

AMERICAN SOCIETY OF INTERNATIONAL LAW

International Legal Theory Interest Group

Distributive Justice and International Law: Symposium Agenda

Friday, November 7, 2008, Tillar House, Washington, D.C.

AGENDA

- 8:30 a.m.**     **Introduction** (Tim Sellers (Baltimore), Brian Lepard (Nebraska), Frank Garcia (Boston College))
- 8:40 a.m.**     **Panel 1 – Foundations** (moderator: John Linarelli (La Verne/Northeastern))
- Carol Gould (Temple) (keynote)  
Daniel Butt (Oxford)  
Aaron James (UC Irvine)  
Robert Hockett (Cornell)
- 10:15 a.m.**     **Coffee**
- 10:30 a.m.**     **Panel 2 – Applications** (moderator: Chi Carmody (Western Ontario))
- Chantal Thomas (Cornell/Am. Univ. Cairo) (keynote)  
Chin Leng Lim (Hong Kong) (keynote)  
Jeff Dunoff (Temple/Harvard)  
Fernando Tesón (Florida State)
- 1:00 p.m.**     **Lunch**
- 2:00 p.m.**     **Panel 3 – Critique** (moderator: John Linarelli (La Verne/Northeastern))
- Joel Trachtman (Tufts)  
Barbara Stark (West Virginia)  
Jan Klabbers (Helsinki)
- 3:45 p.m.**     **Coffee**
- 4:00 p.m.**     **Open Forum** (moderator: Frank Garcia)
- 5:30 p.m.**     **Closing Comments** (Frank Garcia, John Linarelli, Chi Carmody, Tim Sellers)

## ABSTRACTS

### Panel 1 – Foundations

Carol Gould, *Approaching Global Justice through Human Rights: Elements of Theory and Practice* (keynote)

This paper explores the advantages for an account of global justice of using a human rights framework that privileges the fulfillment of basic economic and social rights, in place of other cosmopolitan perspectives. It argues that such a human rights approach, derived from a conception of equal positive freedom, can avoid two conundrums that face theories of global justice: concerning the tension between cosmopolitan claims of universal personhood or global interconnectedness on the one hand and nation-state priority for economic distribution and redistribution on the other; and concerning the “demandingness” of global justice approaches. The paper also sketches some practical applications of this approach for public policy and international law, including a proposal for institutionalizing human rights across borders through new or strengthened regional human rights agreements.

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

### Extended Abstract

#### *Introduction*

We live in a world with a broad range of institutions whose actions affect the distribution of benefits and burdens both between and within particular political communities. It is commonplace to assert that as cooperation and interdependence between communities increases, so there is a greater need for over-bridging institutions which regulate and control international interaction. As such, we can expect both increases in the powers of existing international institutions and the development of significant new international bodies. By what standards should the decisions and actions of such institutions be assessed? This paper argues that international institutions should be guided by a cosmopolitan principle of global equality of opportunity, which holds that individuals should have access to opportunity sets of equivalent value regardless of their nationality. It further argues that this principle can be best pursued by a particular focus on socio-economic rights, which falls somewhere between sufficientarianism and egalitarianism. Such an approach allows both for immediate action by international

institutions to uphold sufficientarian basic rights and for a political project whereby cosmopolitans seek to build popular majorities in favour of more expansive conceptions of such rights in relation to specific capabilities central to global equality of opportunity. The paper consists of four sections.

*Section 1: What does it mean to say that institutions “should” implement principles of distributive justice?*

The question of whether and how political institutions should be guided by principles of distributive justice is a complex and contested one. It does not necessarily follow from the fact that one believes that individuals have particular entitlements as a matter of distributive justice that agents in the real world should act in such a way as to make actual holdings closer to ideal holdings. A claim that a given principle should or should not be implemented may be a response to one of three distinct questions:

- a) What is the best philosophical account of principles of distributive justice?
- b) Is it desirable, in practical terms, that these principles should be implemented?
- c) Do political institutions act legitimately in seeking to implement these principles?

