A Global Concept of Justice - Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World

Stathis Banakas
A Global Concept of Justice—Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World

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I. INTRODUCTION: WHAT JUSTICE, WHAT GOALS FOR JUSTICE, AND JUSTICE FOR WHOM?

Contemplating justice on a global scale in today’s world can easily be seen as an almost impossible, Don Quixotic venture. Important preliminaries arise and need to be clarified:

What justice: political, cultural, religious, or socio-economic justice?

What goals can or should global justice serve? Justice as (Hobbesean) peace, justice as doing no harm,1 justice as equality, justice as reward, justice as welfare (social justice), justice as righteousness (religious-mystical justice), justice as individual agency, utilitarianist justice supplementary to private ethics—to mention but a few.

Justice for whom: for individuals, natural persons, legal entities, corporations, communities, groups, nations, states, all sentient beings, the environment, the planet, the universe, God?2

The issue of global justice promises nothing but an enormous scope of inquiry. This modest effort to offer some reflections on this issue will limit itself to an engagement with the obvious and the urgent.

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* School of Law, University of East Anglia, Norwich, England. This article is dedicated to my esteemed former teacher and personal friend, Professor Apostolos Georgiadis, a gift of honour and love.


II. "WHAT IS, IS, THEREFORE, JUST": 3 THE UNDISPUTED REALITY OF FINANCIAL GLOBALIZATION AS A CHALLENGE FOR CONTEMPORARY JUSTICE THEORIES

"Capital globalized itself," says Santos, one of the most perceptive social scientists working on the effect of globalization. 4 Indeed, among the many forms and manifestations of globalization, that of the capital markets has been the most powerful in its overall effect and is driving with increasing force a global demolition of national and local frontiers. The economy is disembedded from local society, observes Santos. And he identifies the new faces of what he calls the social fascism that accompany this phenomenon: contractual, territorial (colonial) insecurity, and financial fascism. 5 Society is being transformed into a "market society" on a global scale, and political power based on financial power results in new global forms of social exclusion. Everything is commodified on a global scale, including objects and relations that used to be personal and extra-commercium.

Santos is violently opposed to financial globalization, which he appears to think is the cause of all evils in today’s world, and which, one might add, is the main driving force behind all other forms of globalization, such as movement of people and goods (including immigration), communication and media, cultural exchange and imitation, and so on. One might also add that the global market forces also lead a drive toward global legal norms to the extent that such norms are necessary for the proper enjoyment of financial gains on a global scale. 6 Such norms are expeditiously and efficiently introduced on a global scale, with or without the consent of national governments and national legal orders that have no choice but to succumb to their jurisdiction if they do not want to remain excluded from globalized capital. They are also meant to be respected over and above any other international,

5. Id. at 405.
6. For example, globally enforced contracts, globally protected property rights, globally supported mortgages and other financial security mechanisms, globally recognized corporate forms that can be refreshed and extended, and all other necessary conditions for a lasting and fluid global market of lenders and borrowers, supported by global adjudication mechanisms that are seen to be reliable and impartial. Cf. Mancur Olson, POWER AND PROSPERITY (2000).
transnational, or national legal norms, carrying the supreme sanction of exclusion from global financial resources.

If this is the reality of globalization, what is justice for? As traditional Japanese legal culture has it, "What is, is, therefore, just"? A more modern Japanese thinker seems to be firmly rooted in this tradition when he writes:

We should not take the game of market too seriously. We play the game because we want the system that allows each of us to utilize one's knowledge and ability to contribute both to oneself and others. This system requires a mechanism which communicates information concerning scarcity of different goods and resources to each one of us . . . . We have to face the market as no more than such a mechanism.

He goes on to assert his faith in individualism and individual choices, channeled through traditional, Western-style private law creativity away from national or global politics, to contribute to a more just social change on our planet. But this rather confident approach to the reality of financial globalization and the market does not seem to be shared by many. Numerous writers have anxiously and gallantly explored all possible avenues of a "moral" response to this reality: from Kant's Cosmopolitanism and "Constitutionalism," recently revitalized in the writings of Jürgen Habermas, to more contemporary theorists taking into account the multiple dimensions of the globalization process. Numerous international symposia have been organized on the challenges of globalization for international politics and diplomacy and the law, the Louisiana Law Review's in 2007 being the first in the United States, but by no means the last!

