
International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization

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Emmanuelle Tourme-Jouannet. **What is a Fair International Society?** Oxford: Hart Publishing, 2013. Pp. 252. £30.00. ISBN: 9781849464307

Chios Carmody, Frank J. Garcia and John Linarelli (eds). **Global Justice and International Economic Law.** Cambridge: Cambridge University Press, 2012. Pp. 320. \$35.99. ISBN: 9781107438514

Iris Marion Young. **Responsibility for Justice.** Oxford: Oxford University Press, 2011. Pp. 224. \$36.95. ISBN: 9780195392388

Thomas Pogge. **Politics as Usual. What Lies Behind the Pro-Poor Rhetoric.** Polity Press, 2010. Pp. 224. €22.80. ISBN: 9780745638935

Abstract

Global economic justice as a topic of moral philosophy and international law is back on the intellectual agenda and figures prominently in feuilletons, blogs and academic publications. A wave of recent studies by both international lawyers and moral philosophers on the dark side of economic globalization and the role of international law in this context is as such a remarkable phenomenon. The essay engages with diverging scholarly perspectives on global justice and international law as represented in the four volumes under review. Three substantive questions structure the non-comprehensive sketch of the global justice debate: (i) Is the current international economic order unjust? (ii) Can existing international legal rules and institutions be transformed or developed into a more just economic order? (iii) What is the potential role of international lawyers in this context?

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The world-wide disorder affects all sectors. It is a fruitful soil for the 'international order of poverty', governed by implacable mechanisms which turn our world into a jungle. For centuries past, the prosperous countries have steadily grown richer at the expense of the underdeveloped countries, which have become progressively poorer. The workings of such an iron law were examined long ago, and are fully understood. The world economy is organized on the basis of asymmetrical relationships between the dominant 'centre' and the dominated 'periphery', the exploiting and the exploited countries being integrated in this inequitable system, and finding themselves indissolubly linked. This system ... is now vigorously condemned.¹

This quote from Mohammed Bedjaoui's 1979 monograph *Towards a New International Economic Order* sounds disturbingly current. Global economic justice as a topic of moral philosophy and international law is back on the intellectual agenda and figures prominently in feuilletons, blogs and academic publications. A wave of recent studies by both international lawyers and moral philosophers on the dark side of economic globalization and the role of international law in this context is as such a remarkable phenomenon. Are we witnessing a new era in international legal and philosophical scholarship – a new movement for a more 'equitable international society'? How does the discussion today differ from debates on the New International Economic Order (NIEO) in the 1970s? What has happened to the world in the meantime? Are we now, 40 years later, back to square one? Did the NIEO movement just form part of the 'great post-colonial illusion' and what have international lawyers learned from the Third World struggles following decolonization? Can international lawyers as scholars productively engage at all with moral, social and economic issues, such as extreme poverty, structural exploitation and the effects of climate change? And who should participate or take the lead in academic discussions on the international economic order, moral philosophers, economists, political scientists or lawyers?

To begin with, legal approaches to the question of global justice can – at least at first sight – be differentiated from philosophical approaches in their degree of theoretical abstraction. Legal approaches generally take as their starting point an analysis of the legal material that might in one way or another contribute to the dark side of globalization or they focus on those elements of legal practice which have been considered to act as a remedy to the injustices created by economic globalization. Some of the chapters in the rich and multidisciplinary book, *Global Justice and International Economic Law* edited by Chios Carmody, Frank J. Garcia and John Linarelli, adopt such a legal practice-oriented perspective on global justice while others take a philosophical perspective. The latter often develop a specific standard on the basis of moral or political philosophy or economics against which they measure the outcomes of 20 years of economic globalization accelerated by the liberalization and facilitation of international trade and foreign investment induced by countless legal and political interventions by international institutions. This is also the approach taken by Thomas Pogge and other moral philosophers who have intervened in the global justice debate, some of whom with a vehement critique of international law and some of its institutional manifestations.

Emmanuelle Tourme-Jouannet, in her remarkable book *What is a Fair International Society?*, also takes moral philosophy as a starting point of her inquiry, relying on two

¹ M. Bedjaoui, *Towards a New International Economic Order* (1979), at 23–24.

categories of ‘injustices’ borrowed from Nancy Fraser, namely, economic and social disparities on the one hand and non-recognition of cultural and identity claims on the other. Shifting to a more legal perspective, she then sets out to investigate how the evolution and current state of international legal practice addresses these issues. She thus refrains from abstract philosophical investigations. Her aim is to explore ‘the fundamental principles underlying the contemporary international legal order’ by illustrating to her readers what relevant international legal practice ‘represents from the inside’.² Methodologically, this approach amounts in many parts of the book to a historical description of the ways in which various areas of international law, which are relevant for a more ‘equitable international society’ have developed since the 1990s.