Much contemporary philosophical writing about distributive justice relates to the first question. Some writers think that the answer to the first question is connected to the answer to the second,<sup>1</sup> others see these as quite separate.<sup>2</sup> The third question is typically bracketed by political philosophers, and is more commonly addressed by legal philosophers concerned with the legitimacy of judicial policy making. A claim that institutions should pursue distributive outcomes *in an all things considered sense* must address all three questions. Typically, it is harder to make such an argument in relation to transformative, as opposed to conservative, accounts of distributive justice. This section uses the recent example of the South African Constitutional Court, under Chief Justice Pius Langa, to show how an institution can legitimately seek to pursue transformative outcomes. Langa argues that the Court has a duty to further redistributive egalitarian outcomes, and justifies this by reference both to philosophical accounts of distributive justice and by democratic endorsement of the Court’s goal of social transformation.<sup>3</sup> In the absence of this degree of overdetermination of the legitimacy of transformative intervention, things are much more difficult.

---

<sup>1</sup> See Rawls’s account of his work as “realistically utopian”, in John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 6-7.

<sup>2</sup> See G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

<sup>3</sup> See Pius N. Langa, “Transformative Constitutionalism”, *Stellenbosch Law Review* 17 (2006).

*Section 2: What is the best philosophical account of principles of international distributive justice?*

This section makes a substantive argument in favour of a cosmopolitan approach to international distributive justice, which denies that state boundaries have ethical significance in terms of distributive justice. It further argues for a particular egalitarian principle of distributive justice: namely that of global equality of opportunity (GEO). This has been summarised by Simon Caney as follows:

Global equality of opportunity requires that persons (of equal ability and motivation) have equal opportunities to attain the positions valued in every society.<sup>4</sup>

Sylvie Loriaux puts forward a similar conception:

[A] plausible version of global equality of opportunity can be constructed, which demands that equally talented and motivated persons who participate in the global economic order should have a roughly equal chance to benefit from this order if they so choose, irrespective of the society to which they belong.<sup>5</sup>

GEO rests upon what is perhaps the most powerful weapon is the cosmopolitan armoury – the idea, which many find intuitively compelling, that there is something unfair about the fact that the place of one’s birth – which is, in John Rawls’s terms, arbitrary from a moral point of view – has such a critical impact on one’s life prospects. The claim that distributive justice at a domestic level requires some form of equality of opportunity is commonly, though not universally, upheld. The critical question in relation to GEO is whether one believes that distributive duties apply only to fellow nationals, or to everyone in the world regardless of nationality. There are multiple routes to the latter conclusion. One may advocate a non-relational account of distributive justice, whereby the moral equality of persons leads to egalitarian distributive principles between persons regardless of whether there is any interaction between the persons in question. Alternatively, one may put forward a relational account whereby distributive principles only apply between persons who interact in a certain kind of way. Accounts of the kind of interaction relevant to justice vary, with examples including social cooperation, subjection to coercive law and joint authorship of coercive law. The critical question for such accounts is therefore whether

---

<sup>4</sup> Simon Caney, “Cosmopolitan Justice and Equalizing Opportunities”, *Metaphilosophy* 32 (2001), 113-134 at p. 120.

<sup>5</sup> Sylvia Loriaux, “Global Equality of Opportunity: A Proposal”, *Journal of International Relations and Development* 11 (2008), 1-28 at p. 2.

global interaction meets the specified relational threshold. If so, the door is open to an argument for GEO. Finally, one may maintain that although principles of distributive justice need not necessarily obtain between different political communities within ideal theory, the unjust character of historic and/or contemporary international relations in the real world problematizes the claim that particular political communities should be considered as distinct spheres of social cooperation, and so suggest that GEO is an appropriate rectificatory response to international wrongdoing.<sup>6</sup> The section concludes by considering a number of objections against GEO recently articulated by David Miller.<sup>7</sup>

*Section 3: From theory to practice - should institutions implement global equality of opportunity?*

Global equality of opportunity is undoubtedly contentious. As a principle of international distributive justice which is both cosmopolitan and egalitarian, it may appear to be a long way away from those accounts of distributive justice most commonly held in the real world and written into international law, which more typically stress national self-determination and oppose patterned redistribution across state boundaries. GEO may be opposed for a number of different reasons. One response denies that justice requires equality of opportunity even in the domestic case. A second response accepts that domestic inequality of opportunity is unfair, but denies that there is anything unfair about the claim that individuals in different states face differential opportunity sets, since they are members of distinct spheres of distributive justice. A third response accepts that there is something unfair about global inequality of opportunity, but maintains that this is a necessary and/or acceptable price to pay for respecting the self-determination of different political communities. This third response may be expressed under either (1a) or (1b) above – as being unfair, or as being impractical in the real world.

