16E COMMISSION

THE PLACE OF SOCIAL JUSTICE IN INTERNATIONAL LAW

LA PLACE DE LA JUSTICE SOCIALE EN DROIT INTERNATIONAL

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I.S.B.N. 978-2-233-01042-1

DISCUSSION PAPER

A. CONCEPTUAL PRELIMINARIES

The notion of "justice" is often juxtaposed to that of "law", the two being treated as essentially different, though interrelated aspects of the human social experience. In Western legal thought, their relationship has been frequently summarised in the somewhat simplistic opposition between "morality" and "law" or between a "naturalism" for which law appears as an emanation of the pursuit of justice and a "positivism" that denies any necessary connection between the two. Innumerable jurisprudential theories have sought to put in place an intellectually plausible and practically useful view of that relationship. It is doubtful that the *Institut* could or should engage itself in these debates. But it may still be useful to show awareness of the long tradition of legal and philosophical debates about the matter. The first section below gives some indications regarding the recent history of the concept of "social justice" (1). I will then elaborate on the concept of "justice" as a specific type of social virtue as it has been discussed in the Western legal and political tradition (2). The following section makes a few points about justice in the international sphere (3). The next section puts forward a number of ways in which justice and "social justice" may be analysed into their different elements (4). This is followed by a brief exposé of the basic idea in social justice of giving everyone they "due" (5) and a section that highlights that a realistic system of justice does not just address entitlements but also obligations (6). The discussion as a whole is intended as no more than a preliminary for the suggested choice of the perspective that the institute might take in its discussions of the topic.

1. A brief history of "Social Justice"

The concept of "social justice" comes up most frequently in the context of the history of the modern labour movement that began as a reaction to the "social question" in the early 19th century. Here it connoted the many problems of inequality and deprivation, including mass poverty and unemployment, brought about by industrialization and the glaring inequality between what were increasingly understood as social classes. In the latter part of the 19th century and in the twentieth century a call for "social justice" became a widely used slogan uniting the many branches of the labour movement and of the socialist, communist and social-democratic parties in Europe and the United States and their colonial possessions. It was the socialists, as Marcelo Kohen reminds us, who pushed for the Constitution of the International Labour Organization (ILO) to be negotiated together with the Versailles settlement in 1919.[1] By the end of the 20th century, many of the demands of organised labour had been codified in modern social and labour law and institutionalised in domestic public institutions – especially the institutions of the welfare state – dealing with social and labour policy, the

[1] Marcelo Kohen, Does International law Incorporate the Concept of Social Justice', in George Politakis, Tomi Kohyama, Thomas Lieby (eds), *Law for Social Justice. ILO 100* (2019), 92-3.

I.S.B.N. 978-2-233-01042-1

relations between workers and employers and the overall governance of modern industrial or post-industrial society. The Roosevelt legacy and the "*trente glorieuses*" kept social justice concerns high on the political agenda of post-war United States and Western Europe, though by the 1980s, it was gradually challenged by a neoliberalism that replaced the state by the market as the principal mechanism for dealing with social justice problems. Here it became obvious that conditions of domestic justice were dependent on developments in the international world – the freedom of movement offered to goods and capital, for example, but not to labour.

But in fact it was always clear that the problems of industrial modernity transgressed the boundaries of nation-states. "Working Men of All Countries Unite!", Marx and Engels wrote at the end of their *Communist Manifesto*. The class antagonism and the claims of the workers organised themselves across the industrializing world already in the 19th century. The international implications of the "social problem" were recognized in the aftermath of the first World War and given institutional expression by the establishment of the ILO. Later, new types of international legislation, conventions, decisions, recommendations as well as supervisory mechanisms have arisen with the objective of regulating the conditions of work across different societies. In fact, one of the most concrete applications of the theme of "international law and social justice" has precisely to do with the work and achievements of the ILO.

The work of the ILO has been path-breaking in the process whereby an increasing number of social relations formerly imagined in purely domestic terms have become subject to international regulation in the course of the 20th century.[2] But that is not all. The thesis "there can be no peace without justice" has rooted in professional thinking about peace and reconciliation after international and domestic conflict, inspiring novel practices of peace-making and post-conflict governance.[3] A whole industry of transitional justice has emerged since the 1990s to address the conditions of social justice needed to create lasting and stable peace.