Any attempt to discuss justice in today's world will have to be in light of the reality of financial globalization and would have to

7. See Oda, supra note 3.
10. See, e.g., Jürgen Habermas, THE POSTNATIONAL CONSTELLATION (Max Pensky trans., 2000); Jürgen Habermas, The Kantian Project of the Constitutionalization of International Law, Does It Still Have a Chance?, in DERECHO Y JUSTICIA EN UNA SOCIEDAD GLOBAL, supra note 4, at 115.
start by identifying the challenges that this reality presents to law and justice. I strongly believe that "pattern" theories of justice, and they are many, must keep their feet firmly on the ground, and not evangelize principles arbitrarily or patronizingly. This is not to endorse recent theories of so-called "Meta-ethical Particularism" that condemns impartial moral principles as "abstract and deracinated," and advocates that moral reasoning flows in narratives provided by the cultural community in which individuals are situated, and that the preservation and defense of such community necessitates different moral status for cultural insiders as opposed to outsiders. One of the moral theorists writing in this vain has put this "particularism" of values as follows:

[T]he question most likely to arise in the minds of the members of the political community is not, What would rational individuals choose under universalizing conditions of such-and-such a sort? But rather, What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? And this is a question that is readily transformed into, What choices have we already made in the course of our common life? What understandings do we (really) share?

Such an approach feels intuitively right in the flood of fragmentation, de-formalization, and common information interests of globalization. However, impartial classical liberalism and neo-liberalism, from Locke and Kant to Rawls, is also intuitively suspect: As well pointed out by writers recently, it smacks of a particular genetic pedigree of Western political liberalism, cultivated in the abstract in the iron grip of rationalism, and mainly formulated in that distant pre-globalization age of the nineteenth century.

The relentless drive for financial globalization, which is the reality on which any discourse on law, justice, and fairness must be

12. To borrow an expression by Robert Nozick. See Anne Barron et al., INTRODUCTION TO JURISPRUDENCE & LEGAL THEORY 751 (Oxford Univ. Press 2005) (2000); see also discussion infra Part II.
15. See, e.g., Thomas Pogge, REALIZING RAWLS (1989); David Held, Law of States, Law of Peoples, 8 LEGAL THEORY 1, 1 (2002).
based, presupposes a principled respect of private property rights and the primacy of economic value over any other asset assessment. Globalized capital exercises relentless pressure on a global scale for expansion and unqualified protection of private property rights, as more privately owned goods increase markets' volume and turnover. We see a constant erosion on a global scale of traditionally retained (i.e., not available for private ownership or trade) objects (goods), with traditionally publicly-owned social services and so-called national assets being in the frontline of privatization/capitalization.

III. RESPONDING TO THE CHALLENGE

A. The Property Issue: Justice as Entitlement

Financial globalization has been supported by the perceived popularity and success of a Western neo-liberal, free-market economic and moral philosophy, best represented by the very influential writings of the American philosopher Robert Nozick. Inspired by the Kantian ideas of personal autonomy and responsibility, Nozick argues that welfarism, and its restrictions and claims on private wealth, violates the important principle that human beings are ends in themselves and cannot be treated as means to an end, however charitable and desirable that end can be to (the majority of) others. He also argues that personal rights are "side constraints," defining what the law should and should not do, and cannot be violated in pursuit of any social goal, without consent. Such rights include, according to Nozick, the right to legitimately acquired property. Confronting the also hugely influential views of John Rawls, Nozick describes Rawls's second principle of justice, the so-called "difference" principle, as a "pattern" theory of justice, and points out that: "The term 'distributive justice' is not a neutral one . . . . In a free society, diverse persons control different resources." Nozick is led to the conclusion that a fundamental principle of justice is entitlement to just holdings. Such entitlement for Nozick comes only from an original acquisition, exchange, or gift, and cannot be violated for the pursuit of any social goal. Nozick's main difference from Rawls, who also accepts that persons are entitled to rights in private property, is that Rawls's contractarian vision of social justice allows the violation of property rights to the