In this essay, I wish to engage with the diverging scholarly perspectives on international law and global justice as represented in the four volumes under review. Three substantive questions will structure my selective and non-comprehensive sketch of the current debate on global justice and international law: (i) Is the current international economic order unjust? (ii) Can existing international legal rules and institutions be transformed or developed into a more just economic order? (iii) What is the potential role of international lawyers in this context?

1. Is the Current International Economic Order Unjust?

Judging by its outcomes the answer is ‘yes’. At least this seems to be the answer given by practically all the current contributions to this debate. Of course, and depending on the author, this ‘yes’ is often not a black and white one, but comes in many different shades of grey. Nonetheless, authors who respond to this question with a straight ‘no’ are very hard to find. Let me start with a black and white response. Most prominently here we find Thomas Pogge, who from the perspective of a moral philosopher has emerged as one of the most vocal and critical voices regarding the current global economic order, constantly reminding his readers of the scale of persisting inequalities produced by extreme poverty in many regions of the world: ‘Many more people – some 360 million – have died from hunger and remediable diseases in peacetime in the 20 years since the end of the Cold War than perished from wars, civil wars, and government repression over the entire twentieth century.’³ For Pogge, it is the current design of international institutions that makes these staggering inequalities between the affluent and the poor possible: ‘The present rules favor the affluent countries by allowing them to continue protecting their markets through tariffs, anti-dumping duties, quotas, export credits, and huge subsidies to domestic producers in ways that poor countries are not permitted, or cannot afford, to match.’⁴

Less black and white is Joel P. Trachtman’s contribution in *Global Justice and International Economic Law*. He expresses the view that moral philosophy alone is not

² E. Tourme-Jouannet, *What is a Fair International Society? International Law Between Development and Recognition* (2013), at 3.

³ T. Pogge, *Politics as Usual. What Lies behind the Pro-poor Rhetoric* (2010), at 11.

⁴ *Ibid.*, at 35.

helpful in answering intricate questions of justice regarding the rules of the global economic order. Nonetheless, he also criticizes some existing rules and institutions for their role in the transfer of wealth from poor to rich countries: ‘Viewed independently, TRIPS was a bad deal for poor countries.’⁵ Yet, in a somewhat awkward defence of the existing TRIPS rules, Trachtman adds: ‘However, the problem for poor countries, and more specifically of poor people, in relation to TRIPS is not the rules of TRIPS themselves, but the poverty of these individuals.’⁶ In contrast to moral philosophers like Pogge, who in view of the effects of existing institutions on the world as it is tend to condemn them as unjust from a moral perspective, Trachtman seems to remain sympathetic to the economic rationale underlying the relevant rules, thereby implying that it is not the rules themselves that are to blame but the messy world in which they are operating. If there were no poverty in the first place, the rules would not only be economically ‘efficient’ but would also be likely to produce more wealth for everybody. ‘Efficiency’ thus figures prominently as a normative yardstick of existing rules and institutions and introduces another perspective into the debate: economics. Accordingly, Trachtman criticizes moral philosophers, including Pogge, who argue in favour of redistributive justice for not seeking assistance from economists in their assessments of the global economic order. Without such assistance, philosophers should ‘abstain from analysis that is dependent on information regarding the causation and remedies for poverty’.⁷ At the same time, Trachtman feels compelled to state that, with regard to the two sets of rules of WTO law briefly discussed in his piece, no consensus among economists exists as to whether the TRIPS regime increases efficiency, nor whether special and differential treatment of developing and least-developed country members causes or remedies poverty and existing inequalities.⁸

Emmanuelle Tourme-Jouannet, in *What Is a Fair International Society?*, assesses the state of the world in 2013 as follows: ‘The rules governing globalization are unfair as they are designed once again primarily with the advanced industrial nations in mind. Certainly, some emerging countries have benefitted from them, but the rules are not equitable ... Contrary to the idea that globalization benefits everyone, there are losers on both sides, North and South.’⁹ While acknowledging that in some countries such as China the number of people living in poverty has dropped considerably, Tourme-Jouannet, citing World Bank reports, points to the fact that the same globalized economic system which has enabled growth in parts of Asia is thought to have exacerbated poverty in other parts of the world.¹⁰ For Tourme-Jouannet ‘poverty, hunger and economic and social inequalities between states persist in terrifying and unacceptable proportions’. Even Fernando R. Tésón and Jonathan Klick, in their rigorous and uncompromising defence of global free trade policies in the edited volume under

⁵ Trachtman, ‘Doing Justice: The Economics and Politics of International Distributive Justice’, in C. Carmody, F. J. Garcia, and J. Linarelli (eds), *Global Justice and International Economic Law* (2012) 281.

⁶ *Ibid.*

⁷ *Ibid.*, at 284.

⁸ *Ibid.*, at 281 and 284.

⁹ Tourme-Jouannet, *supra* note 2, at 78.

