

10^E COMMISSION

DISTRIBUTIVE JUSTICE AND SUSTAINABLE DEVELOPMENT

JUSTICE DISTRIBUTIVE ET DÉVELOPPEMENT DURABLE

RAPPORTEUR : JORGE E. VIÑUALES

La commission est composée de

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FRAMING PAPER (23 AUGUST 2021)

I. OVERVIEW OF THIS PAPER

The purpose of this paper is to proceed to a preliminary framing of the topic entrusted to the 10th Commission: ‘Distributive Justice and Sustainable Development’. This topic is different from the type of legal questions, narrow or broad, that the Institut usually addresses, and it therefore calls for an initial reflection regarding its nature, framing and approach, before a preliminary study with sufficient detail and a questionnaire can be prepared.

Initially, my hope was to convene an in-person meeting of the 10th Commission in Cambridge or elsewhere to conduct this exercise through a facilitated dialogue among those members present, with written (or online oral) input from those members unable to join. In-person discussions present many obvious advantages, particularly for a meeting aimed at narrowing down such a vast topic. That initial step would have permitted to follow thereafter the ordinary process (prepare a Preliminary Study and a Questionnaire, to be followed by a Provisional/Final Report and a Draft Resolution) without the need to intercalate a Framing Paper, like this one. The strictures of the COVID-19 situation prevented, alas, this *modus operandi* in 2020. My renewed hope for a second attempt in 2021 was also disappointed. As a result, I am proposing to organise an online discussion before the end 2021 or early in 2022 based on (i) this Framing Paper and (ii) the written input from commission members, which may be considered preparatory work for the Preliminary Study and Questionnaire.

The paper describes briefly the nature of the topic, possible framings that may be given to it and some options regarding the approach to follow in the work of the commission. An appendix summarises the main proposals for convenience. Commission members are invited to use this appendix to facilitate and organise their input, and they are also most welcome to send their comments in any other format of their choice.

II. THE NATURE OF THE TOPIC

The topic entrusted to the 10th Commission revolves around two definitional terms, ‘Distributive Justice’ and ‘Sustainable Development’. These terms, although not entirely intractable, are remarkably broad and prone to different interpretations, understandings and expectations. They are also different in nature to the extent that ‘sustainable development’, however broad, is an expression which carries legal implications (a normative concept, as it has been characterised by some of the commission members in their writings) whereas ‘distributive justice’ is a branch or approach of moral philosophy dealing with the just, fair or equitable distribution or allocation of benefits and burdens amongst moral subjects, whether present or future, individuals or groups, humans or non-humans. Combined, the two definitional components of the topic make for what is both an extremely interesting but no less

challenging area of investigation, of a nature which is fundamentally different from most topics previously addressed by the Institut.

The basic characterisation of sustainable development, a term in use already by 1980, was given the 1987 Report of the World Commission on Environment and Development entitled ‘Our common future’,¹ also known as the Brundtland Report after its chairperson. Chapter 2 of the Report famously begins by stating that ‘*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’.² Although this characterisation is very broad and only of a policy – not a legal – nature, it is helpful for present purposes because it contains both intra- and inter-generational dimensions. The needs of present generations must be met but without jeopardising those of future generations. These two dimensions are key from the perspective of distributive justice because they suggest that distributional choices must be made not only among present moral subjects but also future ones.

If this broad policy statement is placed from the current scientific perspective of global environmental change, the inter-generational aspect becomes particularly important given that, in the course of meeting the needs of present generations, some environmental thresholds may be crossed (known as ‘tipping points’) beyond which the type of interventions previously used to address the problem would no longer be effective. The image of the straw that breaks the camel’s back (or an environmental system) offers a simple yet sufficiently accurate idea of what these thresholds mean: after the camel’s back is broken by a single additional straw, removing a thousand straws will no longer make any difference. There is a ‘non-linearity’ or ‘non-incrementality’ in the effect of a straw on the camel’s back beyond a certain ‘tipping’ point.

The temporal distributive dimension is not only relevant for the future, but also for the past. To continue with the basic image, the accumulation of straws on the camel’s back unfolds incrementally over a certain – often long – period of time and policy cannot make abstraction of that accumulation. By looking at the past, we see that the inter-generational dimension is intrinsically related to the intra-generational one, to the differences between the present situation of different moral subjects or stakeholders. First, one important aspect of the distribution of benefits and burdens amongst present generations is the different historical contributions of the relevant moral subjects to a given problem. Other aspects include present contribution to a problem, different needs and capabilities and, of course, a balancing between the expected benefits of an action and its environmental implications. Secondly, the amount of straw over the camel’s back determines how much straw can still be loaded without crossing the threshold, which may in turn limit the amounts that some moral subjects would have otherwise been legitimately entitled to load in light of their limited or non-existent past contribution. In brief, even if a larger share of pollution could be fairly

¹ *Report of the World Commission on Environment and Development, Our Common Future* (10 March 1987).