For those who oppose GEO and seek to uphold non-cosmopolitan accounts of international distributive justice, the gap between theory and practice is generally either small or non-existent. Insofar as they advocate conservative principles of distributive justice, their prescriptive claims typically approximate to contemporary settled norms of international justice, as embodied in international law and progressive international rhetoric, if not in actual international practice. It is relatively uncomplicated for such theorists to argue that international institutions should (in

---

<sup>6</sup> For relevant discussion, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002) and Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (Oxford: Oxford University Press, 2008).

<sup>7</sup> See David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

every sense) intervene to uphold basic rights, but not go further in pursuit of transformative distributive patterns. This is most obviously the case in terms of negative rights ensuring certain minimal freedoms and securities, but is also true of basic socio-economic rights to certain minimal levels of functioning, in relation to goods such as subsistence, health, education etc. One can straightforwardly make a case in favour of institutions upholding these rights based on the best philosophical accounts of human rights. Significantly, these accounts need not depend upon cosmopolitan principles of distributive justice: non-cosmopolitan theorists who deny that distributive principles extend across national boundaries nonetheless typically maintain that states possess duties of assistance to those in other countries regardless of the character or extent of interaction between them. Furthermore, socio-economic rights are well grounded in a wide variety of international treaties and agreements, and in global public opinion. As such, it appears as if the justification for rights-reinforcing intervention is similar to the case for transformative intervention in the South African case, in that it is backed by both normative argumentation and democratic consensus.

The difficult question, then, comes for those who believe that the best philosophical principles of international distributive justice are transformative in nature. They face two questions:

- 1) Do international institutions act legitimately in seeking to implement global equality of opportunity?
- 2) Even if we deem such action to be illegitimate, should international institutions, in an all things considered sense, act to implement GEO?

Answering (1) negatively does not answer (2), since there might be cases where injustice of not intervening trumps concerns of legitimacy. This can be seen most clearly in relation to interventions to protect basic rights. (2) might be answered negatively for one of two reasons, based on the wrongness of illegitimacy, or on the practical effects of illegitimacy (on, for example, the future interventionist capacity of the institution in question). Nonetheless, many are likely to believe that whatever the philosophical strength of egalitarian cosmopolitanism, its lack of real world support means that international institutions act wrongly and/or ill-advisedly if they intervene to uphold GEO.

#### *Section 4: Socio-economic rights and global equality of opportunity*

This final section argues that framing GEO in terms of socio-economic rights helps to mitigate such concerns relating to its implementation. This addresses concerns relating both to the best philosophical account of distributive justice, and to both the practicality and the legitimacy of implementing GEO. This approach draws on the capabilities approach of writers such as

Amartya Sen and Martha Nussbaum and on Michael Walzer's conception of "complex equality" to assess what is needed for GEO to obtain.<sup>8</sup> Three categories of capability are assessed: those whose provision needs to be provided equally if opportunity is to be equal; those whereby a minimal level of provision is necessary for equality to be equal; and those where international inequalities seem largely insignificant. The crucial point is that GEO does not require that international redistribution be so extensive as to leave all states equally well off in terms of, for example, per capita GDP. For some capabilities, such as education and health, it does seem necessary that provision in different states be of a comparable standard if opportunity sets are to be equivalent. GEO claims that individuals should have access to the highest attainable standard of healthcare and of education. Whilst such rights are subject to progressive realisation and resource availability, the availability of resources in question is measured globally, rather than by reference to the holdings of particular states.<sup>9</sup> For other capabilities, such as access to shelter and housing, what is important is that each individual has access to a sufficiently good level of provision. Inequalities after this point are relatively unimportant. GEO thus combines egalitarianism and sufficientarianism, depending on the good in question. Finally, the approach allows for significant resource differentials between different states, in relation, for example, to luxury goods, when these differentials do not impact on GEO. Whilst this approach will not persuade those who reject the value of equality of opportunity at a domestic level or those who deny that distributive principles apply across state boundaries, it does provide a partial response to those who seek to balance GEO against national self-determination, either for reasons of fairness or of practicality.