¹⁰ *Ibid.*, at 77.

review, seem to join the consensus on the current unjust distribution of wealth in the global village: 'Virtually everyone agrees that world poverty is a major scourge and that alleviating it should be a priority of international law'¹¹ and 'Persons and governments have a prima facie duty to try to alleviate poverty.'¹² In sum, the scandalous dimensions of extreme poverty in the world seem to be undisputed in the global justice debate.

That this dire status quo entails moral responsibilities not only on the part of the governments of poor countries appears to be equally broadly accepted in the literature. For Pogge, the unfair global rules of the game lead to a massive violation of human rights, which creates a moral obligation on the part of the rich countries to alleviate world poverty. In their attempts to erase a categorical distinction between moral obligations of justice within a given political community on the one hand and transnational obligations of justice on the other, Pogge's as well as Allen Buchanan's approach can be distinguished from that taken by John Rawls, David Miller and Thomas Nagel on this particular issue. While Pogge and Buchanan insist that global redistribution is required by principles of justice, Rawls, Miller and Nagel restrict principles of justice in the narrow sense to the state level. None of the latter three philosophers, however, believes that there are no moral obligations which extend beyond borders. For Thomas Nagel, for instance, an obligation to redistribute wealth globally does not stem from principles of justice but from elementary considerations of humanity.¹³

Based on a concept of 'equal positive freedom', Carol C. Gould sides with the cosmopolitan requirement of global distributive justice in her chapter in *Global Justice and International Economic Law*. She proposes concrete practical directions for the realization of her claims, which focus on an enhanced system of implementing economic, social and cultural rights and the democratization of global governance mechanisms. The contributions by Daniel Butt and Robert C. Hockett also see a need, from a philosophical perspective, for a redistribution of wealth on the global level; Daniel Butt on the basis of a global equality of opportunity standard and Robert C. Hockett with an analysis of the ethics of distribution in transnational contexts.

The different foundations for a 'duty' to alleviate poverty abroad advanced by the above-mentioned philosophers may be relevant from a purely philosophical point of view, but from an international law perspective they seem much less important, if not irrelevant, and not only because all of these fine philosophical distinctions have no bearing on a professional internal assessment of whether 'legal' duties exist. The moral case for combatting extreme poverty is so obvious that a denial of moral obligations from a philosophical point of view would be counterintuitive. It does not seem necessary and is perhaps even counterproductive to draw comparisons with Nazi crimes or abortion practices, as Pogge does, to convince the academic public that global inequality has scandalous and morally unbearable consequences for affected populations. If the absence of an efficient health system in African countries currently leads to situations where parents must let their Ebola-infected children die in

¹¹ Tesón and Klick, 'Global Justice and Trade', in Carmody, Garcia and Linarelli (eds), *supra* note 5, at 217.

¹² *Ibid.*, at 259.

¹³ On the different positions, see *ibid.*, at 240.

an isolated hut without any help, care or personal contact, entire communities will be destroyed physically and morally.

More interesting for international lawyers working with or within international institutions seems to be the philosophical question of responsibilities of individuals for extreme poverty abroad. Here the late Marion Young had advanced a new and sophisticated model of responsibility for structural global injustices, like the one we are dealing with in the context of extreme poverty. In her volume, *Responsibility for Justice*, she differentiates between a ‘liability concept’ of responsibility, which is based on the idea of finding guilt with regard to what particular agents have done in their singularity¹⁴ and another understanding of responsibility based on the mediated ‘social connection’ that agents may have to structural injustices. For Young the traditional idea of ‘isolated’ attribution of responsibility to particular acts and individuals is inadequate: ‘When harms result from the participation of thousands or millions of people in institutions and practices that produce injustice, on the other hand, such an isolating concept of responsibility is inadequate’.¹⁵ From her social connection model of responsibility it follows that all those who contribute through their actions to the structural processes that produce structural injustice share responsibility for those harms: ‘The ground of my responsibility lies in the fact that I participate in the structural processes that have unjust outcomes. These processes are ongoing and ought to be transformed so that they are less unjust. Thus I share with others the responsibility to transform these processes to reduce and eliminate the injustice they cause.’¹⁶ Even though we might not be ‘liable’ for the harm produced by structural injustices, such as exploitation of workers in the global garment market or Western export subsidies on agricultural products, we bear an individual forward-looking responsibility for our contributions to social systems that produce these structural injustices.

A central question emerging from the global justice debate on institutional and individual responsibilities is the extent to which international law and its institutions are considered a key mechanism to either cement or alleviate extreme poverty and staggering inequalities between the affluent and the poor countries. The following section attempts to find answers to these questions in the selected current contributions to this debate.

2. Can Existing International Legal Rules and Institutions Be Transformed or Developed into a More Just Economic Order?

Recent debates over this issue are reminiscent of the controversial debates among the first generation of Third World scholars in the 1970s over whether the newly independent states should place their hopes for a more equitable international economic order on international law or not. Many of these scholars believed that because the newly

¹⁴ I. M. Young, *Responsibility for Justice* (2011), at 105.