² Brundtland report, chapter 2, para. 1.

allocated to one stakeholder, its use would tip the system beyond the threshold. The tension between what is fair (under an approach known as ‘deontological’ in ethics) and what would cause overall disastrous consequences (under an approach known as ‘consequentialist’ in ethics) is at the heart of the tipping points debate. To compound the problem, the determination of where exactly a threshold is located and how it may be crossed is an extremely complex matter which can only be made by reference to possible ranges or, alas, in hindsight. Such determinations are themselves organised through processes which raise distributive justice struggles.

When the load that can still be placed on the camel’s back (the pollution ‘budget’ still available) is thus ascertained, three additional complexities emerge. One complexity concerns the incremental implications of the additional load which, without breaking the camel’s back, may nevertheless have significant distributional implications at the intra- and inter-generational levels. Pollution and/or environmental degradation, even if it does not cross a threshold, is nevertheless harmful and therefore raises issues of distributive justice. Such issues are highly regulated by a range of primary rules of international law, and they may trigger the consequences described in the applicable secondary rules, mainly of State responsibility for internationally wrongful act but also other systems (e.g. individual responsibility, responsibility of international organisations, responsibility or strict liability of corporations, etc.). Some of these primary and secondary rules have been or are being addressed by the Institut (e.g. by the work in the 3rd Commission or in the 12th Commission). Another complexity concerns the need for action of a compensatory nature, which may be due to the fact that a hypothetically fair share for a given stakeholder is no longer available given the current state of the problem, so the stakeholder is to be compensated in some way for not making use of its fair share. Compensation is also an intricate issue when either incremental or non-linear impacts (for which there may be geographical disparities, such as the collapse of a specific ecosystem or the consequences of a specific extreme weather event) felt by certain stakeholders are irreversible. Finally, a third additional complexity relating to distributive justice arises in relation to the ‘equivalences’ implicit in the idea of compensation and, more generally, in that of any balancing exercise. Compensation, broadly understood to encompass matters of balancing and proportionality intrinsic to sustainable development and distributive justice, implies comparability of goods which may not be easily (or realistically) comparable among themselves.

These brief considerations are only meant to emphasise both the interest and the difficulties arising from the unprecedented nature of the topic entrusted to the 10th Commission. Such nature has important implications for the framing and approach that could be selected by the Commission.

III. POSSIBLE FRAMINGS OF THE TOPIC

Whether the 10th Commission decides to venture beyond issues of law and into matters of ethics, science and/or history (see approaches) and irrespective of the approach taken to do so (see approaches), international law remains at the core of the Institut's contribution to this topic. However, even from an international law perspective, the topic is vast and may potentially overlap with (but also synergistically rely on) previous or ongoing work. It therefore requires careful framing.

A discussion on framing can be organised around three main levels. The first concerns the broad determination of what components to encompass (concepts/principles, applications, processes). The second concerns, within each one of these three components, a determination of what specific sub-components to examine (which concepts/principles? which applications? which processes?). The third focusses on the end outcome of the work (a resolution? a framing resolution and separate ones for at least some applications? a set of principles? other?). Naturally, decisions at one level have implications for the others.

A. Components

The three basic components that could be encompassed by the work under this topic are: concepts/principles; applications; processes.

The term concepts/principles refers to norms of international law formulated in such a way that they can be described as either normative concepts or principles (with this term used not to refer to a formal source or a category of customary norms, such as 'fundamental principles', but to a type of formulation of the norm). The concepts/principles would provide the umbrella guidance for the distribution of benefits and burdens arising in the context of sustainable development.

Such umbrella could be specified in specific matters relating to sustainable development. This would be beneficial because the main advantage of concepts/principles, their generality and possible relevance for a wide range of situations, is also their main disadvantage, because their normative guidance or pull may be greatly undermined. Thus, specific applications could remove some of the uncertainty and controversy that may surround the Institut's own stance on more specific distributional issues arising in the broader context of sustainable development.

Finally, work on this topic could address processes given that any examination of distributive justice involving a temporal dimension must account not only for distributive principles starting from a clean-slate or tabula rasa but redistribution (or combined redistribution/compensatory) processes starting from distributional considerations which may or may not be consistent with the principles. The more the latter require redistribution, the stronger the institutional process that is called upon. The historical dimension would be particularly illuminating if the process component is retained.

III.A.1. My initial proposal would be to encompass concepts/principles and applications, and to leave the decision on whether to encompass processes to a later stage, once the implications of the work on the first and second components are fleshed out.

B. Sub-components

1. Which concepts/principles?

International law contains a range of sufficiently recognised concepts and/or principles specifically addressing distributive justice matters arising in the context of sustainable development. The main examples include the normative concept of sustainable development itself, which some have also characterised as a principle, the principles of inter-generational equity, the principle of common but differentiated responsibilities, the polluter-pays principle and some concepts relating to the distribution of access to resources, such as that of a common area, common heritage of mankind and common concern of humankind.

One significant challenge in relation to the selection of the concepts/principles to be examined in the present context concerns a trade-off between creativity and credibility. Some concepts and principles relating to sustainable development have been coated by a thick conceptual fog generated by sometimes excessive conceptual development – however good the intentions underlying it – with little anchor in legal practice. That may have been useful at an early stage but, at present, it undermines the normative traction, the actual normative functions that such concepts or principles may realistically perform.