This conception of GEO thus constitutes a transformative cosmopolitan principle which is compatible with, but goes further than, the sufficientarian basic rights approach, and which can plausibly be advocated within an international democratic context. The paper advocates an agonistic approach to international democracy, whereby cosmopolitans seek to effect political change by building popular majorities in favour of GEO. The extent of deep principled disagreement as to the circumstances of international justice means that cosmopolitans should accept that it will not be possible in the immediate future to build an overlapping consensus on cosmopolitan principles of distributive justice. Cosmopolitans should focus on building popular majorities in favour of equal access to those capabilities such as healthcare and education which

---

<sup>8</sup> Martha C. Nussbaum, and Amartya Sen, (eds.) *The Quality of Life* (Oxford: Clarendon Press, 1993); Michael Walzer, *Spheres of Justice* (Oxford: Blackwell, 1985).

<sup>9</sup> This builds upon, but goes beyond, the approach to the right to the highest attainable standard of health articulated by the UN Committee on Economic, Social and Cultural Rights in General Comment 14. See Paul Hunt, "[The Millennium Development Goals and the Right to the Highest Attainable Standard of Health](http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/HUNT_POPULATION.PDF)", *The John D. and Catherine T. MacArthur Foundation International Lecture Series on Population Issues, Abuja, Nigeria*, available at [http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/HUNT\\_POPULATION.PDF](http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/HUNT_POPULATION.PDF)

are critical to global equality of opportunity. International institutions can legitimately intervene to implement GEO when backed by popular majorities of this kind. Such intervention need not be redistributive in nature; it can also take the form of intervention in domestic policy making in relation to policy courses which affect the relevant basic capabilities. If one maintains that such intervention requires majoritarian support to be legitimate, one might also note that such consent need not necessarily be global in nature if it can be found within the polities in question. The hardest questions arise when international institutions are able to intervene in a manner consistent with GEO, but are of the opinion that they lack a democratic mandate so to act. The paper concludes by drawing upon empirical literature critical of the meaningfulness of democratic outcomes to suggest that, at the very least, institutions need not wait to act to further GEO until popular sentiments regarding distributive justice are formally expressed through the election of representatives or the ratification of international instruments. Potentially, this suggests a general scepticism concerning not only the extent to which one can take the results of formal election processes as indicative of popular opinion, but also the extent to which institutions should defer to majoritarian popular opinion when seeking to further the ends of distributive justice. The more critical the interests being served by transformative institutional action, the more justifiable it is for institutions to disregard public opinion. According to this perspective, the legitimacy-based concerns facing international institutions are largely pragmatic and prudential in nature, rather than strictly normative.

Robert Hockett, *Human Persons, Human Rights, and the Structure of Justice*

It is common for economically oriented transnational legal theorists and policy analysts to think and communicate mainly in maximizing terms. What is less common is for them to notice that each time we speak explicitly of globally maximizing one thing, we speak implicitly of globally distributing another thing and equalizing yet another thing. We also, moreover, effectively define ourselves and our fellow human persons by reference to that which we equalize; for it is in virtue of the latter that our global welfare formulations treat us as “counting” or rights-bearing for purposes of globally aggregating and maximizing.

To attend systematically to the inter-translatability of maximization language on the one hand, equalization and identification language on the other, is to “take distribution seriously” in global legal and policy analysis. It is to recognize explicitly, and to trace the important normative consequences that stem from, the fact that all law and policy are as distributive and entitlement-defining as they are aggregative. It is also to recognize therefore that all law and policy treat us as equally rights-bearing in some respects – respects in terms of which they identify and “count” us as politically relevant – and as non-equally rights-bearing in other respects. Attending

explicitly to these “respects” brings transparency about the degrees to which our transnational laws and policies identify, “count,” and treat us as equal rights-bearers in the right respects.

This paper accordingly seeks to lay out with care how to take distribution seriously in transnational legal and policy analysis. It does so by two means, keyed to the principal guises in which distribution is typically implicated in legal and policy analysis: First, by careful attention to the internal structures of the social welfare functions favored by most economically oriented transnational legal theorists and policy analysts. And second, by systematic reference to what linguists call the “cognitive grammar” of non-formal distributive language, a structure that mirrors the structure of distribution itself. The payoffs include both a workable method by which systematically to test proposed global maximization norms for their normative propriety, and an attractive globally applicable distributive ethic that can serve as an ethically intelligible normative touchstone for transnational legal and policy analysis.

