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BOOK REVIEW

John Linarelli, Margot E. Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy*, (2018), Oxford University Press, 304 pp, ISBN 9780198753957
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A casual student of international economic law (IEL) should be forgiven for wondering how the framework relates to capitalism. IEL may be the regulatory regime for global capitalism but this point is not always explicit in materials and, in fact, is frequently overlooked in favour of the technical nuts and bolts. This process is testimony to the hold that capitalism exerts over IEL – the economic model is presumed rather than deliberated – despite its consequence to much of what is lamented about the legal regime by (critical) scholars and observers alike.

From my own experience in the lecture theatre, I acknowledge that law students favour this approach. Doctrine, they believe, will smooth their path into a magic circle law firm. Their preference is more instinctive than reflective as law students tend toward economical illiteracy. Though this does not justify their apathy for IEL's overriding capitalist influences, it does help explain it. We should, however, be less charitable toward IEL scholars who know all too well that the legal regime is symbiotic to the economic model and that a lack of familiarity with the latter will impoverish understanding of the former. Knowledge of the economic model is essential lest students come to view capitalism as amoral or even innate. Capitalism is both political *and* economic system. On one hand, it conveys the medium through which resources are allocated – the operation of the market – while on the other it dictates the overriding aim – perpetual accumulation. These two characteristics help situate capitalism alongside its political predilections while provoking the awareness needed to understand the partisan quality of IEL and the attendant injustices that *The Misery of International Law* critiques.[1]

Linarelli, Salomon, and Sornorajah are committed to unearthing the socio-political, historical, and moral dimensions of the global economy and their combined relationship to the architecture of IEL. In contrast to many other texts in the field, they reach beyond the regulatory capacities of the regime, targeting its constructivist character and tracing the conceptions of (in)justice that emerge. Travelling well beyond doctrine, they regale readers with a plethora of evidence about how IEL is experienced – frequently suffered – by the world's masses. Deploying multiple approaches, they build a robust critique that evidences the partialities of IEL. Indeed, when coming to the end of the book, I found myself in possession of a persuasive account of the many injustices of IEL but, foremost, a sense of the deterministic quality of the outcome, the latter of which qualifies their (limited) calls for reform.

The Misery of International Law makes an important contribution to IEL, providing scholars and students alike a critical text that embraces the essential links between IEL, history, morality,

[1] J. Linarelli, M. E. Salomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018).

and materialism. Their prose is accessible and the evidence compelling, inspiring the reader to want to learn more about the field (more on this later). In the following review, I discuss some reflections triggered by *Misery*.

My own research in IEL leads me to a banal conclusion: IEL is a field of economic regulation but also an instrument of social engineering. Each intervention devised in regulatory terms precipitates changes in the configuration of society. This is true across the gamut of IEL subfields, whether in finance, trade, or investment law, the disciplinary trinity that corrals both the field and the book. What does this mean for the representation of IEL? It means that most texts prove inadequate in conveying IEL's sociolegal nuances, often presenting a utopian view – liberal – or a stunted one – doctrinal. Critical work abounds but entry-level scholarship in IEL, the kind that guides introductory modules and textbooks, begins and ends with legal instruments (the textual), perhaps straying into the subtext and context along the way.[2]

On this path, IEL textbooks omit much including, most of all, critique of the underlying capitalist framework. Their respective authors might lament certain outcomes – inequality – but they routinely return to misguided overtures about the benefits of global capitalism on poverty levels in China.[3] An IEL newcomer comes to see the field primarily in technical terms: the International Monetary Fund supports short-term stabilization, the relaxation of capital controls is a natural outgrowth of the liberalization of current account transactions, and investor-state dispute settlement procedures bolster investor confidence and capital in-flows. Self-evident as the shortcomings of this approach are, the fetishization of rules perseveres with many scholars displaying neither remorse nor adventure. Enter Linarelli, Salomon, and Sornarajah.

Notwithstanding the critical title, above all else, *The Misery of International Law* is a treatise on IEL. Bar the introduction, each chapter systematically adumbrates a subfield of IEL: finance, investment, trade, and, in recognition of their shared political disposition, a chapter on human rights closes the text. Evident from the title alone, the contribution is denoted by a dissident tenor as the scholars seek to re-locate IEL historically – within its Eurocentrism – and morally – through the lens of (in)justice. We, thus, find ourselves confronted by a book that takes IEL beyond its self-imposed parameters: *Misery* is driven by revulsion at IEL's 'legal rendering of immiseration' and the complicity of IEL scholars in legitimizing what the authors condemn as an immoral regime.[4] Their critique is wide-ranging, crisscrossing the field of IEL, but also fastidious, unravelling each subfield with a scalpel.