¹⁵ *Ibid.*, at 106.

¹⁶ *Ibid.*, at 110.

independent states were in the majority in the United Nations General Assembly, they could over time change the rules of the game. In the context of the struggles over a New International Economic Order, the time to change international law had come for Bedjaoui in 1979. He expressed his cautious and sociologically reflected hope in a new international law in the following terms:

At such a time, one is conscious of the amazing yet fruitful contradiction contained in the law, the contradiction between its true nature and its real function. It seems to be evolutionary by nature yet conservative in function. On the one hand it reflects a social reality which is changing and which it is obliged to try to keep up with, though there is bound to be some discrepancy and lag. In this it appears as something evolutionary. On the other hand, by being the expression of social relations, it fixes or stabilizes the social milieu of which it is the product. It thus reinforces and protects established practices, rejecting any change which might threaten them, and in this respect its function is conservative.¹⁷

Like most of the authors from the Third World writing in the 1970s Bedjaoui did not abandon the international legal project,¹⁸ quite the contrary:

One of the fundamental roles of contemporary international law is to bring to light the mechanisms, whether avowed or camouflaged, blatant or subtle, which slow down, hamper or obstruct the advent of the new international economic order. This brings out the futility and mystification involved in any attempt to separate legal analysis from the economic, social and cultural realities and values upon which legal rules rest. While it is rather naïve to think that international law can, by itself, become the cornerstone of change and development, it is equally wrong to say that international law can only represent the ratification and conservation of already established international norms.

But what happened to the NIEO project and its attempt to rethink fundamental principles of the international economic system in order to remedy the unequal distribution of wealth and power resulting from the colonial past? As Tourme-Jouannet shows in her historical reconstruction, non-reciprocity in trade relations, preference schemes, commodity producer cartels, common heritage – to name a handful of new concepts from that era – did not for various reasons live up to the expectations of the decolonized countries; partly because they were successfully watered down by the industrialized countries, and partly because more important structural disadvantages remained in place.¹⁹ After the debt crisis had paralysed regulatory capacities of many developing states in the 1980s, globalization processes in the 1990s consolidated a neo-liberal mode of economic development, including massive legal and economic interventions in the Third World by international institutions in the form of structural adjustment programmes.

One of the many strengths of Tourme-Jouannet's overview of the subject is her account of the historical developments in international economic law and its institutions from the perspective of the Third World:

The weakening of the nation states brought about by globalization was perceived as beneficial as it unharnessed the positive force of private actors. These thrived as did investment

¹⁷ Bedjaoui, *supra* note 1, at 112.

¹⁸ Critical of Bedjaoui's approach in that regard: M. Craven, *The Decolonization of International Law* (2007), at 87–90.

¹⁹ Tourme-Jouannet, *supra* note 2, at 27–29.

flows. Capital flows to developing countries grew six-fold in the six years from 1990 to 1996. Multinational firms played an increasingly decisive part in setting prices and directing strategies. They came to control between 50 and 90 percent of world output, depending on the sector ... Besides, from that time on, the most significant decisions in terms of development were no longer taken by the UN but by the Bretton Woods financial institutions, the Organisation for Economic Cooperation and Development (OECD) or the G8, where developing countries had no foothold. UNCTAD, the Group of 77 and the NAM became insignificant and lost all influence.²⁰

Tourme-Jouannet's specific reconstruction of the inter-linkages between legal battles and political and economic developments demonstrate that what we are used to calling globalization is the result of numerous conscious policy decisions based on legal interventions by international policy elites assisted by international lawyers during the last 25 years. At the same time, however, it would have been interesting to learn more about the exact fate of proposed innovations in international economic law, which were developed in the NIEO context.²¹ Due to historical research lacunae it seems indeed impossible to answer the question of what we can learn from the fate of the legal battles during the decolonization era. We just tend to accept that the NIEO is a history of political and legal failure, which as such does not seem to be of any continuing relevance. Tourme-Jouannet also places her main emphasis on the description of new post-NIEO concepts such as 'sustainable development', cultural diversity, human rights, rights of minorities and of indigenous peoples, and international legal feminism, all of which she summarizes under the headings of 'law of development' and 'international law of recognition'. Dynamic developments in these fields are portrayed as potential remedies for a one-sided and unfair globalization. Despite a fragmented international legal system, in Tourme-Jouannet's view there is hope for a more decent and equitable international legal order through the continuous legal integration of principles of distributive, corrective and even reparatory justice.²² Tourme-Jouannet is fairly realistic about the 'dark side' of these legal fields without, however, giving up on international law. In this sense she seems to follow Bedjaoui's advice.