My initial proposals regarding the selection of the concepts/principles to be included in the work of the 10th Commission are as follows:

III.B.1.1. The commission’s work should provide a detailed examination of at least sustainable development, common but differentiated responsibilities, inter-generational equity, and the polluter-pays principle.

III.B.1.2. The commission’s work may or may not encompass the concepts of common area, common heritage of mankind and common concern of humankind, which could also be dealt with in the context of the work of the 3rd Commission, on ‘Harm Prevention Rules Applicable to the Global Commons’. This should be decided in coordination with the 3rd Commission to avoid that these important concepts are left unaddressed.

2. Which applications?

The applications would consist of specific normative contexts defined by a combination of (i) a small set of key international instruments specifically governing the matter and (ii) clearly identified issues for which the application of the concepts/principles identified elsewhere is important.

A clear example would be the context of climate change, which raises major questions of intra- and inter-generational equity and has a normative context given by some core instruments (the UNFCCC, the Kyoto Protocol and the Paris

Agreement) as well as other key related agreements (e.g. the Montreal Protocol as amended by the Kigali Amendment). Climate change raises numerous issues at the very heart of distributive justice, whether in the intra- or the inter-generational dimension. Matters such as access to finance and/or technology, rights to emissions (or emissions per capita), accounting of emissions/contribution from a consumption- rather than a production-based perspective, resort to different types of geoengineering techniques, policy design based on ‘net zero’ targets rather than on deep mitigation, distribution of subsidies or other financial support schemes to fossil fuels rather than to renewable energies, access to energy, considerations relating to a just transition for the workforce, etc. But there are many other examples, some of which arise in the specific context of environmental protection, such as biodiversity protection, which raises both intra- and inter-generational issues relating to ecosystem protection and collapse, the management of biological resources and the specific issue of access to genetic resources and benefit sharing (including the benefits arising from the sharing of pathogens, a necessary basis for vaccine development and improvement). The normative context is provided by the Convention on Biological Diversity, its Nagoya Protocol as well as by a range of other related instruments specifically concerning some narrower aspects (e.g. the International Treaty on Plant Genetic Resources). These and other environmental problems provide relevant normative contexts where the operation of the concepts/principles examined earlier would require specification. There are also other aspects relating to distributive justice and sustainable development which, although extremely important to inequality and redistribution, are connected to sustainability in less direct ways, such as matters of taxation, access to vaccines (once available), and energy.

My initial proposals regarding the selection of applications to be examined in the work of the 10th Commission are as follows:

III.B.2.1. The commission’s work should include at least two applications of the concepts/principles examined under the first component: climate change and biodiversity, including biological and genetic resources.

III.B.2.2. The commission’s work could include other applications to be decided at a later stage.

3. Which processes?

If the 10th Commission engages in the discussion of processes, the focus of this work could be on one or more of the following sub-components: (i) identification of existing processes where one or more aspects relating to distributive justice should be undertaken (e.g. clarification of open matters of resource distribution in the Area within the International Seabed Authority); (ii) establishment of new processes (e.g. a new mechanism of access to pathogens and benefit sharing to facilitate the development of vaccines or an international body representing future generations or exchange markets of climate-related IPRs or compensatory mechanisms relating to loss & damage caused by climate change); (iii) rules for a range of purposes, such as to structure deliberations (a matter widely discussed in

the procedural justice literature), to organise compensation (e.g. in case of ‘shared responsibility’, as investigated by some commission members in their writings) or to establish compensatory mechanisms.

I have no specific position in this respect. I am not sure processes should be included in the work or, if they are, whether they should concern the implementation of concepts/principles and/or applications and/or specific issues within a given application. My initial proposal is for the commission members to:

III.B.3.1. First discuss ‘whether’ processes are to be encompassed or not after a decision on the two other components (concepts/principles and applications) and sub-components has been made.

III.B.3.2. If processes are covered, to address the type of sub-component for which a process will be developed ((i), (ii) and/or (iii) or still others or combinations thereof) and the level (concepts/principles, applications, item within applications, other?)

C. Outcomes

The ordinary outcome of the 10th Commission would be a resolution, but there are different options regarding the design of this resolution and also some possible alternatives.

Given the peculiar nature of the topic, the preparatory works leading to this outcome, including the papers, reports, questionnaire, answers, and exchanges, would be particularly important to clarify the contents of the outcome. In such preparatory works, broader conceptual matters as well as insights from other disciplines, such as moral philosophy, history, environmental science and others could more appropriately be covered, giving clearer and deeper roots to the work of the commission.

If the outcome is in the form of a resolution, it would be possible to have certain statements of principle followed by specific applications in the same text or in appendices or, still, appended proposed institutional developments. A combination of these formats is also possible. For example, a resolution could clarify the first component (concepts/principles), with appendices clarifying their application in certain specific contexts and describing basic aspects of a proposed institutional development.

