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**Fairness and International Law:
Within or Without?**

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Fairness and International Law: Within or Without?

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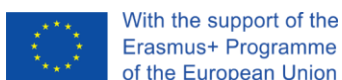
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Abstract

Starting from a notion of fairness that relies on taking all legitimate interests involved into account, this paper identifies fairness as a regulative idea to assess and criticise the law, but also to apply and to progressively develop it. After addressing ways and means to realise fairness in applying international law and to set it up as a 'learning system', it focuses on 'fairness over space and time', and asks under which conditions interests of distant strangers and of past and future generations should be taken into account in the application of international law.

Keywords

Fairness, legitimate interests, treaty interpretation, contestation, capability approach, extraterritorial obligations, historic injustice, intergenerational justice, climate change

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1. Taking Legitimate Interests into Account

Is law a way to fairness or fairness a way to escape the law? An answer to this question demands a confession. For apologists of power, the answer is clear: Where law is meant to serve the powerful, fairness belongs to a world outside international law. Trying to realise fairness within the law thus has a distinctly utopian tendency, if we take up Martti Koskenniemi's dualism.¹ For a 'moderate' utopian like me, law, also international law, should strive for fairness, and partly it does so. However, the relationship between law and fairness is complex and caught between 'is' and 'ought'. Fairness serves as a regulative idea to assess and criticize the law, but also to apply and to progressively develop it. Fairness is at the same time within and outside the law.²

I found it difficult (if not impossible) to reflect on this complex relationship and on the tools of realising fairness 'within' international law without so much as a working definition of fairness. For the time being, I would speak of fairness if all legitimate interests involved are taken into account. This notion of fairness has a procedural dimension (via the process of taking account), but is aimed at the realisation of legitimate interests, and thus also has a substantive dimension.³ What I would take as 'legitimate interests' will be disclosed later.

While it might be easy to postulate that international law *in general* should aim to realise fairness, it is less easy when it comes to the application (and to the creation) of specific legal norms.⁴ For it is inherent in law to draw boundaries. For every legal norm it has to be determined what is inside and what is outside its field of application, what – or who – is included, what – or who – is excluded. This generates a tension, given our regulative idea that law should strive for fairness.

¹ Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (reissue with a new epilogue, 2005).

² Similarly, on the related concept of equity, Catharine Titi, *The Function of Equity in International Law* (2021), at 5-8, 92-99, 199-201.

³ Cf. Thomas M. Franck, *Fairness in International Law and Institutions* (1995), at 7-9, who also conceives of fairness as procedural as well as substantive (in his case: oriented towards distributive justice).

⁴ Cf. Titi (note 2), at 5.

My paper will address the topic of ‘fairness through international law’ in two parts. I will reflect briefly on the relationship between fairness and international law’s techniques and methods, in the first part of this paper (II.). In the latter part, I want to focus on structural challenges to the underlying question ‘fairness within or without’, which I would term as ‘fairness over space and time’ (III.).

2. Realising Fairness in International Law

But first to the techniques and methods. A lot could be said about fairness in international law-making. A central problem here is how to create a level-playing field which allows all parties involved an equal possibility to engage meaningfully in decision-making. While this might be achievable in the negotiation of international treaties (with a host of problems in practice⁵), it is far more difficult in informal law-making procedures.⁶ However, for the sake of brevity and focus, I will confine myself to some thoughts on realising fairness through the application of international law.

Occasionally, ‘fairness’ turns up as an express term in international law, such as the Fair and Equitable Treatment (FET) standard in investment law.⁷ If we take ‘equity’ as an expression of fairness (Tom Franck and, more recently, Catharine Titi have given good reasons for this⁸), also the equitable sharing of resources⁹ or the third step of maritime delimitation in the ICJ’s (and ITLOS’) jurisprudence¹⁰ enter the picture. To such express ‘fairness’ formulas one might add, in a wider sense, also references to ‘proportionality’¹¹ or to ‘due diligence’¹². All these have in common that the applicable rule itself demands to take account of all legitimate interests involved. If not, the result achieved will neither be ‘equitable’ nor ‘proportionate’ or ‘due’.¹³

In many (if not most) cases, such express references to ‘fairness’ or its proxies will be lacking. Here, fairness as the regulative idea referred to earlier asks to make best possible use of the

⁵ For an excellent exposition of the existing (and persisting) problems in multilateral settings, cf. Promotion of inclusive and effective international tax cooperation at the United Nations, Report of the Secretary-General, 26 July 2023, A/78/235, at 13-18, 42-46.