Instead of putting both the blame and the hope on international economic law and its institutions, a couple of authors focus on national conditions which produce extreme poverty. Jeffrey L. Dunoff, writing in *Global Justice and International Economic Law*, for instance, joins those voices which hold that 20 years of preference systems for developing states had little effect on trade relations between developed and developing countries. The GATT/WTO's development discourse since the NIEO debates had focused too much on the highly contested preferential schemes. Instead, for Dunoff, who relies on Hudec's 'Developing Countries in the GATT System', explanations of the poor economic performance of many developing countries should be sought in their domestic policies. Dunoff claims that 'virtually all of the scholarship foregrounds the

²⁰ *Ibid.*, at 31.

²¹ Sundhya Pahuja has redescribed the debate over international investment law standards in *Decolonizing international Law: Development, Economic Growth and the Politics of Universality* (2011).

²² Tourme-Jouannet, *supra* note 2, at 216–219; for an in-depth reflection on the often irreconcilable conflicts between international trade law and human rights obligations, see Bartels, 'Trade and Human Rights', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009) 572 *et seq.*

critical importance of domestic institutions' (at 179).²³ It can indeed hardly be denied that there are evident links between domestic policy failures and poverty (including in OECD countries), be it due to a lack of effective redistribution policies or other dysfunctional domestic structures, which aggravate the socio-economic situation of many inhabitants. At the same time, there seems to be a chicken and the egg problem: Is the lack of pro-poor policies of domestic institutions in many countries of the Global South a result of continuous economic and political interventions from Northern countries, international institutions (structural adjustment), corrupt business practices of multinationals and unfair standards? Alternatively, have governments from so-called 'developing' states abused a once existing political and economic autonomy and negligently or deliberately corrupted their own public institutions after decolonization, making their societies incapable of profiting from more trade and investment? And even if the latter assumption were correct for some countries, would it be a justification for upholding unfair and damaging economic interventions from the North?

Dunoff for his part makes clear that his insistence on domestic policies should not be understood as an argument against efforts to reform the trade system:

It may well be true that changes to existing trade rules can do much to address global poverty, and there can be little doubt that much more should and can be done to improve duty-free access for products from developing states, lower developed-state tariff peaks and tariff escalation in products of particular importance to developing states, and reduce developed state producer support. In particular, trade-distorting agricultural support in OECD states remains unacceptably high, negatively impacting the prospects for developing-country agriculture.²⁴

Thus, here we have a concrete list of what could be done on the side of OECD countries within the WTO system to combat poverty in the Global South, a list that is well known and is by the way echoed by many commentators in the global justice debate.²⁵

In her chapter in the edited volume, Chantal Thomas adds a highly interesting observation on both the question of why preference schemes face so much resistance by developed states and why trade-distorting measures of the North, which cement structural injustices, are possible within institutions that propagate free trade. The resistance to preference schemes by developed states, according to Thomas, contravenes the foundational economic theory of comparative advantage, which assumes that countries benefit even from unilaterally granted market access. For her, the international trade system in reality is driven by the concepts of reciprocity and mercantilism which undergird international trade negotiations. Both these elementary driving forces are at odds with the holy grail of international economic law: comparative advantage through free trade: 'Such contradictions manifest themselves even more

²³ Dunoff, 'The Political Geography of Distributive Justice', in Carmody, Garcia and Linarelli (eds), *supra* note 5, at 179.

²⁴ *Ibid.*, at 181.

²⁵ On these inequities of the Uruguay Round see Weiler, 'The WTO: Already the Promised Land?', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 418, at 420–421; see also Jouannet, 'How to Depart from the Existing Dire Condition of Development', in *ibid.*, 392, at 413–415; Thomas, 'The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development in the WTO', in Carmody, Garcia, and Linarelli (eds), *supra* note 5, at 199.

strongly considering that agricultural trade liberalization in developing countries comparatively outdoes that in developed countries'.²⁶

Hence, institutions which ostensibly have been erected for a specific normative purpose provide a forum for policies which often are completely at odds with this assumed normative basis. Which conclusions can be inferred from this insight for the workings and value of the institutional fabric erected by international law? Three scholarly reactions can be discerned: (i) if only the state organs operating in and through these institutions kept their measures in line with the normative foundations, the promise of more wealth for everybody would eventually come true. The institution in an ideal sense, including its basic rules, is good. States thus must get their act together and honour the ideals and general principles on which the institution has been erected; (ii) institutional reforms will one day direct or force selfish state organs and rent-seeking elites to finally realize the ideals incorporated in the institution; (iii) everything would be much worse without the institution, even if its values are only imperfectly realized. This third argument in particular raises the question as to which realistic alternatives to the present institutions would have been available at the time of their inception.²⁷ The deeply problematic move from multilateralism into (World Bank-assisted) bilateralism in international investment law in the 1980s and 1990s, for instance, certainly would not be an advisable role model to follow in other areas of international economic law. All three reactions provide strong arguments for the reform and development of the institutions we have, rather than imagining new rules and institutions. The catch is, however, that while we engage in these ever-lasting piecemeal reform efforts, the discrepancy between the high-sounding normative ideals of the institution and the policies pursued within the institution often seems to work in favour of the unjust status quo. In other words, while we are busy making plans for eventually realizing the ideal purpose of international economic institutions, 29,000 human beings die of malnutrition and preventable diseases each day.