One alternative to the previous approach would be to proceed by stages. The first would lead to a resolution clarifying the main concepts/principles of direct relevance to distributive justice in the broad context of sustainable development. Then, work on one or more resolutions relating to applications could be undertaken, e.g. as regards climate change-related issues and biodiversity protection-related issues. These more specific resolutions could contain specific appendices on key issues (e.g. geoengineering, subsidies/financial support, just transition, right to energy, etc.) and possibly also with an associated proposal for an institutional development. This approach would have the advantage of facilitating the ‘branching out’ to work

ongoing in other commissions (e.g. pandemics), without the need to undertake a specific resolution in the context of the 10th Commission.

My initial proposal regarding outcomes depends on the scope of the first component (concepts/principles):

III.C.1. If it encompasses only the four sub-components identified in proposal 1.1 (sustainable development, CBD, inter-generational equity, and PPP), then it is suggested to proceed in a single resolution with appendices, as needed. The distribution of matters within this resolution and its appendices is to be decided over the course of the work.

III.C.2. If, instead, more concepts/principles are encompassed, as suggested in proposal 1.2 (in addition to these four, also those of common area, common heritage of mankind and common concern of humankind), then it is suggested to proceed in more than one resolution, which would be handled over time by the 10th Commission. Combinations of these proposals are possible, e.g. parallel development of the concepts/principles and the climate change application.

IV. APPROACHES

Given the nature of the topic, one of the most complex tasks of the 10th Commission will be to strike a careful balance between the technical legal aspects, which are the core object of the Institut, and the need to resort and reflect the wider dimensions of the topic, particularly its historical, ethical, economic and scientific aspects.

In addition, the nature of the topic may require an approach which is more participatory than in other topics. To the extent that the 10th Commission will have to go beyond a narrow technical description of a handful of norms and clarify implicit aspects or even aspects left deliberately ambiguous in current law, an ethical dimension will be core to the undertaking. The commission, and the Institut, enjoys an increasingly wide representation of perspectives. But a statement which is closely linked to ethical choices, would require a broader engagement with stakeholders beyond the Institut itself (e.g. philosophers, environmental scientists, younger generations, etc), and a carefully designed process to do so.

IV.1. My initial proposal would be to combine both aspects into a suitable approach whereby the wider dimensions would be informed by structured consultations with key stakeholders, in the format of open workshops or short hearings of key stakeholders (followed by written transcripts), possibly also written input from them. Such input would then be considered by the 10th Commission in its proceedings, and it would be joined to the preparatory works of the work on this item.

I believe that such a modus operandi would not only be extremely enriching for our discussions, but it would also add legitimacy to the value choices underpinning our work.

APPENDIX
SUMMARY OF PROPOSALS

Proposal	Brief description	Comments from Commission Members
Components		
III.A.1.	The commission's work should encompass concepts/principles and applications and leave the decision on whether to encompass processes to a later stage, once the implications of the work on the first and second components are fleshed out.	
Sub-components		
III.B.1.1.	The commission's work should provide a detailed examination of at least sustainable development, common but differentiated responsibilities, inter-generational equity, and the polluter-pays principle.	
III.B.1.2.	The commission's work may or may not encompass the concepts of common area, common heritage of mankind and common concern of humankind, which could also be dealt with in the context of the work of the 3 rd Commission, on 'Harm Prevention Rules Applicable to the Global Commons'. This should be decided in coordination with the 3 rd Commission to avoid that these important concepts are left unaddressed.	
III.B.2.1.	The commission's work should include at least two applications of the concepts/principles examined under the first component: climate change and biodiversity, including biological and genetic resources.	
III.B.2.2.	The commission's work could include other applications to be decided at a later stage.	
III.B.3.1.	The commission's work should first discuss 'whether' processes are to be encompassed or not after a decision on the two other components (concepts/principles and applications) and subcomponents has been made.	
III.B.3.2.	If processes are covered, the Commission's work should then address the type of sub-component ((i), (ii) and/or (iii) or still others or combinations thereof) and the level (concepts/principles, applications, item within applications, other?)	

Outcomes		
III.C.1.	If the Commission decides to encompass only the four sub-components identified in proposal 1.1 (sustainable development, CBDR, inter-generational equity, and PPP), then it is suggested to proceed in a single resolution with appendices, as needed. The distribution of matters within this resolution and its appendices is to be decided over the course of the work.	
III.C.2.	If, instead, the Commission decides to encompass more concepts/principles are encompassed, as suggested in proposal 1.2 (in addition to these four, also those of common area, common heritage of mankind and common concern of humankind), then it is suggested to proceed in more than one resolution, which would be handled over time by the 10 th Commission. Combinations of these proposals are possible, e.g. parallel development of the concepts/principles and the climate change application.	
Approach		
IV.1.	The Commission's approach should combine both interdisciplinary and engagement aspects into a suitable approach whereby the wider dimensions would be informed by structured consultations with key stakeholders, in the format of open workshops or short hearings of key stakeholders (followed by written transcripts), possibly also written input from them. Such input would then be considered by the 10 th Commission in its proceedings, and it would be joined to the preparatory works of the work on this topic	

**OBSERVATIONS SUBMITTED
BY THE MEMBERS OF THE COMMISSION**

1. OBSERVATIONS SUBMITTED BY JOSÉ ALVAREZ

29 December 2021

Cher Confrère Jorge:

Like Dire, I must apologize for responding so late to your request for comments on your thought-provoking framing paper from last August. In my case, the delay was caused by many COVID-related disruptions and additional responsibilities but also, in all candor, by my own difficulties with the subject of your paper. As you indicate, the twin concepts before us, “distributive justice” and “sustainable development”, have lengthy legacies of interpretation and relate, more strongly than most *Institut* topics, to other disciplines apart from law, from philosophy to economics. For this reason alone, I benefitted a great deal from reading Dire’s responses to your paper and would greatly benefit from reading any others that you have received to date. I am curious if there is a common ground within this distinguished company with your summary of proposals and ways of going forward. Both concepts can be understood in many different ways and present very different normative agendas.