We are told that international trade law, for example, cannot be detached from Europe's predatory past as a plethora of 'atrocities, even genocide' was deployed 'so that Europeans could enjoy their natural freedom to trade'.[5] Through historian Sven Beckert's account of the cotton manufacturing industry, they explain that today's fault lines in trade law are less the product of comparative advantage than of historical disruption: '[w]e can see in the international market for cotton a forced restructuring of a global industry to enrich British and eventually American interests at the expense of both Indian weavers and African slaves'.[6] The authors are of course in good company with James Gathii's *War, Commerce, and International Law* detailing a similar record of predation and coercive trade in the history of commercial activity and international legality.[7]

The subsequent chapter on international investment law equally charts a historical course verifying, once again, the self-serving benevolence upon which protection for foreign investors was fashioned.[8] Devised by the United States, the aim of the then nascent investment regime

[2]A. Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?', in A. Perry-Kessaris (ed.) *Socio-Legal Approaches to International Economic Law* (2014).

[3]Linarelli, Salomon and Sornarajah, *supra* note 1, at 12–13.

[4]Ibid., at 1.

[5]Ibid., at 111.

[6]Ibid., at 114.

[7]J. Thuo Gathii, *War, Commerce, and International Law* (2010).

[8]Linarelli, Salomon and Sornarajah, *supra* note 1, at 147.

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was to ensure that American investors received special protections when investing in Latin American states despite flying 'in the face of the obvious principle that an alien is always subject to the jurisdiction of the state that he voluntarily enters'.[9] Investor-bias persisted through the generations, proving itself immune to geopolitical shifts by surviving Chinese resistance, the Zapatista revolutions, decolonization, and the NIEO along the way. '[T]hrough the sophistry of the law and legal arguments', the colonial imposition of extraterritorial protections for foreign trade and investments – originating in capital-exporting states – ensured that historical imbalances would rise above decolonization movements and sovereignty claims alike.[10] Those who had expected the end of colonialism to pave a path for the adoption of domestic legal preferences learned that customary European law beat them to the punch: 'prescriptions of various standards of treatment . . . secure foreign investment through the neutralization of the power of the state to take measures that would be harmful to such investment'.[11] Even progressive anti-colonial states fell in line, accepting the controversial claim that foreign investment is 'the basis for economic and social development' and 'the promotion of flows of foreign investment into developing countries,' in the end agreeing to make its protection primordial.[12]

Swapping lenses, moral philosophy is made explicit in the sixth chapter on financial globalization. In contrast to the historical character of trade and investment, finance is the new kid on the block, maturing into its current iteration during the neoliberal era. While financial globalization first developed during the nineteenth century, its early forays were curtailed by the ensuing intra-European imperial wars. Its character also morphed as the 'development finance' of the colonial era – necessary to extract wealth from the colonies – was supplanted by the 'diversification finance' in circulation today.[13] Development finance, as the authors term it, was necessary to extract wealth from the colonies, either by dispossessing natives of their resources (capital to colonize) or compelling natives to engage in productive-activities (capital to enslave). It possessed a developmental character even if the benefits accrued principally for settlers and their overlords. In contrast, current cross-border financial flows are designed for investors and traders, providing them with a framework within which they can hedge and diversify risk. They do this by pooling and swapping financial assets between themselves, in what often appears as little more than a glorified Ponzi scheme. Diversification enables investors to insulate themselves from market risk while heaping systemic risk on states and societies at large.[14] Sovereign debt crises, banking crises, currency devaluation crises, and inflation crises, all manifesting post-capital account liberalization, run riot under the pressure of denationalized speculative finance.[15] Finance overrides sovereignty as an extra-legal framework is devised and managed by a host of private institutions (e.g., Berkshire Hathaway), associations (e.g., The International Organization of Securities Commissions), and clubs (e.g., The Paris Club).[16] Beyond up-scaling the accumulation of private rights and liabilities, the authors argue that the globalization of finance serves no social purpose.[17]

Some, perhaps much of what I have recounted is known to critical IEL scholars and *The Misery of International Law* does not break new ground on the distinct subfields of IEL though it does collate the critique in a cohesive and biting anthology. What is pioneering is the attempt to comprehensively weave a theory of justice through IEL. Beginning with Thrasymachus's argument in Plato's *Republic* – 'justice is nothing other than the advantage of the stronger' – they proclaim,

[9]Ibid., at 155.
[10]Ibid., at 156.
[11]Ibid., at 171.
[12]Ibid., at 151.
[13]Ibid., at 182.
[14]Ibid., at 183.
[15]Ibid., at 186–7.
[16]Ibid., at 190.
[17]Ibid., at 197–201.