Already by the 1960s perceptive commentators such as Wolfgang Friedmann had noticed a turn in international law from a law of formal "coordination" of inter-state diplomacy into a law of "cooperation", intervening in the most varied subjects relating to the social conditions prevailing in domestic societies.[4] Increasingly

[2] See generally the essays in *ibid*.

[3] The relationship between peace and social justice was underlined by the UN General Assembly in the resolution that established 20 February of each year as the "Day of Social Justice". According to the resolution, "social development and social justice are indispensable for the achievement and maintenance of peace and security within and among nations and that, in turn, social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms", UNGA Res 62/20 (26 November 2007), para 1.

[4] In 1964 Friedmann identified a huge number of "new fields of international law", including international constitutional and administrative law, international labour law, international criminal law, international commercial law, law of economic development, international corporation law, international anti-trust law and international tax law and noted the many ways in which the "individual" had become a subject of international law. See Wolfgang Friedmann *The Changing Structure of International Law* (1964), 152-187, 232-252. He also identified "trends and patterns" in what he called "international welfare organisation".

I.S.B.N. 978-2-233-01042-1

thereafter, treaty-making and other types of regulation by institutions such as the UN, EU and other regional integration organizations, human rights courts and other bodies has become a mundane aspect international cooperation. The claim of domestic jurisdiction under Article 2(7) of the UN Charter is today very rarely heard. Human rights law – including economic, social and cultural rights – intervenes in many ways in the lives of domestic societies. There is intense global attention on environmental cooperation; dealing with climate change and the protection of biodiversity has a multitude of effects on social conditions at home. Developments in trade and investment law have a direct impact on the work of domestic regulators as well as in the social relations of domestic actors and institutions. The very point of the implementation of UN's sustainable development agenda, *Agenda 30*, is to affect the social conditions of domestic societies as well as the relations between the global south and the global north.[5] Poverty, hunger, health, education, hygiene, energy, employment, sustainable industries, urban planning, different forms of discrimination… If Agenda 30 can be used as a measure of what the scope of international law is today, then it seems clear that it increasingly operates in the field of social justice and that its projects can and ought to be judged by reference to social justice criteria. But what are they?

2. Justice: A Social Virtue

Alongside the relatively brief history of social justice as a political claim about the right principles of government of late-modern industrial society, there is a much longer history of "justice" as a theme in Western political thought. The beginning of this history is usually sought from Aristotle's theory of the virtues, especially of the moral virtues which he, and the very powerful tradition following him, enumerate usually four, namely prudence, fortitude, temperance and *justice*. Now a moral virtue, according to this tradition, is a quality of the "soul" – that is to say, it denotes characteristics of an individual human being. To be prudent, to have fortitude and display temperance are all praiseworthy moral qualities that any individual may be more or less in possession of. These concern the human being as a single individual. By contrast, "justice" is a social virtue (or better, *the* social virtue) that addresses the relationship that an individual has with others. Individuals may be said to be "just" to the extent that they act in their social relationships in a just way, that is to say so as to bring about the happiness of the others, thus contributing to a just political commonwealth, *polis*. Nobody is just by nature. Nor is justice attained by learning a few rules or principles by heart. Instead, justice has to do with experience and critical concern for the consequences of one's actions on others, in the vocabulary of this tradition, the use of right reason in acting in the *polis*. As Aristotle summarises it in accordance with his teleological world-view, "We become just by performing just acts".[6]

[5] 'Transforming our world: the 2030 Agenda for Sustainable Development', UNGA Res 70/1 (25 September 2015).
[6] Aristotle, *The Nicomachean Ethics* (Penguin 2004), II. 1 (32).

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Another source for discussions on "justice" in the Western legal tradition is Roman law. The first Chapter of Book I of the Digest and of the Institutes of the Iustinian code is titled "Of Law and Justice". The latter also includes the famous definition of "justice" as "unswerving and perpetual determination to acknowledge all men's rights" ("*constans et perpetua voluntas ius suum quique tribuere*"). Although the Digest does address lawyers as "priests of justice", the very pragmatic character of Roman law avoids further abstract discussion or definition of that large notion. Instead, the Digest suggest that what it presents as "law" is precisely what this general definition of "justice" entails. Perhaps the best one can say is that like the Aristotelian tradition, the Roman view of "justice" focuses on the way "will" intervenes in the determination of social relationships, by allocating to each what is due to them ("*suum quique*").