At this initial stage, let me indicate why I volunteered to join this commission and my own, possibly idiosyncratic, initial understanding of what this effort was all about. I saw this topic as a useful adjunct to the UN’s SDG enterprise because that effort – 17 goals and 169 targets – was not only impossibly over-ambitious but insufficiently connected to how international law (“IL”) could be put to use to help the world reach these goals/targets that were both desirable and attainable. I think that the *Institut* is as reasonable a place as any to seek guidance for governments on how to use IL to promote the SDGs – and therefore sustainable development. Finding ways that IL could connect to the SDGs is also important for IL’s own legitimacy. Given international law’s own contribution to global economic inequality I thought it was way past time for some of us expert in IL to attempt to use it, for a change, to promote more equitable economic outcomes – to reduce the tremendous (and growing) income inequalities within and among nations. These have become, of course, only more glaring and unacceptable in the age of COVID. Of course, economic inequality has been at the heart of the SDGs.

As indicated in the SDG’s preamble, that effort, as stated in the first paragraph of its preamble, was driven by one critical goal: to eradicate poverty in all its forms and dimensions, including extreme poverty because this was “the greatest global challenge” and “indispensable for sustainable development.” To me, combining the goals of “distributive justice” and “sustainable development” in this commission’s title meant, in short, providing an IL toolkit on best methods to implement through law the most relevant SDGs (and particular targets for these). I understood those to be those related to economic inequalities and involving,

particularly, international economic law. Going into the commission, my naïve assumption was that it would therefore focus on SDG goal 1 (and its sub-targets on ending poverty). But I could also see involving ourselves in closely related SDGs, such as goal 5 (achieving gender equality) and goal 10 (reducing inequality within and among countries). I saw our commission as being useful not only in providing guidance on how to implement the relevant SDGs but also in providing a critical look at the SDGs themselves. As a provocation and an illustration of the last, consider SDG target 1.4: ensuring that all men and women have access to “ownership and control over land and other forms of property . . .” (Also see SDG target 5a). Many of us know the regrettable neoliberal prescriptions (followed on the advice of lawyers like Hernando de Soto) for formal land titling and registration as the single formula for economic development around the world – and the harshly inequitable consequences of such policies. There is much to indicate that while the rhetoric has changed (away from talk of formal land titles to merely the need for “tenure security”), international financial institutions – and IL, including international investment agreements and case law – continue to promote such policies, even if they result in large-scale acquisitions of farmland resulting in food/housing insecurities and much else deeply offensive to distributional justice. These are singularly lawyers’ topics. I could see our Commission doing some good in providing a more progressive interpretation of SDG 1.4 along with some much needed prescriptions for using international law to advance distributional justice in its implementation.

While your framing paper approaches our topic from a far more abstract level, at bottom it suggests an environmental framing of both “sustainable development” and “distributive justice.” If you accept my more pedestrian framing of what this commission is for, I think that you see ourselves as providing legal advice for implementing SDGs 13, 14 and 15 and relevant targets therein. I will accept that this is a different, but equally plausible, interpretation of the twin terms in our Commission’s title. I have no strong objection to following this path but I do think that this framing risks considerable overlap with the Institut’s Third Commission and would require close collaboration with that commission. My own framing – focused on the challenge of deep structural economic inequalities around the world, some of which resulting from IL itself and doing something about them in advancing sustainable development– has, as far as I can tell, no competing Institut commission. Hope this is somewhat useful to you. Again, many thanks for devoting such time to this and very sorry to provide these few comments only at the very last minute.

All best wishes for the new year.

José Alvarez

2. OBSERVATIONS SUBMITTED BY SAMANTHA BESSON

15 December 2022

Comments on section I (Overview of the paper)

Did the online discussion take place? Is it planned to take place before the summer session in Angers? I find it may be easier to decide on the various points you raise in the Appendix following a general discussion.

Comments on section II (Nature of the topic)

Sustainable development as ‘normative concept’: It is interesting how sustainable development is assumed to be a normative and arguably legal concept here while it stems from economic theory, whereas distributive justice is described as philosophical only.

Distributive justice as an approach or branch of moral philosophy: It is interesting how sustainable development is assumed to be a normative and arguably legal concept here while it seems from economic theory, whereas distributive justice is described as philosophical only.

Distributive justice deals with the allocation of benefits and burdens amongst moral subjects, whether present or future, individuals or groups, humans or non-humans: Not exclusively; do we want to endorse this cost/benefit approach to justice? You make it sound as if this was uncontroversial, but many philosophers would object to include humans and non-humans in the same concept of justice. Same thing for individuals and groups, and even more so for present and future subjects. Is it the plan that we all agree on this?