Aaron James, *Global Economic Fairness: Internal Principles*

In discussing the global economy, philosophers tend to focus on what might be called “external” moral principles, that is to say, principles which do not essentially depend on the complex legal and social relations that now organize the global scene. But a different class of principles, which *do* essentially depend on such relations—what might be called “internal” principles—is arguably more interesting and of greater political importance.

Among internal ideas such as “fair play,” “non-discrimination,” “competitive fairness,” and “level playing fields,” I will suggest that the most fundamental is that of “structural fairness” – fairness in how legal and other social rules and expectations distribute advantages and disadvantages between different countries, and between their respective classes. I will explain why structural fairness is the basic notion, and explicate the sense in which its principles are “internal” principles. This will lead us to consider the social underpinnings of international economic law, as well as of relatively unregulated capital markets.

*Paper draft provided upon request.*

## Panel 2 - Applications

Chin Leng Lim, *The Conventional Morality of Trade* (keynote)

Unlike other areas of international economic law, claims for the global redistribution of resources have not loomed as large in international trade law and regulation. They were raised during the ITO negotiations but subsequently dropped out in the negotiations leading to GATT. This is not to say that claims related to wealth and resource disparities do not arise. They do so all the time in myriad situations. But in trade law, the principal issue which has come to the forefront is the tension between GATT's formal rules of non-discrimination and the principled arguments made by developing countries for their exemption.

First, instead of arguing wealth redistribution as such, developing countries argued that free trade requires the lowering of tariffs on the part of rich nations without necessarily requiring reciprocity. This extended to unilateral preferences. The United States' Trade Expansion Act of 1962 is a clear example and the developing countries have been making headway with this argument since the Dillon Round of the 1960s - culminating in the Generalised System of Preferences in 1971 after the Kennedy Round negotiations.

Secondly, developing countries have also argued that trade law's formal non-discrimination rules such the most-favoured nation (MFN) doctrine should not apply in some cases and that there should be special preferences instead for developing nations. The argument, as the late Robert Hudec showed, had been made as early as the ITO negotiations but laid dormant until around 1961 when the European Union sought to make a case for preferential treatment of its colonies falling outside GATT Article I's MFN rule.

Both these arguments – non-reciprocity and new preferences for developing countries - became permanently fixed with the GATT Enabling Clause in 1979. In contrast, international economic law in the 1970s was divided by the claim of developing nations for a New International Economic Order. While redistribution of resources was central to the two historic U.N. General Assembly resolutions won by the developing countries in 1974, these same countries entered the GATT Tokyo Round negotiations in 1973 calling for “differential and more favourable treatment” instead.

The aim of my paper is to outline the kinds of legal policy arguments which developing countries have made in the GATT and the theories of justice implied within these arguments. Roughly speaking, these arguments have been about equality. More specifically, what lawyers call substantive equality as opposed to formal equality. The sort of exercise which I am most

interested in is empirical in nature. My concern is with those claims which developing countries have actually made, how these claims contributed to institutional behaviour and to the making and application of trade rules. Put another way, before we can ask what theories of justice can tell us about actual situations, we need to know what those actual situations are about. My aim is to bridge the gap between ideal theories about justice which I sense are often characterised more by distributive concerns than by the lawyer's preoccupation with how countries have actually behaved in their trade relations, including the claims they make about the rules of trade law. My search is therefore for the positive morality of trade. In a sense, I am wondering if lawyers do anything useful in the debate about justice for the developing nations. I would like to think, or at least argue that understanding conventional trade morality, essentially a "lawyers' concern", may still be an important part of understanding what theories of justice can bring to improvements in institutional and trade rule design.

*Paper draft provided upon request.*

Chantal Thomas, *Democratic Governance, Distributive Justice and Development* (keynote)

Democratic governance enjoys normative preeminence in much contemporary theorizing about institutional design in the global economy. Yet a moment's contemplation exposes both conceptual and practical complications for international democracy, whether in conventional interstate lawmaking, or in hybrid forms of regulation. In three parts, this paper will assess the challenge of attaining both distributive justice and democratic governance in international law. Part I will briefly recount perspectives within democratic theory for international economic institutions, observing longstanding tensions between procedure and substance. Part II will assess arguments from legal sociology that posit communication as the essential fact in the management of regulatory systems. Part III will observe contemporary adaptations in development law and policy, including the erosion of Fordism, the rapid growth of informal and illegal markets, and the ascendancy of antiterrorism. The paper will conclude with a plea for greater mutuality of theory and praxis in the global distributive justice project.