A much more substantive treatment of justice as a virtue concerning an individual's relationship with others arose from the 13th century writings by Thomas Aquinas and became a crucial element in the 16th century revival of Catholic scholasticism. It is of interest for international lawyers that the so-called "Salamanca School" from the very earliest teachings of its founder, the Dominican friar Francisco de Vitoria, integrated the virtue of justice in his discussion of natural law and the law of nations. Closely following the *Summa theologiae* of Aquinas, he separated between "law" and "justice". The former had to do with the *external* precepts that guide humans to happiness, the latter with the *internal* quality that enabled applying (natural) law in the lives of actual societies and human beings as they are as well as deriving more specific rules from it. If according to natural law humans had been created free and property was common, its application in a world of sinners necessitated the hierarchies of sovereignty and private property, both of these latter being expressed in *ius gentium,* as just types of reaction to the nature of life among sinful humans. In this tradition, "justice" is a flexible concept, often associated with prudence, a *habitus* that an individual (king, judge, administrator) may possess and that enables the application of law in a way appropriate to its overall goals of human happiness and a thriving political commonwealth.[7]

Now the view that the relationship between of "law" and "justice" pertains to the encounter of the external and the internal worlds of humans was also adopted in Protestant jurisprudence. According to Hugo Grotius, for example, "[i]t is one thing to have regard to the laws and another to consider what justice demands".[8] It was often addressed as the relation between law and "morality" or between precepts accompanied by public enforcement and those not so adapted. Nevertheless, despite its non-enforceable character, from Grotius onwards, the tradition has stressed its compelling force for the rightful government of the commonwealth as well as the just conduct of foreign relations (especially in war).

[7] See especially Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás* (Edición preparada por Vicentre Betrán de Heredia, 1934/52).
[8] Hugo Grotius, *The Rights of War and Peace* (De iure belli ac pacis), Bk III, Ch IV, § III.3.

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Since the latter part of the 19th century, it has been customary to relegate the question of the relations between law and "justice" into legal theory and legal philosophy. In those fields, it has been associated with the endless debates about "positivism" and "natural law", legal realism and legal idealism, formalism and anti-formalism. There is no reason to engage those debates here. Nevertheless, those conceptual oppositions may still usefully illuminate the three legal globalizations that have taken place since the 19th century.[9] The first began by the spread in Europe and beyond of something like legal formalism, involving a rigorous effort to keep law separate from "moral" ideas, triggered by the dense German debates on historical jurisprudence and the classical public law tradition. Abstract notions of "justice" were to play little or no role. It was followed by a sociological jurisprudence at the end of the 19th and beginning the 20th century that highlighted developments in social and labour law from and the need to yield to claims of "justice" to mitigate the often-excessive rigour of formal law. In a third stage, by mid-20th century, the formal and anti-formal strands of law would operate side by side in increasingly technical and specialized types of legal practice. Here the demands of "justice" would often be expressed in the ethos of special, functionally designed legal orders set up to fulfil particular types of social objective that in international law were expressed in support for human rights, clean environment, free trade, profitable investments, mitigating the consequences of war, governing international communications and so on.

3. "International" Justice

The classical European view of justice was connected with the government of the political commonwealth, the *polis*. Since the 16th and 17th centuries, however, views about justice as a virtue of good statesmanship began to be applied in international affairs as well, though always insecurely, as aspects of or alongside the law of nations (*ius gentium*). An idea of universal justice had been put forward by many world religions and was often raised by the revolutionaries of late European enlightenment. In the 19th century, ascendant liberalism and the free trade movement pushed forward an idea of universal justice as analogous to domestic justice and integrated it in various cosmopolitan projects, among them the establishment of the *Institut de droit international* in 1873.[10] Thereafter, the vocabulary of international or cosmopolitan justice accompanied the many efforts to coordinate and expand international law and the work of international institutions across the globe. The debates often juxtaposed more or less "idealistic" with more or less "realistic" views, with a middle-of-the-way position reading international law itself as the most tangible expression of what justice in an international context could realistically mean.

[9] See further Duncan Kennedy, "Three Globalizations of Law and Legal Thought", in David M. Trubek & Alvaro Santos, *The New Law and Economic Development* (2006), 19-73.
[10] I have described this in Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* 1870-1960 (2001).

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As explained above, international justice lacked a significant "social" element until the establishment of the ILO and, much later, the integration of various economic development objectives into the law in the 1960s and thereafter. This was in great part owing to the powerful claim from the former colonies that their newly attained formal independence was to be accompanied by measures to guarantee also the conditions for economic development. The claim to solidarity and assistance was put forward as a *legal* claim, but inspired by an idea of justice, especially distributive justice. As expressed by Mohammed Bedjaoui, for example, traditional international law had been a purely formalist system that dealt with sovereign equality as a mere fiction. It had created "*une réalité profondément marquée par le sous développement et l'exploitation du Tiers-Monde*".[11] This unjust system was to be transformed in accordance with the claims of the third world countries in order to attain real, substantive equality.