From a philosophical perspective, Iris Marion Young is less interested in reforming international law and its institutions than other proponents of global justice, let alone the international lawyers taking part in this debate. While acknowledging that international institutions can be powerful agents to improve the circumstances of the least advantaged people, she asserts that they often fail to do so: 'it is because the rules and practices of these institutions are more aligned with the powers and processes that produce or perpetuate injustice than with those who seek to undermine it.'²⁸ For her it does not make sense to turn to international organizations as neutral arbiters in a struggle between interests that has produced unjust outcomes: 'The policies and programs that states and international organizations enact themselves tend more to reflect the outcome of those struggles than to balance between or adjudicate them.'²⁹

²⁶ Thomas, *supra* note 25, at 199.

²⁷ Howse and Teitel, 'Global Justice, Poverty and the International Economic Order', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 437, at 439.

²⁸ Young, *supra* note 14, at 151.

²⁹ *Ibid.*

That is a strong and somewhat sobering assumption about international law and its institutions. If these institutions and their rules inevitably were the outcome of political struggles between strong and weak states or policy elites, the rules would serve the interests of the most powerful most of the time. Barbara Stark, in her contribution to *Global Justice and International Economic Law*, makes a similar point. For her any sustained attempt to implement redistributive justice will be irreconcilable with the present neo-liberal economic order. Her thesis is that even if the political will were there, it would not happen because international economic law is not coherent enough as a legal subject to make such changes happen.³⁰ Building on Bob Sutcliffe's work from the late 1990s, Stark refers to the post-modern critiques of the development concept.³¹ The meta-narrative of development was an attempt by the West to fix a polarization between those who are developed and those who are underdeveloped, replacing the 19th-century differentiation between civilized and non-civilized peoples. But 'the underdeveloped can never catch up, in part because of all the trash the developed states have left in their way, from toxic waste to historical baggage'. Moreover, it is just physically impossible for the whole world to enjoy the material lifestyle enjoyed by the developed states without producing an environmental apocalypse.³² Both the Washington consensus and the liberal ideology of development have in her words 'benefited the West more than it has benefited the underdeveloped countries that are its erstwhile focus'.³³ It follows from this structuralist position that if you are poor, turning to international law and its institutions would not really be advisable. Any form of inescapable determinism, however, would be the end of the idea of international law as a medium for progressive political or socio-economic projects. It somehow seems to underestimate the transformative potential, which law as a 'social technique' (Kelsen) can potentially have.³⁴

3. What Role for International Lawyers?

But where does all of this lead international legal scholarship dealing with the global legal structures, which for many scholars seem to be either part of the problem or the solution for questions of global economic justice? Some of the recent interventions deny the relevance of the contributions by moral philosophers to the legal debate. Trachtman, for instance, wants moral philosophers to do their homework and to take into account economic studies on global poverty before taking a position in the debate. In a similar vein, Tesson and Klick, in their chapter of the edited volume, deplore a serious omission in the global justice literature: 'Scholars in this area ignore the theoretical claims and empirical evidence of economists suggesting that liberalized trade

³⁰ Stark, 'Jam Tomorrow: A Critique of International Economic Law', in Carmody, Garcia and Linarelli (eds), *supra* note 5, at 262–263.

³¹ *Ibid.*, at 269.

³² *Ibid.*

³³ *Ibid.*, at 264. See also Pahuja, *supra* note 21.

³⁴ J. von Bernstorff, *The Public International Law Theory of Hans Kelsen, Believing in Universal Law* (2010), at 60–61.

is likely to improve the conditions of the poor'.³⁵ And even though Trachtman concludes his contribution with a call for a broad interdisciplinary approach to questions of global justice, involving 'economists, political scientists, social psychologists and lawyers', it seems as though the order in which he lists the relevant disciplines were not a haphazard one. By not including moral philosophers, he excludes the discipline that has to date been the driving force of the entire debate. The question is whether replacing moral philosophy with economics as the guiding light in the global justice debate results in international lawyers jumping from the frying pan into the fire. Is it necessary to defend the influence of economists on the global economic order after the experience of 25 years of the reign of a particular and now increasingly contested economic theory in international economic institutions? As Carmody, Garcia and Linarelli point out in their stimulating introduction to the edited volume, uncritical dogmatism about mainstream economic assumptions can be a problem for international legal scholarship:

Economics dominates the normative side of the WTO and its treaties. If you were to walk into a meeting of international economic lawyers and were sensitive to questions of justice, you would discern an uncritical assumption at work in the discussion, namely that Ricardian comparative advantage is the appropriate *grundnorm* or constitutional principle for trade law and policy. Such discussions start from the unexamined premise that liberalization is always good, no matter how it is accomplished, and the normative analysis ends there.³⁶