Fernando Teson

Economists generally agree that free trade leads to economic growth. This proposition is supported both by theoretical models and empirical data. Further, while the empirical evidence is more limited on this question, the general consensus among economists holds that trade restrictions are likely to hurt the poor. More generally, if free trade leads to superior growth,

governments would have more resources to redistribute to the poor. It is surprising then that philosophers concerned with global justice do not advocate liberalizing trade as a way to improve the welfare of the poor as a class. Many philosophers are simply silent with respect to the effect of free trade on the poor. Others, astonishingly, argue that liberalized trade is harmful for the poor, contrary to the claims of economists. Yet any serious scholar concerned with the plight of the poor needs to address the theory and evidence regarding the effects of trade liberalization on economic growth and the welfare of the poor. This literature almost unanimously recommends free trade as a necessary condition for growth (although not a sufficient condition, as the quality of institutions is crucial). The philosophers' silence on this is, therefore, perplexing. Their usual policy prescriptions (e.g., a global redistributive agency) are, at best, of second order concern and, at worst, counterproductive.

### Panel 3 - Critique

Barbara Stark, *Jam Tomorrow: Distributive Justice and the Limits of International Economic Law*

"I'm sure I'll take *you* with pleasure!" the Queen said. "Twopence a week, and jam every other day."

Alice couldn't help laughing, as she said, "I don't want you to hire *me*—and I don't care for jam."

"It's very good jam," said the Queen.

"Well, I don't want any *to-day*, at any rate."

"You couldn't have it if you *did* want it," the Queen said. "The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."

"It *must* come sometimes to 'jam to-day,'" Alice objected.

"No, it can't," said the Queen. "It's jam every *other* day: to-day isn't any *other* day, you know."

LEWIS CARROLL, THROUGH THE LOOKING  
GLASS AND WHAT ALICE FOUND THERE  
(1871)<sup>1</sup>

"Distributive justice" is an ambiguous goal. If we simply mean "more fair than what we've got now," "distributive justice" is within easy reach, since we could hardly do worse. As a recent UN study explains, global wealth is distributed "as if one person in a group of ten takes 99% of the

---

<sup>1</sup> "Socialists often used to ridicule the capitalist system as offering the empty promise of 'Jam tomorrow.'" As Labour politician Tony Benn said in 1969, "Some of the jam we thought was for tomorrow, we've already eaten." <http://www.phrases.org.uk/meanings/211400.html>.

total pie and the others share the remaining 1%.”<sup>2</sup> The chasm between the rich and the poor has become unfathomable.

While the number of people living in poverty has increased by almost 100 million,<sup>3</sup> there are more billionaires than ever before,<sup>4</sup> people who have more money than some less developed countries (“LDCs”)<sup>5</sup>, people who, as Barak Obama put it, “make more in 10 minutes than a worker makes in 10 months.”<sup>6</sup> Simply rolling back some of the generous de-regulation and outright gifts that have brought us here would be a start, and may indeed have already begun. But how much more is required for actual distributive “justice?”

I take as a starting point the relatively modest objective of the Millennium Development Goals (“MDG”)—to halve the number living in extreme poverty, i.e., the 1.1 billion humans subsisting

---

<sup>2</sup> Anthony Shorrocks et. al., *Pioneering Study Shows Richest Two Percent Own Half the World’s Wealth* 4 (available at [www.wider.unu.edu/research/2006-2007](http://www.wider.unu.edu/research/2006-2007)) (last visited Dec. 7, 2006). UNU WORLD INSTITUTE FOR DEVELOPMENT ECONOMIES RESEARCH (WIDER), *THE WORLD DISTRIBUTION OF HOUSEHOLD WEALTH* (2006). This has been going on for some time. See, e.g., Report of the U.N. High Commissioner for Human Rights to the Economic and Social Council, U.N. Doc E/1999/96 P 4-6, reprinted in HENRY STEINER & PHILIP ALSTON, *HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 239 (2<sup>nd</sup> ed. 2000) (noting growing economic polarization, in which the poorest increasingly lose ground). In the U.S. alone, from 1997 to 2001, the top 1 percent captured far more of the real national gain in wage and salary income than did the bottom 50 percent. Clive Crook, *The Height of Inequality*, *ATLANTIC MONTHLY*, Sept. 2006 at 36, 37. Indeed, in the U.S. the rate of polarization is increasing. David Cay Johnston, *Report Says That the Rich Are Getting Richer Faster, Much Faster*, *N.Y. TIMES*, Dec. 15, 2007 (noting that the increase in income of the top 1 percent was greater than the total income of the bottom 20 percent.) Whether those at the bottom are nevertheless better off is an open question. The bottom line is that no one knows what the bottom line is: “Most likely [globalization] has helped some to escape poverty and thrown others deeper into it.” SINGER, *supra* note 5 at 89.