Another source for claims of social justice arose in the 1960s within the human rights field where the elaboration of international rules of civil and political rights was immediately accompanied by the demand to likewise give international recognition to social, economic and cultural rights, these latter enshrined in the relevant covenant of 1966. Since that time, the calls for "justice" have appeared as claims for free or fair system of trade, a clean environment, increasing attention to humanitarian concerns in peace and war as well as the various versants of the effort to bring about sustainable development. In its study on international law's fragmentation in 2006, the International Law Commission identified the rise of a number of legal regimes for the management of international problems, each intensely concerned with the realization of its special functionality. In this way, different justice concerns have been allocated to different legal regimes with the result that a general view of the situation of social justice is blurred, or receives no articulation. The reality of international law today is become one where each regime seeks to fulfil its objectives in an optimal fashion, while "balancing" and other forms of informal accommodation have emerged as the principal techniques to deal with possible conflicts between countervailing justice claims.

4. Types of Social Justice

It can be deduced from the foregoing that the notion of "social justice" is somewhat of a pleonasm – Aristotelian "justice" has by definition to do with social relationships. As "virtue", it addresses the mindset of those who govern and whose decisions have an effect on the relative position of individuals in society, the hierarchies through which material and spiritual values are distributed. If the vocabulary of virtue seems alien to modern law, it may be translated into the discretion available to members of domestic governments or decision-makers at international institutions as well as the mundane work of legal interpretation, the decisions that law-appliers make to give a meaning to a legal rule or principle and apply it in a concrete situation.[12] It is possible

[11] Mohammed Bedjaoui, 'Non-alignement et le droit international', 151 *Recueil des cours* (1976), 393.
[12] Jan Klabbers has recently abbreviated virtue in global governance to apply there in respect of "judgment and discretion". See his *Virtue on Global Governance. Judgment and Discretion* (2022).

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to distinguish many different ways in which claims of social justice may seem relevant of those types of legal decision-making.

- Already Aristotle distinguished between *universal* and *particular* justice, though not quite in the sense we would today make that distinction.[13] Nevertheless, there is reason to distinguish a justice that applies top relations between human beings in general, and particular justice that focuses on specific relations between single individuals in their context.
- A distinction is sometimes made (and Aristotle certainly made it) between *legal* and *social* justice. The former would then refer to what we today often associate with the "rule of law" while the latter, in contrast, occupies a wider sphere of activities and positions that are not legally regulated. It would align with fairness of perhaps "equity" – especially the kind of equity that cannot be said to fall "*infra legem*".
- Another type of justice is *retributive* justice that has to do with punishment for a crime. This is an aspect of social justice not only because it looks back to what types of action a society may want to criminalize (that is to say, it presumes a system of social value) but also how the society sees appropriate punishment.
- There are many ways to address justice. "Private justice" addresses a specific system of rules and practices outside the public realm and is often condemned while "environmental justice" seeks a better balance between nature and society. "Restorative justice" appears as a counterpart to "transformative" justice: is the point to return to a prior situation or move beyond? In the international world, *transitional* justice has come to address the question of what is required for a society in the aftermath of a social conflict so as to bring about settlement and long term reconciliation between former adversaries.
- But the most important distinction is probably that which is made between *distributive* and *commutative* (or rectificatory) justice, the former having to do with the way material or spiritual values are shared between members of a political commonwealth while the latter seeks to establish a (just) equilibrium between two individuals, or what is owed between them. The former focuses on (vertical) relations between members of a society in general, the latter (horizontally) between two individuals (as typically in a commercial relationship).

5. Social Justice: Giving Each their Due

Most of the uses of "social justice" address the question of what is due to somebody: "What is due to them by law?" "What is the right punishment for this crime?" "What is the prize of this?" Most relevant in the context of global governance is the question "How should these benefits be divided among members of society?" There is no important treatment of the item of social justice that would not be concerned with distribution. It is sometimes abbreviated as the demand for

[13] For him "universal justice" had the same scope as virtuous conduct in general, and particular that of fair action with regard to single individuals. Aristotle, *Nicomachean Ethics*, V.2 (116-117).