They cite a statement by Paul Krugman on liberalization from 2009: 'Don't say that any theory which has good things to say about protectionism must be wrong; that's theology, not economics.'³⁷

The dilemma is that even if we agreed to follow the economists on questions of global justice because economics apparently can help us to evaluate the effects of certain legal regimes, the problem is that we would first have to decide which of the many diverging schools to follow. For every economic study regarding a particular aspect of poverty-alleviation it is most likely possible to find a second study that denies its findings. Are we as international lawyers in a position to judge on the question of who erred on specific economic issues? Lacking the necessary expertise, we tend to take for granted what is portrayed as the opinion of mainstream economics by powerful institutions, be it the World Bank or influential academic institutions. If the history of the Washington Consensus can teach us one thing, then it is that uncritically following and implementing such mainstream economic convictions can have deadly consequences on the ground. All of this is, by the way, equally true with regard to our problems in dealing with the diverging theories of moral philosophy on the problem of global justice.

Can we avoid these epistemic complexities by confining ourselves to what we know best: legal doctrine? It is true, once international legal experts start exploring the nitty-gritty of the specific legal material at hand, the fundamental challenges posed by the recent global justice debate tend to recede into the background. This is primarily

³⁵ Téson and Klick, *supra* note 11, at 259.

³⁶ Carmody, Garcia and Linarelli (eds), *supra* note 5, at 12.

³⁷ *Ibid.*, at 13.

because within *legal practice* direct moral arguments as such do not live up to internal professional standards. Of course, legal discourse is ripe with extra-legal political, economic and moral normativity, but without ultimately dressing up a moral argument as a legal one in line with professional standards, the respective international lawyer will not produce an argument that will be recognized by the operations of the legal system. Even if she realizes that the professional contributions expected from her are another brick in the wall of structural injustices and she heroically follows her own moral convictions by disappointing those expectations, she will eventually marginalize her own position. Her professional environment will just not take her seriously. And if she abides by professional standards, cloaking the moral argument in legal dressing, which is always a possible interpretative option, the intuitive pull of the moral argument will vanish. Having expressed the moral argument through the medium of existing legal structures, morality will lose its revolutionary potential. The conservative function of the law demands its tribute, even in the most progressive interpretation.³⁸

What is at stake here is the autonomy of the legal system. Through abiding by what Bourdieu calls the specific 'habitus' of the legal practitioner, legal decisions can linguistically be portrayed as following their own rationality independent of considerations of morality, economics or politics.³⁹ The neutralizing effect of this process of formalization of legal routines can be a beneficial societal achievement by restraining the otherwise unmediated exercise of power. At the same time, it makes judicial norms 'seem (both to those who impose them and even to those upon whom they are imposed) totally independent of the power relations which such a system sustains and legitimizes'.⁴⁰ The necessary professional struggle for preserving the autonomy of the legal field thus comes with a catch: legal discourse sustains structures of dominance by a 'misrecognition' (Bourdieu) of the structural injustices at the basis of a particular legal regime.

Similarly within international legal *scholarship*, deeply entrenched background assumptions stand in the way of recognizing structural injustices sustained by international regimes.⁴¹ There is an inherent tendency of international lawyers to fall for the inner beauty of the law, its rational façade and the idealized moral or political goals of a certain legal regime.⁴² Despite scandalous effects of a legal regime on the ground, black and white for the international lawyer thus turns into complex shades of grey. The law in force is neither really bad (unjust) nor good (just), it has perhaps

³⁸ On the practitioner's role and her limited ability to further personal utopias, see Feichtner, 'Realizing Utopia through the Practice of International Law', 23 *European Journal of International Law (Eur J Int'l L)* (2012) 1152.

³⁹ On Bourdieu's view of practice, see I. Venzke, *How Interpretation Makes International Law, On Semantic Change and Normative Twists* (2012), at 42.

⁴⁰ Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings Law Journal* (1987) 805, at 817.

⁴¹ On various approaches to ethics and morality in international legal scholarship, see von Bernstorff, and Venzke, 'Ethos, Ethics and Morality in International Relations', in R. Wolfrum (ed.), *Max-Planck Encyclopedia of Public International Law* (2011).

⁴² von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics', 25 *Eur J Int'l L* (2014) 977.

not been implemented correctly, its potential for alleviating distress and extreme poverty for the time being only remains unfulfilled, international judicial decisions got the technical details of the law wrong or overlooked important aspects covered by other applicable legal regimes such as international human rights law, specific corrections of the law are possible once the political will is there, and so on. A good example may be found in the concluding words of Krista Nadakavukaren Schefer in her 2013 edited volume: ‘The contributions in this volume do not indicate, however, a fundamental problem with most of the rules of IEL; poverty sensitive interpretation and a firm desire of governments to serve the disadvantaged people of the world would take us far toward our goal of reducing the suffering of the poor.’⁴³ As her book demonstrates for various areas of international economic law, an important stream in international legal scholarship sees in the application of human rights norms at least a potential legal remedy for the dark side of economic globalization.⁴⁴ Human rights can certainly constitute an effective way to scandalize fundamental experiences of socio-economic injustice. It requires, however, a large dose of optimism to think that human rights-sensitive legal interpretation of entrenched legal structures alone will cause extreme poverty to vanish or be significantly reduced.⁴⁵ And this, not only because of the sociological obstacles of turning law-applying practitioners in specific international economic regimes, such as investment arbitrators, into human rights lawyers,⁴⁶ but also because of the often unrealistic hopes placed on the ‘good will’ of those governments or multinational corporations that profit from the existing status quo.