Is our topic limited to "climate"/"environmental" development and justice (e.g. most of the principles discussed below and in the appendix are drawn from international environmental law)? This may avoid difficult normative conflicts and trade-offs, but would paint an incomplete picture of the competing issues in distributive justice, intergenerational or not, ahead of us.

Characterisation of sustainable development in the Brundtland Report as a policy – not a legal – concept: You mentioned its being “normative” before, however.

Current scientific perspective: Is the scientific perspective the right perspective for a justice assessment? Generally, what is our position on the relationship between international law and (environmental) science?

Moral subjects or stakeholders: We may want to clarify this term as it has become so polysemic, and is somehow foreign to the distributive justice discussion.

Fair: Or “just”?

Such issues (pollution or environmental degradation) are highly regulated by a range of primary rules of international law: It may be interesting to clarify the moral underpinnings of those rules of international law (and the secondary ones, of course): e.g. deontological or consequentialist, distributive or corrective, etc.

The same applies to the different principles of international law you identify later: what makes them principles of distributive justice in the first place? This is particularly important for the discussion later on about what should be the relations between the principle of distributive justice and future international law on the issues (you tend there to make the former an issue external to the law, left to the hand of philosophers).

You may want to add a reflexion on causation here, given how central it is to your reasoning about distribution and redistribution.

Comments on section III (Possible framings of the topic), sub-section B (sub-components), question 1 (Which concepts/principles?)

See my comment above on the fact that the (area in practice and, it is related, the) regime of international law concerned here (the one where those principles originate) is exclusive international environmental law. But why? You do mention other areas (but not the corresponding regimes) below. Should we not broaden the issue and maybe tackle the fragmentation question in the interpretation of the same principles across regimes?

The normative concept of sustainable development itself: The way you present it implies that it is itself a principle of distributive justice in international law. But is it the case?

Other principles: Provided they are principles of distributive justice (see my earlier point), we should also discuss the issue of their potential conflicts. Another related issue is the time frame: some of those principles are older than others and their interpretation may not have involved in light of the others.

Distribution of access to resources: They need not be approached as “resources” (this is part of the problem).

Trade-offs: Same trade-off as the ILC's... What can we learn from the ILC's method in this respect (or avoid doing)? We do not speak in the name of the Commission, States or the UN, but how constrained are we by the practice?

Comments on section III (Possible framings of the topic), sub-section B (sub-components), question 2 (Which applications?)

We may also want to include the question of equal access and distribution of resources from the outer space.

Inequality and redistribution: Earlier you focused only on equity.

Comments on section III (Possible framings of the topic), sub-section B (sub-components), question 3 (Which processes?)

Existing processes: It is probably too vague a term.

Shared responsibility: Shared responsibility goes beyond compensation: it helps establish responsibility in the first place, which is a distributive issue in itself.

Are processes to be included in the work: It is difficult to think of the principles without the processes in which they are discussed, interpreted and applied.

Comments on section IV (Approaches)

Ethical: Or “philosophical” as mentioned earlier?

Involving other stakeholders, such as environmental scientists: Are you thinking of something along the lines of IPCC? What can we learn and improve from the IPCC experience for our purpose?

3. OBSERVATIONS SUBMITTED BY PIERRE-MARIE DUPUY

13 February 2023

III.A.1: Components.

My comment is in the positive. I share the view of the Rapporteur. 1) The Commission’s work should encompass concepts/principles and applications 2) I believe that the Commission’s member should keep in mind the necessity of dealing with processes but should keep this part of the topic to a later stage. The discussion both within the Commission and then in plenary together with the approach described under IV.1 will give guidance on the way how to later deal with processes which are, in any event, dependent on several considerations, both contextual and pragmatical.

III.B.1.1 Sub-components.

My suggestion is that the Commission should provide a detailed examination of the four concepts/principles indicated by the Rapporteur, i.e. sustainable development, common but differentiated responsibilities, intergenerational equity and the polluter-pays principle; for the rest, at this stage, I would not open the discussion to further concepts, with the exception of common areas as they have already, directly or indirectly, been dealt with in multilateral practice and documents as well as in earlier guidelines and resolutions (without forgetting the IDI Resolution (including the IDI Resolution adopted in 1979 during the Athens Session, on the reports of Jean Salmon on Pollution of rivers and lakes).

Going further getting into a methodical examination of other sub-concepts would not only overlap with the work of the Third Commission but excessively enlarge the problematic. That being said, reference to concepts as common heritage of mankind, and common concern of mankind could be synthetically addressed including with a renvoi to the work of the Third Commission.

III.B.2.1 and 2 Applications.

I agree with the suggestion to include into the work of our Commission an application of the concepts/principles examined under the first component, respectively climate change and biodiversity including biological and genetic resources. For the purpose of the Commission’s work at this stage, I would not recommend to enlarge the list of applications more than the two cited above. It should be clear that they are only selected applications but that the rules and principles identified could be applied in other fields according to criteria earlier enunciated.