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over and over, that IEL 'is structured to serve power and interest'.[18] Thrasymachus's trap results from the jurisdictional divisions between international and domestic law and the differentiated approaches to justice that ensue. In a political community such as a nation-state, power is wielded 'to the advantage of their citizens, regardless of the consequences to other states and vulnerable persons in those other states'.[19] Tribal perhaps, nativist even but sovereignty was conceptualized to distinguish between those who belong and those who are to be excluded. It comes as no surprise that in a world where political legitimacy begins and ends with sovereignty, justice would have scarce cross-border purchase. At the international, we have little more than a practical association between co-existing but usually competing political communities. In this framework, there is no reason to expect people from distinct political communities to feel any responsibility toward one another. It is to this conundrum that the authors propose a resolution and what *Misery* contributes to critical scholarship on IEL.

What way out of Thrasymachus's trap? They begin by dismissing 'the description of international law as a practical association and no more'.[20] As they rightly point out, the penetration of IEL into everyday life has forced national legislatures to reconceptualize 'what are typically understood as the domestic affairs of states' introducing a *purposive* character to international co-operation. Next, they collapse the 'inside-outside or member-not member distinction' upon which sovereignty is fashioned for international law has evolved into 'a necessary institution within the panoply of institutions that are needed for states and their peoples to flourish'.[21] The mutual reliance of states on common markets has embedded social co-operation in the global economy, pointing to an evolution from mercantilist conflict to an integrated 'system of transnational political linkage'.[22]

Lest they appear idealistic, they underscore that co-operation neither presupposes nor requires equality of participants and that the world is essentially divided between rule makers and rule takers, a division with flow-on effects for the regulatory framework as rule makers collude to advance self-serving IEL.[23] Substantive inequality is interwoven throughout the framework, producing a global economy that 'is morally disordered by design'.[24] All of this is part of a pattern of Eurocentrism in IEL and '[w]e should not ignore the "violence, ruthlessness, and arrogance" accompanying the disseminating of a European vision of international law'.[25] While geography and history may have some responsibility for the 'impaired starting points' of societies,[26] the authors argue that much more should be said about the legal machinations that consistently exploit historic wrongdoings in favour of the already powerful and privileged.

There is no easy way forward and, in fact, the authors declare theirs a mission of critique and not of prescription.[27] Nevertheless, they do posit an alternate indicator against which international lawmaking should be measured: since 'international law creates and maintains relationships with significant moral consequences', 'persons affected by international law have a *right of justification* for the rights, liabilities, burdens, and benefits it allocates ... The right of justification requires that states justify the international legal rules they create and apply to persons affected by them'.[28] States must work toward improving the moral legitimacy of international law which, to the authors, would involve actively supporting the demands of justice.[29]

[18]Ibid., at 38–9.
[19]Ibid., at 44.
[20]Ibid., at 51.
[21]Ibid., at 53.
[22]Ibid., at 55.
[23]Ibid., at 58.
[24]Ibid., at 60.
[25]Ibid., at 65.
[26]R. W. Tucker, *The Inequality of Nations* (1977), 161.
[27]Linarelli, Salomon and Sornarajah, *supra* note 1, at 274.
[28]Ibid., at 67–8.
[29]Ibid., at 72.

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To this end, they argue for a new barometer against which IEL should be measured, one that accounts for multiple justice principles.[30] They propose a smorgasbord of normative standards including an anti-misery principle, a duty not to harm principle, an equality of opportunity principle, a freedom from domination principle, and an anti-coercion principle. By adopting new principles against which new international law is measured, they argue that reform will occur at the level of 'predistribution' by making:

> international law just in a structural sense, *ex ante*, so that the elements of international law relevant to the global economy are designed to make it structurally impossible in a practical sense for injustice to exist in the global economy in any material sense.[31]

Despite the loose sketch, predistribution is promising and further investigation is needed before a conclusion can be made.

The seamless realization of a project of this magnitude would have been a miracle and the authors stumble along the way. Three instances stand out.