extent that they result in privilege and inequality for the benefit of
the least advantaged members of the community. By contrast,
Nozick argues that justly acquired property (wealth) can only be
given away voluntarily. This has proved a highly influential
argument that, after the collapse of communism and all centrally
planned and insulated economies of communist countries, acquired
the status of orthodoxy and, together with the rise in popularity of
monetarism and the inevitable retreat of interventionism, fueled
financial globalization.19

But private property is excluded. Private property rights enable
persons, physical or corporate, to exclude others from whatever is
their object. Access is only allowed at a (financial or other) price.
In the real, as opposed to an imaginary (e.g., Plato’s world of
ideas) world, the primordial question for any justice discourse at
any point of human history is to face the issue of the fairness or
otherwise of such an exclusion. Therefore, old as this debate may
be (admirably explored in the past by, among others, John Locke),
it needs today a contemporary answer in light of the actual reality
of financial globalization.

More specifically: Is, and to what extent how is, such
exclusion, through an increasingly global enforcement of private
property rights, justifiable? Are there any objects (goods) or
portions of objects that should, in the interests of justice, be
retained or extra-commercium? How can this be done in practice
in a way that is compatible with the realities of globalization?
What is the impact of the globalization process on the issue of just
acquisitions of property rights and historical entitlement? Is there
any evidence of a region in the global community where
enforcement of private property rights does not underpin economic
development?

In a highly influential paper, following a number of earlier
articulations of his views, Amartya Sen considers the question of
entitlement in a globalized world against the background of the
views of John Rawls, the most influential supporter of a modern
distributive theory of justice.20

Sen considers the ways of global relations, universalist,
national particularist, and intersocietal relations, and his preferred
one of plural affiliation. Central to his thesis is the importance of
defining and protecting the right of access on a global scale of

19. For a summary of the many criticisms of Nozick’s view of property
rights, see Anne Barron, J.E. Penner, David Schiff & Richard Nobles,
INTRODUCTION TO JURISPRUDENCE & LEGAL THEORY 762 (2002).
20. Amartya Sen, Global Justice Beyond International Equity, POLYLOG
public goods, such as land, market, media, democratic system, and so on. Public distribution of such goods would be important: Could one contemplate global public goods or global social goods? Sen is not entirely happy with Rawls's two "measures" of justice: "state" and "international." Rawls does highlight, however, what is one of the leading approaches to questions of international or global justice: whether justice cannot be meaningfully perceived outside the bounds of sovereign states. Like Hobbes before him, who famously extolled the purpose of law to allow the sovereign to keep social peace without which human life would be a total misery, Rawls seems to imply that justice on a global scale can only be pursued at the national or state level. According to Rawls, it is only possible for States to build just and fair societies, but, presumably, the more States that are able to achieve this, the more the world will be a just place. Nagel, in a paper in which he himself confronts Rawls, agrees with Hobbes in that justice cannot be achieved without sovereign coercion but seems more optimistic: Noting the presence of several global supervisory agencies established by a small minority of rich States to regulate globalized markets, he says:

I believe the most likely path toward some version of global justice is through the creation of patently unjust and illegitimate global structures of power that are tolerable to the interests of the most powerful current nation-states ... to which the standards of justice apply, standards by which we may hope they will eventually be transformed.22

B. The Poverty Issue: Instrumental Justice

Even assuming that the above questions can be answered in principle, is it justifiable to violate the agreed principles in the interests of corrective justice in an intervention to distribute wealth in order to protect basic human good, and if so, to what extent, how is such good to be defined, what should be the criteria by which to judge the justness of such intervention, and how could such an intervention be achieved on a global, as opposed to a national, scale? As Nagel again observes:


The gruesome facts of inequality in the world economy are familiar. Roughly 20 percent of the world’s population live on less than a dollar a day, and more than 45 percent live on less than two dollars a day, whereas the 15 percent who live in the high-income economies have an average per capita income of seventy-five dollars a day.\textsuperscript{23}

Again, Amartya Sen has argued in a series of publications that protection of basic human good should be globally based on what he describes as basic functioning capability equality. Or should it be, as Rawls argues, if only for national societies, equality of condition? In the latter case, what should be the relevance, on a global scale, of adequate resources? Perhaps the answer is not equality, but sufficiency, meaning that all living human beings, now and in the future, should enjoy conditions of life that place them above the threshold that marks the minimum required for a decent (good enough) quality of life.