⁶ Eyal Benvenisti, ‘Towards a Typology of Informal International Lawmaking Mechanisms and their Distinct Accountability Gaps’, in Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (2012) 297; Alejandro Rodiles, *Coalitions of the Willing and International Law. The Interplay between Formality and Informality* (2018), at 228-235.

⁷ Titi (note 2), at 117-119. For a conceptual approach, see Roland Kläger, “*Fair and Equitable Treatment*” in *International Investment Law* (2011), at 113-258.

⁸ Franck (note 3), at 47-80; Titi (note 2), at 1-6, 71.

⁹ Among others, see Elisa Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’, 27 *European Journal of International Law (EJIL)* (2016) 353. See also Titi (note 2), at 37-38, 77-79, 115-117.

¹⁰ From the ICJ’s rich case law, see only ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, ICJ Reports 2021, 206, paras. 221-225. See also ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, 4, para. 499; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, 4, paras. 360, 409. For a closer overview, see Titi (note 2), at 47-50, 58-59, 63-64.

¹¹ Cf. Titi (note 2), at 10, 181-184.

¹² Cf. Anne Peters, Heike Krieger, and Leonhard Kreuzer, ‘Due Diligence in the International Legal Order. Dissecting the Leitmotif of Current Accountability Debates’, in Krieger, Peters, and Kreuzer (eds), *Due Diligence in the International Legal Order* (2020) 1, at 2-3 (referring to the ‘expectations’ involved).

¹³ Cf. Titi (note 2), at 85-87, on equity *infra/secundum legem*.

whole toolbox of interpretation methods for an application of legal norms that is inclusive of legitimate interests. The aim is to include all legitimate interests involved into the norm at hand and to determine its boundaries accordingly. For pushing those boundaries in the interest of fairness, two distinct techniques deserve to be highlighted here:

The first is *dynamic interpretation* in order to ensure that the law does not lose touch with present notions of what is fair, i.e. what are legitimate interests that have to be taken into account.¹⁴ Consider here the 'living instrument' approach to the Convention in the ECtHR's jurisprudence,¹⁵ based on which the Court has widened, e.g., the notions of 'gender', 'marriage', and 'family life' in the field of LGBTQ+ rights.¹⁶ A similar approach has led its Inter-American counterpart to further indigenous rights¹⁷ or to establish the right to the truth countering the practice of forced disappearance.¹⁸ Here, the wish of families to know the fate of someone who disappeared, was determined by the Court as a legitimate interest to be protected under the Convention.

This right can also serve as an example for the second method to overcome strictures from within a given norm, *normative integration*. In the case of the right to the truth, the IACtHR derived the 'new' human right from a combined reading of several rights, especially the rights to personal liberty, to humane treatment, to life. Of course, the technique of normative integration is not confined to a combination of norms within the same treaty; based on the rule enshrined in Article 31(3)(c) VCLT, 'any relevant rules of international law applicable in the relations between the parties' have to be taken into account, allowing, to just cite a well-known example, to phase environmental and human rights concerns into WTO law.¹⁹ In this

¹⁴ Donald McRae, 'Evolutionary Interpretation: The Relevance of Context', in Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau, and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (2019) 57 (stressing the role of the present-day context). In a similar vein, Titi (note 2), at 74-76, speaks of evolutive interpretation as a means to 'soften law's rigidity'.

¹⁵ As *locus classicus* of this notion, see ECtHR, *Tyrer v. UK*, 5856/72, Judgment, 25 April 1978, at para. 31. For further examples, see Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights', 42 *German Yearbook of International Law (GYIL)* 42 (1999) 11.

¹⁶ For a critical assessment, see Damian A. Gonzalez-Salzburg, *Sexuality and Transsexuality Under the European Convention on Human Rights. A Queer Reading of Human Rights Law* (2019). Critical of the 'constitutional' role assumed by the Court in these cases Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (2017).