III.B.3.1 and 2 Processes.

Processes constitute a sub-topic which has its clear specificity. At this stage, they could only be synthetically pointed to without getting into further details while indicating that they shall constitute the normal follow up of the work in course. Experience with the actual negotiation of processes within other fora (including the OCDE and UNEP) shows that the devil lies in the details. The difficulty will be sooner or later to choose the level of complexity to be retained. It should be recalled in this context that pragmatism and flexibility should prevail over dogmatism.

III. C.1 Outcomes.

Agreed (see option chosen above III.A.1). A resolution is the normal result of the IDI and probably the most easily consulted by scholars and practitioners.

IV.1 Approach.

Agreed/No further comment.

4. OBSERVATIONS SUBMITTED BY FRANCESCO FRANCONI

8 December 2021

Dear Jorge,

Many thanks for your reminder about the overdue comments on your paper.

I apologize for the delay and compliments for the concept paper you have prepared.

When I joined the Commission on distributive justice and sustainable development, I was motivated by a doubt that has been lingering in my mind for quite some time, that is the doubt that we may be still far from having a consensus on the concept of sustainable development – and on distributive justice – because of the different epistemological positions about the concepts. The main difference, of course, is between the urban vision of development and the vision that comes from that large part of humanity – about half – that lives and works in the natural expanses of the world: the farmers, forest workers, indigenous peoples, traditional local communities etc. Until recently, this part of humanity has had hardly any voice in the formulation of sustainable development, and indeed in the development of international law. The decisions on development are made by urban political elites, directors of companies, arbitrators; and yet the consequences of these decisions, even and especially the adverse ones, are often falling on the people who live and work in rural areas physically and culturally removed from the urban mindset. Of course, recent developments of international law tend to give voice to this extra-urban part of humanity: the UN Declaration on the rights of indigenous peoples and the more recent UN Declaration on the rights of persons working in rural areas are important examples. Besides, powerful social movements such as the recent, and successful, mass protest of Indian farmers challenging the central government policy of economic liberalization of the agricultural sector, has shown how strong can be the resistance to an urban inspired model of development based on technology and

capital intensive investments which has often the effect of destroying the socio-cultural fabric of the traditional rural communities.

The conflicting views about sustainable development coming from the urban world and what we may loosely call the rural world reemerge also in the current doctrinal debate about the “anthropocene”. For the urban vision, sustainable development and distributive justice require massive urbanization of people in order to allow an efficient use of resources, the intensification of extraction of minerals to satisfy the energy and consumption needs of humanity, and the incessant development of new technologies as a condition for the satisfaction of economic and social rights of the population. Obviously, this view would require a revision of Principle 1 of the Rio Declaration, which you kindly asked me to comment for the 2015 Commentary you co-authored and edited: This Principle places human beings at the centre of concerns for sustainable development. But it clarifies that such development entails a healthy and productive life “in harmony with nature”. Are we now prepared to shed the requirement “in harmony with nature” in a post-modern urban-centered vision of sustainable development?

Especially after the pandemic, which has shown the tremendous fragility of the urban centered type of development, I think that the urban-rural dichotomy is all the more relevant for the assessment of the role of international law in promoting sustainable development. It is relevant also with regard to the goal of ensuring distributive justice. Any kind of international justice cannot be achieved at the cost of ignoring or destroying the socio-cultural fabric of that large part of the human population that conducts a life in the non-urban world.

I look forward to continuing the conversation.

Francesco

5. ADDITIONAL OBSERVATIONS SUBMITTED BY FRANCESCO FRANCONI

10 February 2023

The framing paper is excellent in providing a methodological approach to a topic so vast and challenging. However, I am a little puzzled by the fact that the paper seems almost entirely focused on questions, concept and principles of international environmental law, as if the theme of our Commission were “distributive justice and international environmental law” rather than “distributive justice and sustainable development”. When I volunteered to participate in this Commission, my understanding of the subject was that it should include the socio-economic and cultural dimension of sustainable development in line with recent trends including the Sustainable Development Goals and agenda 2030. These dimensions call into play the role human rights, which is all the more important in a multidisciplinary approach as advocated in your framing paper.

It seems to me that any attempt at linking sustainable development to distributive justice cannot ignore the relevance that in this context have the theory and practice

of economic, social and cultural rights with regard to vital issues such as the right to water, the right to food, the right to development of indigenous people and even the new right of specially vulnerable human groups such as peasant, according the recent UN General Assembly resolution proclaiming the rights of peasants.

On specific points of your paper, I would like to see more relevance given to the principle of “fair and equitable sharing of the benefits arising from biological resources”, which could be part of the section concerning principles/concepts. This principle represents one of the clearest and examples of explicit and concrete consideration distributive justice in relation to sustainable development and to international law general.

On the relationship between distributive justice and Climate change it would be useful to elaborate on the question of “climate” justice, what does it mean, what does it entail for sustainable development.

6. OBSERVATIONS SUBMITTED BY JEANNETTE IRIGOIN-BARRENNE

19 October 2021

III.A.I: I agree.

III.B.1.1: Yes.

III.B.1.2: Yes, it would be important to coordinate with the 3rd Commission.

