law law will draw what they want from it. In my view, this does not, then, lead to any 'impoverishment' of knowledge, but on the contrary to its 'enhancement', since the deliberately open-ended and non-restrictive vision proposed gives free rein to numerous interpretations

[1] See Boyer, 'Justice et égalité', in D. Kambouchner (ed.), *Notions de philosophie* (1995), iii, at 10.

and to greater possibilities for research. That I have my own conception of law does not detract in any way from this openness, as my own position is only one among many. Just as for anyone else, and just as for Jean d'Aspremont, it depends largely on the *observation point* that I take up when studying what I call 'international law'. This is why it is always necessary to take into account the observers and their subjectivity as a decisive factor in any observation. One must pull back from the thing under study and take into account the actual observer, thereby including the observer within the field of observation. And the same will hold for any reader of this study.

This leads us to another question raised by Jean d'Aspremont which very usefully extends this line of thought.

3 On the Uncertainty of the Functional Project Driving this Research

For what project is this law of recognition highlighted? To answer this, I shall make three remarks:

– As a preliminary observation, I would like to recall that, as Jean d'Aspremont points out, any idea purporting to be somewhat 'new' or rather 'renewed' quite naturally runs up against a degree of academic conformism, or even actual resistance to what may be perceived as a 'heresy' whenever the 'renewed' idea entails the destruction of some part of the established conceptions in force. As in any other field, the rules of the discipline currently forming our object 'international law' and defining a 'field of study' – over which international law scholars supposedly have exclusive jurisdiction – have to some extent become set in stone with time, to the point of looking like objective and real data that we take to be natural. They are part of the mental make-up of the actors in the plot and of legal professionals, and as such they may impede the production of new knowledge.[2] At the same time, it is to be expected that any new proposal should prompt thinking, criticism, and discussion. It is therefore quite normal that it should be asked what functional project is hiding behind the study of the 'international law of recognition'.

– Now, I am not entirely comfortable with the interpretation suggested by Jean d'Aspremont in this respect. There is no enthusiasm in this study; on the contrary, I feel rather pessimistic since, as I say in the conclusion. I very much fear anyway that the rules of recognition may be re-used as forms of 'voluntary submission' to a single dominant neoliberal order that is constantly undermining the potential positive effects as it continues to secure the *de facto* domination of the rules of an international economic law that is oblivious to the human purposes of law and of economics. Similarly, I do not have any comprehensive normative project either, I have no 'grand project of renewal of international

[2] See D. de Béchillon, *Qu'est-ce qu'une règle de droit ?* (1997), at 40.

law'. Ideas are free entities and my study can of course be read in this way and used as such, just as it can be dismissed as false and pointless, but personally I am not invested with sufficient certainty to think about any refoundation of international law. I do, however, completely agree with Jean d'Aspremont in admitting that there is a degree of 'self-legitimization' in this study but, to my mind, just as there is in any other study. Once and for all, whether we are positivists, conservatives, progressives, realists, reformists, or whatever, we must be aware that there will always be some self-legitimizing in any approach and in any point of view we adopt; there will always be some interest, passion, and hidden or stated agenda in a research project, whatever it may be and however neutral it may purport to be. These are states of affairs that cannot be circumvented and that we must take account of as situated observers, but without disqualifying the approaches and methods adopted. It is precisely through gaining this awareness of them that we are better able to move forward.

– Besides, aside from any 'foundational' project that might inform this study but to which I make no claim, I do not at all think that the paradigm of recognition completely drives out any other paradigm, as Jean d'Aspremont suggests. As a historian of international law, I have never observed any wholesale abandoning of one paradigm for another, of one model of legal representation for another. And in my view, we are seeing, for the time being at least, a straightforward process of *reconfiguration* of international law, that is, a transformed (reconfigured) combination of classical legal principles and practices and new legal principles and practices. This is neither a radical break with the past nor a repetition of the same structure, but an intertwining of old and new legal models, such that old subjects and old practices also survive, including through new subjects and new legal principles. So we are not seeing the definitive replacement of one body of law by another, but rather shifts and turns towards a new legal model of international law that is becoming more dominant while continuing to intersect with the old model. And many of the tensions, contradictions, and uncertainties besetting contemporary international law arise from this inevitable entanglement of the new and the old.