George Orwell once wrote, “[A] fat man eating quails while children are begging for bread is a disgusting sight.”\textsuperscript{24} Nevertheless, instrumental theories of justice raise questions of universal legitimacy that are even harder to answer on a global scale. In a pioneering article, Peter Singer said:

Granted, in normal circumstances, it may be better for everyone if we recognize that each of us will be primarily responsible for running our own lives and only secondarily responsible for others. This, however, is not a moral ultimate, but a secondary principle that derives from consideration of how a society may best order its affairs, given the limits of altruism in human beings. Such secondary principles are, I think, swept aside by the extreme evil of people starving to death.\textsuperscript{25}

More recently, Thomas W. Pogge has argued that severe poverty and mass violence are violations of basic human rights, and that the international legal order is in this respect not merely

\textsuperscript{23} Id. at 118.
\textsuperscript{25} Peter Singer, Famine, Affluence, and Morality, 1 PHIL. & PUB. AFF. 229, 243 (1972).
imperfect but fundamentally unjust. Rejecting classic, State-orientated distribution theories, he is calling for a minimum standard of fairness to defend against severe poverty and mass violence on a global scale:

[T]he justice limit, the institutional limit, to a government’s partiality in favor of its own citizens is . . . that its partial conduct must not undermine the minimal fairness of the global institutional order. An appeal to permissible partiality cannot justify the imposition, by the most powerful governments on the rest of the world, of an unjust global institutional order under which a majority of humankind are foreseeable and avoidably deprived of anything resembling a fair start in life.

C. The Human Rights Issue: Principled Justice

How has the globalization process affected the issue of defining human good? If financial globalization is a single-track phenomenon, defining human good remains a multi-faceted one, with often extreme local variations of self-determination and righteousness values. On what grounds is it justifiable to ignore such variations, and, if it is, on what basis can any concepts of a global definition of human good be founded? How true is it that socio-economic justice should be given priority over other goals, such as cultural, religious, or transcendental goals—a view that seems intuitively obvious from a liberal Western Enlightenment perspective—in light of the huge economic inequalities with which globalized capital has been accompanied?

Difficult questions arise: First, are Western conceptions of fundamental rights, most notably self-determination, including the right of self-property (and its corollary right of private property), freedom, and equality, suitable for global application, and what could be a justification for that, in the light of religious and other cultures (Hinduism, Confucianism, Daoism, and also Islam, albeit in a separate manner) that have different conceptions of human dignity, worth, or righteousness? If not, is there anything else to put in their place?

26. A convenient summary of his views can be found in Thomas W. Pogge, What is Global Justice?, Lecture at the University of Oslo Global Justice Symposium (Sept. 11, 2003), available at http://www.etikk.no/globaljustice/Pogge_Introductory_Lecture.doc.
27. Id. at 13.
28. See generally id.
Inside the movement of Meta-ethical Particularism, Maclntyre argues that a flourishing community of agents with shared moral norms and values is a necessary precondition of an individual’s continued existence as a moral agent; therefore, patriotism—understood as involving special obligations to maintain and defend one’s nation—is a precondition of morality. For followers of cultural perfectionism, culture is important for individual self-identification, so that respect for individual choice entails respect for cultural structures in a way that imposes partiality and justifies variance from any broadly accepted ethical norms. Cosmopolitan liberalism, however, would see such particularism as illegitimate and even hypocritical, as it would mean that values good enough for a culture or a nation are, at the same time, not considered good enough for application abroad. Singer, one of the most aggressive cosmopolitanists, argued in a seminal paper in 1972 for global distribution and global liberalism. From Kant’s Constitutional Cosmopolitanism to Rawls’s Limited Cosmopolitanism of Law of Peoples and beyond, there is a serious debate of important preliminaries to principled approaches to justice that must be weighed properly.