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"equality". This does not mean that everyone ought to be treated in the same way. Treating a rich and poor person in the same way would certainly not be seen just. Systems of progressive taxation and positive discrimination give effect to the sense although striving towards similar treatment may be the main rule, it is to be accompanied by taking account of *appropriate differences*. The appropriate principle rather is "treat humans in the same way except where there are relevant differences between them". Equality is always equality *in some respect, in some scale*. And as soon as the scale has been set, it automatically creates a basis for differing treatment as well. An hourly salary that is the same for all provides a basis for differentiating between those who work longer and those who work shorter hours.

Concern over the massive inequality in the global world is then not about people being treated differently. Instead, it concerns the utter unjustifiability of the differences that the system of global governance – including the rules of international law that frame it – makes between countries of the north and those of the south, for example, between men and women and between the white and the non-white. The data is very well-known. Oxfam reports that the 10 richest men own more than the bottom 3,1 billion put together, that 252 men have more wealth than all 1 billion women and girls in Africa, Latin America and the Caribbean combined, and that in the United States, as many as 3,4 million black Americans would be alive today if their life expectancy were the same as white people's.[14] The situation is not improving. A recent World Bank study shows that nearly an additional 70 million people fell into poverty in 2020 – the greatest annual increase since the composition of the statistics began in 1990.[15]

From the perspective of social justice, inequality means that many people are not receiving what is due to them (*suum quique*). This raises the question of how to measure what is "due" to each. One suggestion, tempting especially in a legal context is to refer to "rights". What is "due" to someone has to do with respecting the rights of that person. This would certainly cover much of the relevant ground. But the meaning of "right", or a claim of right, may often be obscure. On the one hand, it is not clear that the call for respecting "rights" always means rights formally established in law or in a treaty. Often the demand for "rights" is, instead, directed at legislators or treaty-makers, calling them to legislate some preference as a formal "right". In the history of human rights activism, for example, the demand for "rights" has been less about respecting some entitlement that already exists, rather than *changing* law in such a way that a new preference would be included in it and capable or formal implementation. This was certainly the case with the 1960s and 1970s demands by developing countries for a New International Economic Order. This was a claim for just treatment. But not a claim for respecting already existing entitlements. On the contrary, those existing

[14] https://www.oxfamamerica.org/explore/stories/what-is-global-inequality/ .
[15] The World Bank, *Poverty and Shared Prosperity 2022*, in https://openknowledge.worldbank.org/bitstream/handle/10986/37739/9781464818936.pdf.

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entitlements (or rights) were seen precisely as an obstacle for realising social justice. Nor were the claims necessarily about "rights"– and certainly not "individual rights" – but rather the balance of entitlements (the "structure of legal arrangements as a whole) that that conditioned the relations between the global north and the global south. That is also to a great extent the case of present-day global inequality.

There are many other ways to recognize what is "due" to somebody, principal among the relevant criteria being those of "merit" and "need". It is often held, especially in domestic societies, that the values or benefits that society owed to its members ought to be determined by the relative merit of those members. "Meritocracy" is the name for a social arrangement that is single-mindedly committed to recognizing the achievements of its members. But the approach also has its problems. It is not always clear how merit should be measured – what values it should contain. And meritocracy tends to freeze social hierarchies in ways that may be justifiably felt by those left at the bottom as unjust. Meritocracy fails, for example, to take account of structural features in society that disable some groups from attaining the values (education, say) on which merit is based. And of course, it would be hard to see how issues of global justice could be dealt with by reference to merit.

A perhaps more intuitively plausible way to measure what is due so someone, especially in an international context, is by reference to need. This was of course the communist utopia ("from each according to their capacities, to each according to their need") and many religiously inclined and charitable movements are focused precisely on distribution in accordance with need. Often the problem is raised of how to identify those who are needful in contradistinction from those who "want" something, especially in a world where resources are scarce and choices have to be made between various interests – whose needs must be satisfied from common resources, and who will have to turn elsewhere? But justice claims are not only about needs – eradicating poverty, say. Because they are about *relationships*, they also address the ways in which benefits and burdens are distributed between different people. Classical writings always pointed to the injustice and dangers inherent in excessive differences of wealth, that is to say, the principle of privilege, a concern that also underlay the idea of the welfare state. The struggle against privilege – an important justice concern – has addresses precisely the question of what may be seen as admissible or even beneficial differences of wealth and where privilege is unjust and socially destructive.