¹⁷ Valerio de Oliveira Mazzuoli and Dilton Ribeiro, 'Indigenous Rights before the Inter-American Court of Human Rights: A Call for a *Pro Individual* Interpretation', 61 *Revista del Instituto Interamericano de Derechos Humanos* (2015) 133.

¹⁸ Starting with, in all but name, IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, Series C No. 4, para. 155; first explicit acknowledgment in IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25.11.2003, Series C No. 101, para. 274. For an overview, Andreas von Arnould, 'New Human Rights in Regional Human Rights Institutions', 93 *Friedens-Warte: Journal of International Peace and Organization* (2020) 44. For a closer analysis, see Maria Clara Galvis Patiño, 'Rights Related to Enforced Disappearance', in Andreas von Arnould, Kestin von der Decken, and Mart Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric* (2020) 415.

¹⁹ See only Drusilla Brown, 'Labour Standards and Human Rights', in Amrta Narlikar, Martin Daunton, and Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (2012) 697; Meera Fickling and Gary Clyde Hufbauer, 'Trade and Environment', *ibid.*, 719; Csongor István Nagy (ed), *Global Values and International Trade Law* (2022).

perspective, the much-discussed ‘fragmentation’ of international law²⁰ also links to questions of fairness: how to avoid an application of the law that does not take into account all relevant legitimate interests.

Zooming out from the application of specific norms to the level of international law as a whole: Here it is of vital importance that the law is set up as a ‘learning system’ – where norms and their received interpretations can be challenged in order to make the law more inclusive of legitimate interests. Such a contestation of rules²¹ has to rely on a ‘constitutional vocabulary’.²² This explains the central importance of the language of rights for the ‘utopian’ project of gearing international law towards greater fairness.²³

Good examples for a strategic use of this ‘language of rights’ are non-anthropocentric rights, such as the rights of nature or animal rights,²⁴ or the right to development, oscillating between individual and collective dimensions as well as empowering developing states.²⁵ Another example is the use of human rights for strategic litigation in national and international courts. The aim here is to overcome the limited access to contestation in ‘other’ fields of international law, such as environmental and climate protection law, arms trade, etc.²⁶ By bringing such rights claims, the claimants are attempting to realise what they perceive as legitimate interests through international law – without the need to wait for formal amendment or the conclusion of new of treaties.

3. Fairness Over Space and Time

Let us now turn to some reflections on ‘fairness over space and time’ which are connected with the underlying question to what extent we can realise fairness through international law. Even if one accepts my working definition of fairness – taking account of all legitimate interests –, it still has to be determined *whose* interests have to be taken into account. Whose interests have to be included into the equation for an ‘equitable’ outcome? This question has a spatial as well

²⁰ ILC, Difficulties arising from the Diversification and Expansion of International Law, Final Report of the Study Group, 18 July 2006, A/CN.4/L.702, and Analytical Study of 13 April 2006, A/CN.4/L.682 (Martti Koskenniemi).

²¹ As conceptualized by Antje Wiener, *A Theory of Contestation* (2014).

²² Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’ 8 *Theoretical Inquiries in Law* (2006) 9, at 35.

²³ For a closer analysis, see Andreas von Arnould and Jens T. Theilen, Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a ‘Human Right to ...’, in von Arnould, von der Decken, and Susi (note 18) 34.

²⁴ See contributions by Günther Handl and Luis E. Rodríguez-Rivera (environment), Tomasz Pietrzykowski and Yoriko Otomo (animal rights), in von Arnould, von der Decken, and Susi (note 18).

²⁵ Cf. Karin Arts and Tamo Atabongawung, The Right to Development in International Law: New Momentum Thirty Years Down the Line?, 63 *Netherlands International Law Review* (2016) 221.

²⁶ See only César Rodríguez-Garavito (ed), *Litigating the Climate Emergency. How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022); Henning Büttner and Nathalie Joyce Zavazava, ‘German Corporate and Government Officials’ Involvement in Arms Trade with Countries of the Saudi-led Coalition in Yemen: A Link in the Supply Chain Leading to Criminal Liability for Alleged War Crimes?’, 63 *GYIL* (2020) 709.

as a temporal dimension. Do we have to include the interests of distant strangers²⁷ and of past or future generations²⁸?