Second, can equality, as a fundamental right, be envisaged on a global scale? Can equality only be parochial, or otherwise quixotic and utopian? What about the (Rawlsian) equality of fair opportunity (“EFO”)? If EFO is to work, it has been observed, it should be coupled by equality of opportunity of participation in the decision-making processes: Would that, again, be quixotic and utopian on a global scale? And should there be equality of welfare, defined as personal human good, and what exactly does (or should) constitute human good in a global theater of values?

Can we impose design-justice obligations on individuals without violating what Rawls calls a fundamental ethical principle of personal responsibility based on the “separateness of persons” (that any metaphysical-religious notion of guilt also violates)? Is this, however, only a localized limitation espoused by Western liberal ethics that cannot claim global legitimacy?

30. See Singer, supra note 25.
A GLOBAL CONCEPT OF JUSTICE

IV. ENFORCING GLOBAL JUSTICE: TRIAL LAWYERS, GLOBAL TORTS, CLASS ACTIONS AND UNIVERSAL JURISDICTION—WHEN MONEY TALKS JUSTICE

A. Keeping the Peace and Compensating Harm: Civil Liability and Global Social Justice

There is no justice, or injustice, without force and the resulting violence. Norberto Bobbio, the inspirational legal thinker of our time, emphasized the importance of legal norms in ruling the use of force. As much as injustice needs force and violence to be effected, justice cannot be restored without force and violence. Injustice is war; justice is peace. Or, as Bobbio shows us, the business of the law is peace, not justice. Global social fascism resulting from globalized capital, of the kind brilliantly described by Santos, results in global exclusion and social war; global social peace is the business of the law in the pursuit of global justice.

A pragmatic approach to global justice leads to questions of universality and universal enforcement of legal norms. Intuitively, all law has a claim to universality. On a formal level, as Kelsen has shown, law's normative language does not need to presuppose the existence of a sovereign. Normativity, like factuality, is actually global. Legal norms can be validated by other legal norms only, and their efficiency does not depend on any primitive fears of sanctions imposed by a sovereign authority but on the willingness of law officials to obey and enforce them. Such law officials, again following Kelsen's enlightened analysis, are designated and empowered by norms that are subject to exactly the same tests of validity and efficiency. Thus, the legal order, including a global legal order, can come into existence by means of valid and efficient norms, without any need for a global political sovereign to come first into existence—in fact, even in the absence of any

34. See Santos, supra note 4.
such power, in a complete power vacuum\textsuperscript{35} (but preferably a vacuum of peace).\textsuperscript{36} In a global world environment,\textsuperscript{37} such officials may be local officials with global reach,\textsuperscript{38} or global law officials, designated by treaty, custom, or voluntary procedure.

Social and economic processes that define globalization cannot, and must not, be ruled by old-fashioned political sovereignty and national political institutions,\textsuperscript{39} indefinitely postponing the legitimization of global justice processes. The intuitive global reach of (national) law mentioned above cannot be forever curtailed by national political interest. Globalized capital empowers globalized law enforcement in national courts under traditional national civil and criminal law categories by creating a market of law enforcement that is itself increasingly global,\textsuperscript{40} client-driven, and funded by the global market’s insatiable appetite for innovation and change.