6. Not only entitlements – also obligations

Social justice concerns are normally raised in terms of claims of entitlement. However, there is no real entitlement without somebody also being obliged to give reality to that entitlement. As pointed out above, "justice" is a relational concept. To the extent that it concerns "rights", for example, it requires the identification of some actor with a "duty" to enable its full realization. The well-known problem with economic, social and cultural rights has been their so-called "declaratory" or

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"aspirational" nature that has so far often meant that no public or private entity has been identified as legally obliged to put them into effect. Nevertheless, the Committee on Economic, Social and Cultural Rights has in several of its general comments and statements highlighted the extraterritorial duties of States in respect of the substance covered by the covenant. Thus, for example, it has noted that the "obligation to protect" the rights under the Covenant extend "to any business activities over which States parties may exercise control" and that this may require setting up appropriate human rights due diligence measures extending also to the foreign subsidiaries of domestic companies and partners in a production chain. The Committee even raised the possibility that a state failing to carry out its duties in this respect might be regarded as internationally responsible.[16] Likewise, the Committee has stressed the extraterritorial extension of States parties' obligations with respect of health care, the uses of water as well as the international investment in and exploitation of land and agricultural resources abroad. It has frequently underlined the importance of social justice problems resulting from globalization, including from the austerity measures undertaken in an effort to manage debt or to comply with the conditionality measures imposed by of public or private creditors, including the IMF and the World Bank.[17]

The work of the *Institut* might take steps towards further identifying the extraterritorial obligations on states and others actors, such as transnational corporations or international financing institutions to give reality to the international concerns expressed in the Covenant on Economic, Social and Cultural rights and other pertinent instruments. In case there may be difficulty in identifying the obligated person or institution, one way to proceed would be to focus on the fact that injustice usually means, both conceptually and historically, that there is somewhere also a beneficiary of the process that has created it. In such case, the obligated person would be that beneficiary. It is, however, well-known that establishing the relevant causalities may be hard, and subject to varying political and expert assessments. There is no general agreement on the causes of poverty and other types of social deprivation. However, not all situations are alike, and the *Institut* might wish to identify some cases where a relationship between victim and beneficiary are sufficiently clear to warrant a specific conclusion.

[16] Committee on Economic, Social and Cultural Rights, General Comment No 24 (2017), on State obligations…in the context of business activities (E/C.12/GC24, 10 August 2017), paras 29-35. See also Statement on Obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, 12 July 2011).

[17] See General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (11 August 2000), paras 38-42; General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (23 January 2002), paras. 30-36; General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights (E/C.12/ 2022/1, 22 December 2022), paras 40-47. General Comment No. 8 (1997). See also General Comment No 8, The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights (E/C.12/1997/8 (12 December 1997). The duties of international financial institutions are discussed in the Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2016/1 (22 July 2016), paras 7-8.

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Moreover, regardless of specific causalities, concerns of distributive justice also apply to the very fashion in which resources are divided among members in a community. To the extent that the international world is imagined or *should be* imagined as a "community", there is reason to examine the "fairness" and "equity" of its various processes of distributing material and spiritual resources. An account of such processes should not be left with identifying the "losers" but also those who benefit – including private industries, businesses, banks and investors – and on whom, therefore, would fall the burden of either justifying the privilege or redressing the concern of justice in some appropriate way. Here, the *Institut* might need to address the role of public authorities in determining the relevant principles.

B. POSSIBLE WAYS FORWARD

The foregoing reflections cover some of the very large ground occupied by the concept of "social justice". As the *Institut* will need to consider how to proceed with its project on the "Place of Social Justice in International Law", at least the following preliminary suggestions arise from them:

- There is no specific area of international law to which concerns of social justice are limited. Instead, they seem relevant for the most varied questions – from peace and security to human rights, from development to environment, from trade to the uses of natural resources, from the uses of digital technologies to the management of exploration and exploitation of the outer space. It is mostly relevant as a *demand* or an *invitation* to change existing law or practice in some particular way so that the question of its "place" cannot be decided by examining international law as it is, but as it *ought to be* in some respect. *It is a claim about the need for "progressive change".*
- Social justice claims may be of many types. They may concern the strengthening of the rule of law (legal justice) or the operation of criminal jurisdiction and enforcement (retributive justice). They may concern the relations between the political community and its members (distributive justice) or they may concern the relations of individual members among themselves (commutative justice). Although there are other types of justice claims as well (claims for private justice, environmental justice or transitional justice, say), it is these four types that are most relevant for this project.
- However, of the four types of social justice, two are already being considered widely in international institutions – rule of law and retributive justice. The UN has a rule of law program and a regime of international criminal justice has become a well-established part of international law. In this sense, a novel opening by the *Institut* could best focus on commutative or distributive justice. Moreover, these are the type of justice concerns that relate directly to *economic* concerns that are most commonly addressed when global social justice is being considered.
- Commutative justice – justice in commercial exchanges – has obvious relevance in international trade. Nevertheless, the parties of international