First, both tone and content left me wondering who the intended audience is. While IEL scholars are lining up to read the book – myself obviously included – the schematic and sprawling nature of the scholarship appears more suitable for students or non-IEL scholars. To reiterate, the authors readily confess the book's critical and non-prescriptive character. Yet there is something startlingly familiar in the critiques levelled. Admittedly each is prolific in their respective field so some repetition is to be expected. Here, however, the ambition was perhaps excessive, resulting in what are sometimes superficial representations of doctrine, history, or critique in IEL subfields. While the justice thread is indeed interwoven through and throughout the chapters, the bulk of the analysis appears in the opening chapter with subsequent references acting more as restatements than original additions. In short, whereas my admiration for the scholars caused me to predict a transcendental contribution, what we have instead is a critical exposition of IEL that would sit beautifully alongside a textbook in the reading lists of UG and PG courses.

Next, and linked to the initial critique, is the insouciance with which the authors broach the controversy surrounding their non-prescriptions. As highlighted in the preceding section, they call for the introduction of new normative standards in the regulation of the global economy. For illustrative purposes, I press them on their equality of opportunity and freedom from domination principles. Self-evidently, the birth lottery is primordial in determining a person's life chances: in which state or postcode are they born? This applies both domestically and internationally.[32] They propose that international law 'neutralize bad brute luck' by changing the structure of trade agreements to account for equality of opportunity and freedom from domination.[33] Their concern is that imbalance in economic power produces detriments in the negotiated outcomes for impoverished states. Of course, the history of IEL verifies this point endlessly.

The changes prescribed appear in Chapter 4. Hardly circumspect, they begin with a throw of the gauntlet: failure to compensate losers of trade agreements is produced by our 'lack of imagination about the structure of cooperation in international trade [that] prevent us from using these insights to construct new agreements'.[34] Indeed, due to our lack of imagination, co-operation and other normative ambitions are more rhetorical than sincere. Rather than toothless effusions toward social justice, we must adopt structures that '[integrate] trade, investment, and social justice into non-fragmented rule regimes'.[35] The deep malaise in IEL they bemoan can only be

[30]Ibid., at 72–6.

[31]Ibid., at 75–6.

[32]Social Mobility Commission, 'State of the Nation 2017: Social Mobility in Great Britain', available at www.gov.uk/government/publications/state-of-the-nation-2017.

[33]Linarelli, Salomon and Sornarajah, *supra* note 1, at 74.

[34]Ibid., at 129.

[35]Ibid.

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resolved through confrontation where with the aim of '[exposing] a common set of values' and creating 'the possibility of real reconciliation'.[36]

I note two important flaws in their analysis. First, and in contradiction which much of the book's thesis – more on this below – is the inferred inadvertence of the outcomes. *Real reconciliation* is attainable through a procedural exercise aimed at uncovering our *common set of values*. Between who this reconciliation is meant to take place and what basis for this common set of values is left unanswered. Drahos and Braithwaite made a similar point about the TRIPS, pointing to the Bretton Woods' institutions embrace of fuzzy values:

> [h]ere we have a group of fuzzy values that include cooperating with the poor, recognising their autonomy and helping to empower them. How do these values square with the detailed technical rule-making that goes on with respect to intellectual property rights in trade fora?[37]

As it turns out, they do not. Rather, the rules are devised to prevent any disturbance to the established hierarchies and privileges. The role of the values is to legitimize the intended outcomes. This is known and the preceding chapters acknowledge the contested nature of justice, the pathologies intrinsic to IEL, and the perverse outcomes precipitated by the global economy. Yet, in some sections of their book, these contradictory aims are reduced to 'frictions between the values and priorities of the different regimes'.[38] As is evident to a plethora of IEL scholars, including the authors, IEL is designed to leverage the dominance of economically powerful states against the weaker ones. Adopting a 'freedom from domination' principle would require upending the entire regime.

This brings me to the second flaw. The authors convincingly argue that '[o]ne of the core structural defects in international trade agreements is . . . [that] they structure markets to produce winners and losers. They compensate the winners . . . but they do not compensate the losers'.[39] They bemoan the 'failure to show respect for persons for suffer harm from a trade agreement and have reasonable grounds to complain'.[40] Two interrelated issues arise here. First, that trade agreements produce winners and losers is not only known or tolerated but also the very raison d'être of the treaty. It is nigh on impossible to imagine a state consenting to a treaty that is not aimed at producing putative gains for its population. Second, the finiteness of resources means that as some demographics gain, others will invariably lose. It is possible, even desirable for a state to intervene with an industrial plan intended to address the plight of the demographics that lose. But this is a matter of domestic politics. British textile workers surely have reasonable grounds to complain for the spiriting away of their sector to China. But the casual inference that their grievance is against the EU's trading partners rather than against the EU or the British government stretches the equality of opportunity argument to its inevitable snapping point.

