Introduction

THIS BOOK ENQUIRES into the changes in classical liberal international law and examines to what extent and in what ways it has readjusted in recent decades. More specifically, it looks at the way in which international law has changed following decolonisation and the end of the Cold War. These episodes led to major re-alignments of some of the branches of international law and they are closely associated with the paradigms of development and recognition. We shall ask how this change relates to the growing demand for justice within international society and how it begs the question of what a fair international society might be.

The world today is a postcolonial and post-Cold War society. Accordingly, it is beset by the same two forms of injustice that Nancy Fraser identifies in individual countries. First, economic and social disparities among states caused outcry from the 1950s onwards with the first stages of decolonisation. These inequalities, to which a number of emerging states now contribute, are still glaring and still pose the problem of the gap between formal equality and true equality. Second, international society is increasingly confronted with cultural and identity-related claims, distorting the dividing line between equality and difference. The less-favoured states, those which feel stigmatised, but also native peoples, ethnic groups, minorities and women now aspire to a legal recognition of their equal dignity and to the protection of their identities and cultures. Some even seek reparation for the injustice arising from the violation of their identities and the confiscation of their property or land. While this phenomenon of the demand for recognition has been examined at length in relation to national societies, crucial as it is, it has so far been very inadequately investigated in international society.

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2 The UN identifies 16 ‘non-self-governing territories’ that may be decolonised, including the Western Sahara, New Caledonia and Gibraltar. They are supervised by the UN Special Committee on Decolonisation. While mindful of their limits and ambiguities, we shall not go into the involved discussions of the terms ‘colonialism’ and ‘postcolonialism’. See also John McLeod, Beginning Postcolonialism (Manchester, Manchester University Press, 2000) 4 ff and Robert JC Young, Postcolonialism. An Historical Introduction (Oxford, Blackwell, 2008) 13 ff. On the introduction of this little used term for the French-speaking world, see Marie-Claude Smouts, ‘Le post-colonial pour quoi faire?’ in Marie-Claude Smouts (ed), La situation post-coloniale (Paris, Ed Sciences Po, 2007) 25 ff.
3 A selection of the American philosopher’s work is published in French: Nancy Fraser, Qu’est-ce que la justice sociale? Reconnaissance et redistribution (Paris, La Découverte, 2005).
In answer to these two forms of claim, the subjects of international society have come up with two kinds of remedy encapsulated in the legal rights of development and recognition. Claims relating to socio-economic inequalities have led to the formulation of an international law relative to development – and not redistribution – as the solution to those inequalities; what Alain Pellet in 1987 called a ‘social law of nations’. This body of law has been thriving for some years and it has shifted from being a law of economic development to a much more complex law encompassing human, social and sustainable development. The second type of claim, about culture and identity, is currently giving rise to what we shall call an international law of recognition. It brings together a set of legal practices relating to recognition in the international arena that had not previously been theorised in that way, nor indeed collated. This is what is illustrated, for example, by the enshrinement in treaty of the principle of diversity of cultural expressions in 2005, by the reappearance of minority rights, by the emergence of rights of indigenous peoples, or again by legal issues relating to the World Conference against Racism (2001–2009), the mission of which was to symbolically re-establish the international community by putting an end to racism as a pre-eminently humiliating state of affairs.

A change of this kind reflects the similarity of concerns found in both internal and international law. This can come as no surprise since international law has always been the product of values and concerns that dominate within national societies, and in addition since international law is called upon to govern many internal states of affairs. When they are transposed into the international arena, domestic issues are rearranged in a way that is dependent on international society and on the specific circumstances of justice as it relates to the characteristics of contemporary international society. And yet, such a change is not self-evident; for not only is there nothing straightforward about it, as can readily be agreed, but moreover its content and its implications may appear particularly problematic. International law may well prove as much of a problem as a possible solution to inequalities, for it itself engenders rules that create injustice.

Besides, the concepts of recognition and of development are far from new; they are constructs that have become unreliable now that the intensive use that has been made of them has rendered them problematic, and they have come in for some very forceful criticism, to which we shall return in the course of the study, along with criticism levelled at the idea of a law of development or a law of recognition.

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this change calls for an exploration of the facts and legal data that have led us to formulate it in these terms. But there is also need for a critical discussion of the presuppositions on which the change is based as much as of its actual or supposed effects. It is with a view to successfully conducting this double investigation that the two main lines of the evolution described here have been studied. The endeavour is to ascertain and question the way in which international law has responded to the calls for development (Part I) and for recognition (Part II).

It ought to be said from the outset that what is to be addressed here are not contemporary theories of justice and the philosophical questions that the topic raises – the issues covered by Fraser, but on the international stage. Many highly interesting studies have already sprung from these questions in recent years and accordingly it is the aim to address them here from a different angle: from within legal practice, as it were. Instead of discussing the great principles of justice in the international arena and their ultimate theoretical foundation, and subsequently seeking out concrete manifestations of them, I have opted for an approach based on existing legal practice, with a view to conceptualising and questioning it. It is not a matter of adhering to this legal practice but of adopting a point of view that might be described as ‘moderately external’ to international law; a half-way house between the external viewpoint and the strictly internal viewpoint so that, by a reasoned exposition of what it represents from the inside, one can think about the fundamental principles underlying the contemporary international legal order.\(^8\)

While no attempt has been made to take up any a priori definition of international justice, my hope is, through this examination of legal practice, to empirically identify the contours of what a fair international society might be in this day and age; and in doing so, to fuel a contemporary debate on justice which sometimes seems to completely ignore existing international practice in normative and institutional terms and is therefore unaware of the actual conditions in which the problem arises empirically.\(^9\)

But it is not my aim to make a detailed analysis of the legal rules at issue, nor a study of their mandatory character; two points that shall be necessary later on. I have attempted simply to begin by identifying the principles and legal practices relating to development and recognition and by setting aside past legal struggles and the fundamental ethical and economic challenges involved. However vital it may be for jurists to conduct more technical future research into the legal nature of the principles, texts and practices that are

\[^8\] These are methodological distinctions set out by Michel van de Kerchove and François Ost, *Le système juridique entre ordre et désordre* (Paris, PUF, 1988) 9 ff.

to be expounded, that research will depend on each researcher’s conception of law and of their amenability to law in general, as no conception can make any claim to absolute truth in this domain. Moreover, evoking the question of justice in a book on international law does not have any polemical purpose as might sometimes be thought within the discipline in French-speaking countries. I have simply sought to show how questions that cannot be reduced to their legal and technical aspects are envisaged ethically and how they can be discussed without necessarily falling into the arbitrariness of ideology or the moralisation of law.  

Finally, it should be pointed out that precedence has been given to the historical perspective inasmuch as it challenges any idea of a radical break between past and present and provides an understanding of the current persistence of a certain ambivalence and of past contradictions of international society and of its law on these issues. To act as if the past were no longer relevant can only lead us to endlessly reproduce legal practices and techniques that are no more than heedless repetitions of a past that has been forgotten or that we have sought to repress.  

For example, for some commentators the latest episode of globalisation has supposedly rendered obsolete any reading based on colonial and postcolonial concepts and replaced it by one using transnational and global concepts. I see this as a curious misreading of history and its effects. Admittedly, the current phase of globalisation has renewed some terms of the debate, a point that will be taken up later and which should certainly not be underestimated, for the world is changing. However, contemporary international law and postcolonial society cannot easily shrug off a past that continues to haunt them and that all too often leads them to reproduce discursive structures and practices of the colonial/postcolonial legacy even in what seem to be the most emancipating of present day legal techniques.

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