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commercial exchanges seldom relate to each other in purely bilateral or transactional terms. Even if the price of goods, for example, the paradigmatic commutative justice question, is usually agreed bilaterally, the very conditions of bargaining in the international world are set up by the massive global organization of trade – the rules of the World Trade Organization, of course, but also of other bilateral and regional trade arrangements, the regulatory structure of international finance as well as a whole body of institutions and rules on sustainable development. Even as these regulatory structures concern the way bilateral economic transactions are carried out, the most important social justice concerns with respect to them have to do with the distribution of bargaining power resulting from the initial appropriation of resources that determines the conditions on which contracting takes place within these structures. The ideology of "free trade" simply perpetuates the consequences of that initial allocation/appropriation. For such reasons, it is insufficient to focus on commutative justice alone (i.e. on the actual transactions made within or decisions passed by these institutions). Instead, it is necessary to focus historically on the way that initial appropriation/allocation has been undertaken. It follows that one way to reframe the study of the *Institut* would be focus on *distributive justice in international economic relations (international political economy).*

- One preliminary question in such a study would have to deal with the *typology of relationships* that would be pertinent for social justice relations in international political economy. Initially, one can identify a series of typical relations:
- a. State-to state relations;
- b. Relations between particular classes of states (i.e. developed and developing states, states of the global north and of the global south, donor states and states that are recipients of assistance;
- c. Relations between and across international members of economic institutions (customs unions, integration organizations, preferential trade and investment agreements…);
- d. Relations between states and international investors;
- e. Relations between states and multinational corporations;
- f. Relations between domestic and international civil society actors on the one hand, and international institutions on the other.
- Another preliminary question that would have to be decided is to identify the pertinent social justice questions. Or, in other words, "*what types of social justice concerns or claims emerge in the relations of different types of actors*?" Initially, such concerns may be identified from international human rights treaties and other regulation prohibiting discrimination on the basis of race or gender as well as treaties and other regulation of relevance for labour rights, social protection, public health, the conditions of foreign debt management, and protection of the environment, just to name a few. One benchmark are the 1966 Covenants and especially the general comments and statements,

I.S.B.N. 978-2-233-01042-1

referenced above, produced by the Committee on Economic, Social and Cultural Rights.

- But even as existing human rights treaties do provide information on social justice concerns that may be pertinent for the *Institut* project, such concerns also emerge in most treaties that have to do with the conditions of international economic relations. For example, trade treaties that qualify aspects of domestic regulation as "protectionism" are important to the extent that they may have an effect on the ways the domestic government is able to meet social justice concerns at home. The same can be said of investment treaties that assess domestic laws from the perspective of "fair and equitable treatment". "Fairness" and "equity" are typical standards of justice, but there has been much disagreement about what they mean for the foreign investor and the domestic government. As is well-known, the application of such standards in international arbitration has led to a very varying jurisprudence. Efforts to articulate more clearly the balance between domestic justice priorities and the interests of international investors in new "hybrid" treaties such as the 2016 Trans-Pacific Partnership Treaty (TPP) or the 2016 EU-Canada Comprehensive Trade Agreement (CETA) are welcome – though both have also occasioned widespread opposition and neither is yet in force. Nor has the protracted negotiation of a general Investor-State Dispute Settlement Reform within the UNCITRAL (WG III) been able to meet the justice concerns of many actors. [18] The same seems true also of the fate of the Energy Charter Treaty (ECT). The effort to globalize that arrangement has met with many parties either withdrawing or having declared their intention to do so in view of the perceived injustices it has created.[19] The *Institut* project might focus on the types of justice concerns have been supported under such terms in present instruments and their implementation practice.
- When they adopted the Agenda for Sustainable Development, *Agenda 30*, in 2015 the Heads of State and Government and other high representatives of States described the distribution of tasks belonging to domestic and international actors in matters of social development in the following way:

> *"We reiterate that each country has primary responsibility for its own economic and social development and that the role of national policies and development strategies cannot be overemphasized. We will respect each country's policy space and leadership to implement policies for poverty eradication and sustainable development, while remaining consistent with relevant international rules and commitments. At the same time, national development efforts need to be supported by an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced*

[18] https://uncitral.un.org/en/working_groups/3/investor-state .