A. 'Legitimate Interests': a Capabilities Approach

I will not attempt to answer this question in this short paper, but will only hint at possible directions, leaving further questions for further consideration. For this, however, it becomes necessary to specify what I consider as 'legitimate interests' that fairness demands to take into account. Without aiming to be comprehensive, I would borrow here from Amartya Sen and Martha Nussbaum and their 'capability approach'.²⁹ Though developed in the context of human rights and ultimately founded in the concept of human dignity, with its focus on development of capabilities and self-determination this approach seems – with slight modifications – applicable to persons, peoples and states alike.

For persons, capabilities are the doings and beings (i.e., the actions to be performed and the states of being to be attained) they can achieve according to their own choice; for this, they have to rely on personal, socio-political, and environmental conditions. Their legitimate interest is in conditions that allow them to develop their capabilities according to their autonomous decision; fairness demands to take this interest into account. For states, there is also a legitimate interest in developing their potential and to generate welfare according to their own autonomous (sovereign) decision. Like persons within a given society, also states within the 'international society' rely on conditions favourable to that interest. The same goes for peoples, which can be opposed to states where the government does not represent the legitimate interests of its population as a whole.³⁰

Assessed through the lens of our regulative idea, the creation or application of a norm of international law that affects the capabilities of persons, peoples, states, should take their legitimate interests into account. Where not including such interests would amount to an injustice, adapting the law to the dictates of fairness becomes a moral imperative. With this, let us now look more closely at the spatial and temporal dimensions of fairness.

B. Fairness over Space

The problem with 'fairness over space' is that, partly due to globalisation, partly due to a raised awareness, activities by or in one state affect the 'capabilities' of other states, of peoples or persons outside their territory. How far can international law regulating those state activities be taken to include their legitimate interests? Or, put differently: How far can fairness be realised here within international law and where are limits to it?

²⁷ Cf. from different philosophical standpoints, Carol C. Gould, 'Motivating Solidarity with Distant Others: Empathic Politics, Responsibility, and the Problem of Global Justice', in Thom Brooks (ed), *The Oxford Handbook of Global Justice* (2020) 122; Aravind Ganesh, *Rightful Relations with Distant Strangers: Kant, the EU, and the Wider World* (2021), at 82-120, 154-189.

²⁸ On this, see only the recent *EJIL* debate between Stephen Humphreys, 'Against Future Generations' 33 *EJIL* (2022) 1065, and Margarethe Wewerinke-Singh, Ayan Garg, and Shubhangi Agarwalla, 'In Defence of Future Generations: A Reply to Stephen Humphreys' 34 *EJIL* (2023) 651. Cf. also Titi (note 2), at 80-81.

²⁹ See, especially, Amartya Sen, *Commodities and Capabilities* (1985); *Development as Freedom* (1999); Martha C. Nussbaum, *Creating Capabilities* (2011).

³⁰ Here, one can connect with the political ramifications of Sen's approach, cf. Lawrence Hamilton, 'A Theory of True Interests in the Work of Amartya Sen' 34 *Government and Opposition* (1999) 516, at 535-544.

A good starting point for the extension of the spatial reach of international rules is international environmental law. Commencing with rather narrow concepts of ‘neighbourhood’ in the case of shared resources and transboundary pollution, insights into the interdependency of ecosystems have over the decades led to a spatial extension, including the care for areas beyond national jurisdiction. Climate change as a global problem now forces to take account of the legitimate interests of everyone, all peoples and every state, perhaps even of nature herself.³¹ This imperative of fairness can, and should, be phased into existing international legal obligations via, e.g., the customary obligation to conduct environmental impact assessments³² – as a formal proceduralisation of ‘taking into account’.

More complex is the realisation of ‘fairness over space’ through extraterritorial human rights obligations. Relatively straightforward are cases of state action abroad that results in a violation of human rights (though the ECtHR still struggles to disentangle itself from its unfortunate *Bankovic* decision).³³ More difficult are positive human rights obligations owed to non-nationals abroad. Manifold constellations arise here: As to human rights violations by private actors, recent national and EU regulations on monitoring supply chains might serve as an illustration of a growing awareness, however limited in scope.³⁴ If these regulations answer to an existing, positive human rights obligation is open for debate; I would tend to say they are.³⁵ As to activities by other states, the German judiciary recently had to deal with claims of Yemenites that demanded to interfere with the practice of targeted killings by the US military, as they claimed that the airbase Ramstein in Germany was being used for coordinating drone operations in Yemen.³⁶ And, finally, what about extraterritorial obligations stemming from economic and social rights?³⁷ Can we, in the ongoing armed conflict, mobilise the right to food

³¹ Henry Shue, ‘Distant Strangers and the Illusion of Separation: Climate, Development, and Disaster’, in Brooks (note 27) 259.