<sup>3</sup> The number of people living in poverty has increased by roughly 100 million, even as total world income has increased by 2.5 percent. JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 5 (2003). See also *Oxfam Faults Response to Famine in Africa*, *N.Y. TIMES*, July 24, 2006 (noting that “the number of food emergencies has nearly tripled in 20 years.”)

<sup>4</sup> Eric Konisberg, *A New Class War: The Haves vs. the Have Mores*, *N.Y. TIMES*, Nov 19, 2006 (explaining that the “superrich” – the \$20 million a year households – “are getting richer almost twice as fast as the rich” – the top 1 percent with an average income of \$940,000. See Jenny Anderson & Julie Craswell, *Make Less Than \$240 Million? You’re Off Top Hedge Fund List*, *N.Y. TIMES*, April 24, 2007 at A1 (noting that the top 25 hedge fund managers earned a combined total of \$14 billion, “enough to pay New York City’s 80,000 public school teachers for nearly three years.”)

<sup>5</sup> The assets of the world’s richest three individuals exceed the combined Gross National Products of *all* of the least developed countries (“LDCs”), with a population totaling 600 million people. SINGER, *supra* note 5 at 81 (citing 1999 *Human Development Report*.) See also *Annual Rankings of Top Earning Hedge Fund Managers*, *ALPHA MAG.*, April 2007 (noting that the top 25 managers earned more than \$14 billion, equivalent to the GDP of Jordan or Uruguay.)

<sup>6</sup> Jeff Zeleny, *Obama Proposes Tax Cut for Middle Class and Retirees*, *N.Y. TIMES*, Sept. 19, 2007 at A22.

on less than \$1 a day, by 2015. As economist and Director of the MDG Jeffrey Sachs points out, the wealth is there.<sup>7</sup> It is just a matter of moving it around.

My thesis here is that this is not going to happen under the aegis of international economic law, or the neoliberal economic order (“NEO”) as presently constituted, for two reasons. First, the NEO does not want this to happen. Indeed, it is inconsistent with the basic objectives and fundamental values of neoliberalism, including free markets and individual autonomy. This Part draws on Karl Marx -- not as an economist, but as a political theorist. I draw on Marx because, as Tony Judt has pointed out, “from first to last, Marxism’s strongest suit was . . . the moral seriousness of Marx’s conviction that the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.”<sup>8</sup> In addition, as Judt further notes, “Marxism . . . is now once again, largely for want of competition, the common currency of international protest movements.”<sup>9</sup>

Second, even if the political will were there, it would not happen because “international economic law” is not a coherent legal subject with the capacity to make it happen. This part draws on the postmodern critique of the Enlightenment. From a postmodern perspective, Marxism, like liberalism, is just another Enlightenment metanarrative.<sup>10</sup> As Pierre Schlag explains, “postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self. . . . For postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc. has turned out to be just so much Kant.”<sup>11</sup>

*Papers from the Symposium are to be published in the International Legal Theory Series of  
Cambridge University Press*

---

<sup>7</sup> JEFFREY SACHS, *THE END OF POVERTY* (2005).

<sup>8</sup> Judt at 9.

<sup>9</sup> Judt at 11.

<sup>10</sup> As Judt observes: “The Marxist project . . . was one strand in the great progressive narrative of our time: it shares with classical liberalism, its antithetical historical twin, that narrative’s optimistic, rationalistic account of modern society and its possibilities.” Judt, *supra* note 26 at 8.

<sup>11</sup> PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 24 (1996).