III.B.2.1: Yes...at least two applications.

III.B.2.2: Of course.

III.B.3.1: I agree.

III.B.3.2: To decide at a later stage.

III.C.1: A single resolution is welcome.

III.C.2: To decide at a later stage.

IV.1: Very good idea, the consultations with different stakeholders.

7. OBSERVATIONS SUBMITTED BY DONALD MCRAE

31 October 2021

Dear Jorge,

My apologies for not responding to you earlier than the last minute of the date you set for responses.

I enjoyed your paper very much which sets out the complexities and challenges as well as the opportunities for the topic. It is an excellent start to the project which is indeed unlike most of the topics taken on by the *Institut*.

I have no problem with each of your proposals. My only comment is that while the paper deals comprehensively with issues and approaches in dealing with sustainable development, it says little about distributive justice. As you point out, distributive justice is a branch of moral philosophy and not a normative concept in the same sense as sustainable development, although I suppose it may become

normative depending on context and application. In any event, I wonder if the Commission at some point will have to address the notion of distributive justice in more depth in order to ascertain content and how it is to be applied in our exercise.

Many thanks for what you have done so far. I look forward to next steps.

Best regards, Don

8. OBSERVATIONS SUBMITTED BY ANDRÉ NOLLKAEMPER

7 November 2021

III.A.I: I can agree with the proposal in terms of phasing the work, but my position is that the final outcome would have to address questions of processes. My take is that precisely the absence / lack of adequate processes have hindered the development and in particular application of substantive principles, and have undermined the trust that progress on substance is meaningful.

III.B.1.1: I would add to this the no-harm rule, otherwise I agree.

III.B.1.2: I agree.

III.B.2.1: My sense is that this may be too narrow; there are many dimensions (ie relating to natural resources) that would fall outside these categories. I would think that this could be left more open.

III.B.3.1: I would think that this would have to be (and can be) a prior decision.

III.B.3.2: I agree.

III.C.1: I do think that the aim should be to work towards a single resolution, rather than to multiple outcomes at this stage of the work.

IV.1: Yes, I agree.

9. OBSERVATIONS SUBMITTED BY DIRE TLADI

13 December 2021³

1. Early on the paper, it is asserted that the nature of the topic is different from the types of topics that *Institut* normally addresses. The reason why this is so, remain unclear to me. There is an explanation at page 2, but it nonetheless eludes me.

2. In section II, there is another angle to the relationship between distributive justice and sustainable development that could be more explicitly captured. That is, like distributive justice, sustainable development is also about the distribution of benefits and burdens. In this sense, the two concepts are remarkably complementary. The point is there, but it could be made more explicitly.

3. The characterisation of sustainable development in the Brudtland Report (“sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”) is said be “only of a policy – not a legal – nature. This may or may not be true, but the point is made rather definitely.

³ Transcribed in fuller form on 13 February 2023.

4. At page 6 there is an example of the term concepts/principles. There is stated that these terms can be in a normative sense, but that this is not to be used to “refer to a formal source, or a category of customary norms, such as ‘fundamental principles’ but to a type of formulation of the norm”.) First, I fear that this explanation may be a little confusing. Second, and more worrisome, is that it may be read to be stating a claim that principles/concepts we will be looking at are not customary. It is understood that the sentence is not making this claim and I gather the idea is to be agnostic concerning. Yet it can be read in that way. I would be more comfortable with a statement to the effect that here we are referring to the type of formulation without reference to the legal status, while noting that some of these principles may well have customary status.

5. A related point: the concept/principles are said to provide umbrella guidance. Again, I fear this might have the effect of undermining the value. Thus, I would propose “umbrella framework” which is neutral as to status.

6. On the question of scope of the project and in particular whether to address applications, I certainly see the benefits as described. But I also worry that this runs the risk of broadening the topic and making it unwieldy. I think there are simply too many areas of application.

7. On the particular principles, I initially had scepticism towards the polluter pays principle, but on reflection, I think it would be appropriate. I would, however, prefer the precautionary principle.

8. On whether to address concepts of common area, common heritage of mankind and common concern of mankind, my view is that we should address them. If we decide not to address these concepts because they fall within the work of the Third Commission, we should make explicit that this is the only reason we are not addressing them.

9. My next point concerns the question “which applications?” This point should be read together with comment in paragraph 6. Here my view is that each area, if we are to proceed to applications, would need its own resolutions. Furthermore, it is not clear how we would make the decision to address climate change, but not say biodiversity where sustainable development and distributive justice issues are ubiquitous. A final point, if we exclude issues of common areas by virtue of it being addressed in Commission 3, then we probably ought to also exclude climate change.

10. At pages 11-12, the framing paper refers to the need for broader engagement. I think this is correct. Nonetheless, I think I would point out that the broader engagement should be designed to ensure that the *Institut* applies its mind taking into account the views derived from broader. This should, in any event, be the normal course of action and I don’t think it is necessary, in this project to adopt an approach different from what we have done in the past.

11. A final comment on the latter point. It would be very important, if we adopt the methodology proposed to think carefully about how “stakeholders” are identified, particularly if the objective is legitimacy.