[19] See International Institute for Sustainable Development, Statement "Energy Treaty withdrawals Reflect reform Outcome is Insufficient for Climate Ambition, November 7, 2022, https://www.iisd.org/articles/statement/energy-charter-treaty-withdrawal-announcements.

I.S.B.N. 978-2-233-01042-1

global economic governance. Processes to develop and facilitate the availability of appropriate knowledge and technologies globally, as well as capacity building, are also critical. We commit to pursuing policy coherence and an enabling environment for sustainable development at all levels and by all actors, and to reinvigorating the Global Partnership for Sustainable Development."

- The statement highlights the priority of the role of the domestic government and domestic regulation in making the choices of which social justice in its domestic context ought to consist. At the same time, it recognises the supporting role of international cooperation – indeed of something it calls "international economic governance" – for securing the success of those choices. The *Institut* project should distinguish – to the extent possible – social justice concern that arise in domestic societies and those applicable internationally, specifically to international actors, both public and private. To some extent such separation will remain artificial. The operations of private companies have often wide international effects, as the Committee on Economic and Social Rights has noted, and many international actors, not least international financial institutions, have great significance on the social justice situation at home. Nevertheless, it is precisely the interdependence of justice concerns that justifies the intervention of international law in them
- The unjust distribution of material and spiritual resources in the world today is based on historical reasons. It is not the effect of natural laws but of human action, of centuries of war, foreign occupation, various forms of imperialism and colonialism, the unjust appropriation of resources. Taking into account the relationship between the beneficiaries and victims of past practices is an important aspect of social justice. It is increasingly taken into account in on-going international negotiations, fore example those regarding compensation for damages caused by colonisation or slavery. The establishment of the relevant causal chains and the very morality of compensation for historical wrongs are matters of some dispute, of course, but needs to be pursued. But concerns of justice are not just about historical responsibilities. The mere fact of glaring inequality already calls for remedial action. Justice is not just compensating for past wrongs, but doing the right thing now. That global inequality is already recognised by economic law is represented in the principle of "special and differential treatment of developing states" (SDT). This could be enlarged to concern more generally the unequal uses of global resources between populations in the developed north and those in the south. One proposal to deal with this might concern the establishment of a resource tax whereby those with exclusive right on a resource would pay a dividend to compensate to those with insufficient access to such resources.[20] The difficulties of any such proposal are clearly evidenced in past efforts to

[20] One example of such a method would be a "Global Resources Dividend" as proposed by Thomas Pogge in *World Poverty and Human Rights* (Polity 2003), 196-215.

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construe just systems of uses of common resources ranging from the UN Conference on Trade and Development (UNCTAD) to the Third UN Conference on the Law of the Sea (UNCLOS III) and further to the negotiations of the Paris Climate change convention (UNFCCC).[21] Making a reality of a new international institution designed to remedy existing injustices is wrought with difficulties and might tend end in yet another UN-looking structure, with the many problems such structures have (among them insufficient representation of civil society). But the *Institut* might nevertheless seek to identify realistic proposals that have emerged in international institutions and among scholars for the just uses of common resources.

- Finally, in any such study, some attention needs to be given both to the *material and the formal* aspects of social justice. The *material aspects* concern the *rules and principles* that govern or ought to govern the pursuit of social justice in the relations between international actors: what are they? "Fairness" and "equity" clearly are such, and there are many others, but they are situated at a very general level of abstraction. Can they be specified to the extent that they apply between particular classes of actors or in regard to specific types of subject-matter? The *formal aspect* concerns the procedures and techniques to make social justice concerns applicable in the relations of particular actors or with regard to specific substantive questions. What action should be taken to address problems of unequal bargaining power? What considerations should govern the composition of decision-making bodies in matters relating to social justice concerns? How to ensure the appropriate representation of non-governmental actors and concerns in different international processes?

[21] One recent sketch, elaborately building upon a long heritage of debates on cosmopolitan justice, for a "transnational assembly" to decide on the administration of global "public commons", elected in a process aspiring to democratic principles may be gleaned in Thomas Piketty, *Capital et idéologie* (Seuil 2019), 1180-1186.

I.S.B.N. 978-2-233-01042-1