Does all of this then boil down to a call for new institutions and new legal rules that are able to transform structural injustices and are worth being supported by international lawyers? For the Third World scholars from the 1970s this seemed a plausible assumption. Not only was the old order (colonialism) morally discredited, the world also witnessed a revolution within the international political system. For the young Hegel, reflecting on the French revolution, theory only generates a transformative potential if it manages to portray the existing world as something purely negative (*‘rein Negatives’*). Only at this point in time will reality start to move towards the concretization of the idea of justice.⁴⁷ In Hegel, theory (*‘Philosophie’*), by its ability to reveal the contradictions between reality and its own discursive representations, is capable of generating

⁴³ Nadakavukaren Schefer, ‘Epilogue’, in K. Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System* (2013) 433.

⁴⁴ On human rights duties, the global economy and poverty see the interesting and diverging perspectives in the contributions of Samantha Besson, Monika Hakimi and Markus Krajewski in Nadakavukaren Schefer, *supra* note 43.

⁴⁵ Cf. Beckett, ‘Fragmentation, Openness and Hegemony: Adjudication and the WTO’, in M. K. Lewis and S. Frankel (eds), *International Economic Law and National Autonomy* (2010), at 54–56; somewhat less sceptical J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law relates to Other Rules of International Law* (2003), at 242–243.

⁴⁶ Criticizing the ‘disintegrative inclination’ of investment arbitrators, see Simma and Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’, in C. Binder, et al. (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (2009) 678–707; Comparing and criticizing the selection procedures in international courts and tribunals from a democratic theory perspective, see A. von Bogdandy and I. Venzke, *In wessen Namen?* (2014), at 224–230.

⁴⁷ G. W. F. Hegel, ‘Freiheit und Schicksal’, in G. Lasson (ed.), *Schriften zur Politik und Rechtsphilosophie* (1923), 138 *et seq.*

such revolutionary force. In the 1970s real transformations in the international political system led to a hope among many scholars that the old order would also gradually be replaced by a new one. And indeed this was the case with regard to the political self-determination of colonized peoples. The transformative project failed, however, in relation to the international economic order, despite a widespread scholarly recognition of the existence of unjust global economic structures. But if this project failed in the 1970s, despite a revolutionary and transformative moment in world history, is it then realistic to assume that a call for new institutions and new rules could be successful in 2015?

Such scepticism seems to be the reason why Tourme-Jouannet places her moderate hopes for change on specific fields of the fragmented international legal system (international law of recognition, international development law), which can 'correct' the international legal order from within.⁴⁸ Developments in specific legal areas (human rights/rights of minorities/rights to cultural diversity/feminism) in her view however will not be able to radically 'transform' the international legal order 'because they leave in place the deep seated cultural and economic structures that underpin that order, that is, the dichotomous cultural patterns of representation inherited from the colonial/postcolonial period ...and the market capitalist and financial system which both constantly reproduce economic and cultural inequalities'.⁴⁹ For Tourme-Jouannet, solutions with a real 'transformative' potential would inevitably have to take the form of 'de-growth', which would constitute a significant shift away from the legal structures of liberal international economic law as we know it.⁵⁰ She is probably right.

Individual Contributions to C. Carmody, F. J. Garcia and J. Linarelli (eds), Global Justice and International Economic Law

Chios Carmody, Frank J. Garcia, and John Linarelli, Introduction;

Carol C. Gould, Approaching Global Justice through Human Rights: Elements of Theory and Practice;

Daniel Butt, Global Equality of Opportunity as an Institutional Standard of Distributive Justice;

Robert C. Hockett, Human Persons, Human Rights, and the Distributive Structure of Global Justice;

Aaron James, Global Economic Fairness: Internal Principles;

Chin Leng Lim, The Conventional Morality of Trade;

Jeffrey L. Dunoff, The Political Geography of Distributive Justice;

Chantal Thomas, The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development in the WTO;

Fernando R. Tesón and Jonathan Klick, Global Justice and Trade;

Barbara Stark, Jam Tomorrow: A Critique of International Economic Law;

Joel P. Trachtman, Doing Justice: The Economics and Politics of International Distributive Justice;

Chios Carmody, Frank J. Garcia, and John Linarelli, Conclusion: An Agenda for Research and Action.

⁴⁸ Tourme-Jouannet, *supra* note 2, at 214

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, at 215.