³² Cf. Benoît Mayer, ‘Climate Assessment as an Emerging Obligation under Customary International Law’ 68 *International & Comparative Law Quarterly* (2019) 271.

³³ See only Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 118-228. In the same vein, Andreas von Arnould, ‘Das (Menschen-)Recht im Auslandseinsatz. Rechtsgrundlagen zum Schutz von Grund- und Menschenrechten’, in Dieter Weingärtner (ed.), *Streitkräfte und Menschenrechte* (2008), 61.

³⁴ On these, cf. Opi Outhwaite and Olga Martin-Orgeta, ‘Human Rights in Global Supply Chains’, 10 *Human Rights & Internationale Legal Discourse* (2016) 41. On the recent German law, see Philip Nedelcu, ‘The Act on Corporate Due Diligence Obligations in Supply Chains: An Examination of the German Approach to Business and Human Rights’, 64 *GYIL* (2021) 443.

³⁵ Concurring, Olivier de Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations* (2006); Aravind Ganesh, ‘The European Union’s Human Rights Obligations to Distant Strangers’, 37 *Michigan Journal of International Law* (2016) 475.

³⁶ Higher Administrative Court (Oberverwaltungsgericht) Münster, Judgment, 19 March 2019, 4 A 1361/15, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00 (finding a violation); Federal Administrative Court (Bundesverwaltungsgericht), Judgment, 25 November 2020, BVerwG 6 C 7.19, ECLI:DE:BVerwG:2020:251120U6C7.19.0 (finding no violation). See Leander Beinlich, ‘Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the United States’ Drone Programme Before the Higher Administrative Court of Münster’, 62 *GYIL* (2019) 557.

³⁷ Radhika Balakrishnan, James Heintz, and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (2016), at 103-121; Elif Askin, ‘Economic and Social Rights, Extraterritorial Application’, in Rüdiger Wolfrum and Anne Peters (eds), *Max Planck Encyclopedia of Public International Law* (January 2019); Askin, *Die extraterritoriale Anwendbarkeit des UN-Sozialpakts im Zeitalter der Globalisierung* (2022).

to demand from Russia to agree to Ukrainian grain exports in the interest of people on the African continent?³⁸

Be it in human rights, environmental or in other fields of international law, questions of causality, impact and immediacy will have to be addressed in order to determine the spatial scope of fairness. Building on this, it has to be seen how and to what extent the imperatives of fairness can be realised through the international *lex lata* or have to inspire the *lex ferenda* to be realised within international law, and not outside.

C. Fairness over Time

Finally, 'fairness over time'. The interests that have to be taken into account are primarily those of people presently living. If fairness aims at conditions conducive for developing one's capabilities, it cannot reach those already dead.³⁹ However, when talking about 'past' injustice, severe cases often have enduring effects also on later generations' lives and life-chances. Numerous claims concerning colonial crimes or crimes related to World War II raised before national and international courts over the last 20 or so years build on these lasting effects. Countering these claims, the responding states uniformly point to the non-retroactivity of the law: Whatever happened in the past is most regrettable but was in conformity with contemporaneous international law. At best, *ex gratia* payments might be offered. Fairness to mitigate the unfair effects of the law.

However, the principle of non-retroactivity has to be handled in a differentiated manner and has never been absolute.⁴⁰ The Nuremberg trials are the prime (if not uncontested) example for this. If non-retroactivity can be modified even in international criminal law, it should be all the more possible in matters of state responsibility. Various ways have been suggested over the last years how to bridge the apparent gap between international law and fairness here.⁴¹ I submitted a possible solution myself two years ago, making a case for just satisfaction in the form of negotiations with the victims' descendants.⁴² The aim here is to realise fairness by recourse to the law of state responsibility.