Mercantile politics combine with sovereignty to produce varying degrees of nationalist sentiment. To the extent that the human rights narrative clobbers collective interests in favour of individual ones, it does so at a domestic level alone. However, the nation, or at least the lobbying classes within the nation, remains primordial in the economic ambitions of the negotiating parties. That they pursue self-interest above all else is a design feature of IEL, one that the authors acknowledge yet also evade across the text. Could it be otherwise? I recognize that, here, I too might be bereft of imagination. Unfortunately, the authors do not provide adequate support for the argument, instead dwelling on fuzzy values and presuming some form of consensus around the social justice aspirations they detail.

[36]Ibid., at 130.

[37]P. Drahos and J. Braithwaite, 'Hegemony Based on Knowledge: The Role of Intellectual Property', (2003) 21 *Law in Context* 204, at 215.

[38]Linarelli, Salomon and Sornarajah, *supra* note 1, at 130.

[39]Ibid., at 129.

[40]Ibid.

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This brings me to the final and, perhaps, most damning critique of the book: the competing narratives running through it. Across the chapters, the authors provide a blistering condemnation of the oppressive character of IEL. Injustice is a leitmotif of the international order. This is not an aberration but a design feature. Even today's imperialist remorse, whether expressed for enslavement, genocide, or armed trade, appears as nothing more than rhetorical spin. The rule makers persist in their pursuit of a regime that favours the interests of a minor demographic, almost always at the expense of the world's majority. Beginning with European monarchical powers and followed by mercantilists, industrialists, capitalists, financiers and a plethora of international economic agents in between, the authors highlight the dominance of plutocracy, occasionally oligarchy in the governance of IEL:

> [p]owerful states and other global actors have always shaped international law through conquests for capitalist expansion and international economic law now constitutes and sustains the terms of that expansion. There has never been "progress" towards something better but an allocation of advantages based on the power of the actors who control the making of the law in any given historical period. The present is no different.[41]

Yet, simultaneously and jarringly, a lot is written about international law's *moral* failures, about its *injustice* and, dare I say it, its *emancipatory* potential:

> [t]hat international law is both constituted by capitalism and constitutive of it seems clear, but it is an open question whether international law is path-dependent. The arguments herein for a different type of international law, one that better accords with the demands of justice, implies that there may still be hope, but if there is it is faint. This book is a contribution to an uphill battle to recover international law so that, "ordinary life" might become "the focus of the entire discipline".[42]

The authors appear to fall into their own trap, condemning the abhorrent design features of international law while calling for the regime's rescue. It is hard, impossible even to reconcile the clash of narratives: if international law is painted with a plutocratic brush, if the terms entrench the legacies of Europe's barbarous past, if the privilege of the minority is contingent on the dispossession of the majority, then the inequitable distribution they lament is inevitable and IEL is being condemned for its very success.

Moreover, as they argue, if the present is the same as the past and power continues to inform lawmaking, then their hedging around *path-dependency* appears duplicitous: are we to *recover* international law from itself; are we to constitute a new international law that is not constitutive of capitalism; and, more to the point, what is this 'different type of international law' they advocate for?[43] Is it just historically immaterial or full-fledged utopian? While the authors have only 'faint hope' and do not 'hint at great faith' in the possibility of the reform they aspire to, following my reading of their text, I am left wondering if concepts such as faith and hope are not part of the problem. Like good technocrats, we persist with magical-thinking in search of a new principle, a new right, and a new international law that can '[reconstitute] the brutal world' that international law has authored. Does their | our stumble at the finish line not simply allow IEL to live to fight and to oppress another day?

The Misery of International Law is a treasure trove. It is a marauding text informed by the authors' revulsion toward the depravity of the world and IEL's complicity in its design and preservation. I have already adjusted my reading list for both UG and PG modules on IEL and will also

[41] Ibid., at 272.
[42] Ibid., at 37.
[43] Ibid.

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rely on their work in the pursuit of my own scholarship. However, perhaps like IEL itself, the authors are victims of their own success: readers are pushed to despair. Hope and faith, a right of justification and predistribution (and perhaps a little masochism) will keep us hungry but, once we grasp the scale of the challenge articulated by Linarelli, Salomon, and Sornarajah, the only feeling one is left with is misery.

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