Finally, if we take the conditions for the development of one's capabilities and self-determination as the starting point, then it should also be possible to include the interests of future generations into the equation. Normally, there will be too many intervening variables

³⁸ Cf. on this issue Diane Desierto, 'The Human Right to Food, Freedom from Hunger, and SDG 2: Global Food Crisis and Starvation Tactics from the Russian Invasion of Ukraine', <https://www.ejiltalk.org/the-human-right-to-food-freedom-from-hunger-and-sdg-2-global-food-crisis-and-starvation-tactics-from-the-russian-invasion-of-ukraine/> (9 June 2022); Teresa Weiß, 'Military Success > Global Food Security: Is Russia Violating the Right to Food Outside Ukraine Through the Invasion of Ukraine?', <https://voelkerrechtsblog.org/military-success-global-food-security/> (20 February 2023) (both accessed 26 October 2023).

³⁹ Cf. Jeremy Waldron, 'Superseding Historic Injustice' 103 *Ethics* (1992) 4, at 7.

⁴⁰ Andreas von Arnould, 'How to Illegalize Past Injustice. Reinterpreting the Rules of Intertemporality', 32 *EJIL* (2021) 401, at 417-418 (with further references); Makau Mutua, 'Reparations for Slavery: A Productive Strategy?', in J. Bhabha, M. Matache and C. Elkins (eds), *Time for Reparations: A Global Perspective* (2021) 19, at 22-26.

⁴¹ Among many, cf. only, Mieke van der Linden, *The Acquisition of Africa (1870–1914)* (2016); Matthias Goldmann, 'Anachronismen als Risiko und Chance: Der Fall *Rukoro et al. gegen Deutschland*', 52 *Kritische Justiz* (2019) 92; Edward Martin, *The Application of the Doctrine of Intertemporality in Contentious Proceedings* (2021).

⁴² von Arnould (note 40).

over the course of time to predict how a decision taken today will affect future generations.⁴³ The case is different, though, with a problem of the magnitude of climate change.⁴⁴ This has been acknowledged by the German Federal Constitutional Court in its March 2021 climate protection decision where it states:

Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens [...] being unilaterally offloaded onto the future.⁴⁵

The link to self-determination and a fair chance to develop one's capabilities is here spelled out clearly.

Apart from continuities of colonialism still determining the relations between 'Global North' and 'Global South', climate change might put the most complex challenge to the fairness of international law. In March 2023, the UN General Assembly requested an advisory opinion of the ICJ on the obligations of states in respect of climate change.⁴⁶ An international court with a composition that combines – and sometimes confronts – different conceptions of law, justice and fairness (and thus is tending to compromise) might not be expected to realise the utopian dream with the boldest of steps. It is to be hoped, however, that the ICJ will strengthen international law's character as a learning system and contribute to fair solutions for the greatest single global challenge today.

4. Conclusion

Is fairness an integral element of international law or is it international law's 'other'? This paper argued that it is neither. As sketched out here, fairness (or one of its proxies) can be expressly referred to as a legal standard and thus be part of positive international law; it is doubtful, however, if fairness – unlike equity⁴⁷ – can be regarded as a general principle of international law (or of law in general). But neither should it be understood as law's other, correcting outcomes where the law fails to produce just results. As a regulative idea fairness is at the same time distinct from international law, serving as a yardstick to measure lawmaking and law application, as it sets out to guide its creation, interpretation and application – thus also working within the mechanisms of international law. In this regard, wherever we create, interpret or apply international law, we should attempt to make the law more inclusive of the legitimate interests involved, also those that refer to, seemingly, remote places or times.

⁴³ Humphreys (note 28), at 1075-1080. Cf. also Waldron (note 39), at 7-14, on the related criticism of a contrafactual reconstruction of what 'would have been' in the attempt to 'repair' historic injustice. Both lines of criticism relate to a hypothetical modeling of events.

⁴⁴ Shue (note 31), at 267-272.

⁴⁵ Federal Constitutional Court (Bundesverfassungsgericht), Order, 24 March 2021, 1 BvR 2656/18 et al., ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, headnote 4; English translation to be found at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=E10388DF6CCBFB2ACD3D6297DDD415AD.internet952 (accessed 26 October 2023).

⁴⁶ UNGA, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023, A/77/276.

⁴⁷ Cf. Titi (note 2), at 128-135, 199-200.