Global enforcement of justice as compensation of harm has acquired an impressive new momentum riding astride globalized capital. Tort law, the most effective mechanism of restorative justice, is being used in increasingly ambitious ways and global ways. It is not without foundation that tort law has become the most politically controversial field of contemporary legal debate.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{35} One can, although it is not essential, presuppose an International “Grundnorm”—a device that does not affect in the slightest the validity and efficiency of norms.
\item \textsuperscript{36} Very relevant here are the views of Bobbio, supra notes 32–33.
\item \textsuperscript{37} A useful definition of “globalization” in this connection is: “a multidimensional set of social processes that create, multiply, stretch, and intensify worldwide social interdependencies and exchanges while at the same time fostering in people a growing awareness of deepening connection between the local and the distant.” Manfred B. Steger, GLOBALIZATION, A VERY SHORT INTRODUCTION 13 (2003).
\item \textsuperscript{38} Compare the international law doctrines of extraterritorial and universal jurisdiction. See Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 HARV. INT’L L.J. 121 (2007).
\item \textsuperscript{39} John Rawls, THE LAW OF PEOPLES (1999), and David Miller, PRINCIPLES OF SOCIAL JUSTICE (1999), are wrong. As succinctly put by Iris Marion Young, Responsibility and Global Justice: A Social Connection Model?, in DERECHO Y JUSTICIA EN UNA SOCIEDAD GLOBAL, supra note 4, at 671, 673, “Ontologically and morally speaking, though not necessarily temporally, social connection is prior to political institutions.”
\item \textsuperscript{40} No need to labor the point here of the worldwide dominance of so-called “global” law firms. See, for example, websites for three of the leading global law firms in the world today: http://www.cliffordchance.com/home/default.aspx; http://www.bakernet.com/BakerNet/Firm+Profile/Welcome/default.htm; and http://www.lw.com/default.asp.
\item \textsuperscript{41} On the often heated, highly politicized debate about U.S. tort reform, see Jay M. Feinman, Unmaking and Remaking Tort Law, 5 J. HIGH TECH. L. 61
\end{itemize}
being at the same time demonized as capitalism's arch-enemy and hailed as the "Jurisprudence of Hope." Enthusiasts have pointed out that in the quest for "juster justice and a more lawful law," tort law, being described as public (and one might add, lately, international public) law in disguise, is "a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society."

How can tort law serve global justice? First, with the advent of the class action, tort lawyers can act as private attorneys general to victims of mass torts and also international mass torts, independent from national political pressure, enforcing standards of protection of basic human rights equally on a local as well as a global basis.


42. See Schumer's Tort Epiphany, WALL ST. J., Jan. 29, 2007, at A16 ("[W]e didn't expect to see a leading Senate Democrat declare that tort law abuse is making America less economically competitive."). The cost of the U.S. tort system has risen from 0.5% to 2.3% of the gross domestic product ("GDP") during the last three decades. Projecting forward, over 3% of the GDP ($360 billion) could be spent annually on U.S. litigation within the next ten years—the equivalent of total U.S. defense spending in 2002.


44. Allen M. Linden, Viva Torts, 5 J. HIGH TECH. L. 139, 142 (2005) (quoting Tom Lambert). Thus, in countries in the French legal tradition with highly developed systems of Administrative (public) Tort Liability, administrative courts enforce tort claims for violations of collective rights: see Juan Carlos Henao, Collective Rights and Collective Actions: Samples of European and Latin American Contributions, in EXPLORING TORT LAW 426 (M. Stuart Madden ed., 2005), on the acciones populares, an administrative law remedy that serves functions similar to class actions. For another view of the public function of tort law in the United States, see Guido Calabresi, The Complexity of Torts—The Case of Punitive Damages, in EXPLORING TORT LAW, supra, at 337, arguing that the first function of tort law is to enforce societal norms through the use of private attorney's general.

45. Linden, Viva Torts, supra note 44, at 145.

46. Potential claimants are also recruited on the Internet. See, e.g., http://www.classaction.com/. Milder versions of the aggressive U.S. model of
Second, tort law can internationally empower individual victims of violations of basic human rights to gain not only compensation but also closure and restored dignity.47

But even beyond basic human rights, global tort law can arguably be part of the answer to the apparently insoluble problem of extreme deprivation and global social welfare. Social welfare, controversial as it is on a national level, becomes a moral conundrum if transposed on the global field.48 As the U.S. experience has shown, tort law offers a safety net when social welfare is inadequate.49 Whether tort law should or should not, in terms of economic efficiency, be used as a mechanism of wealth distribution on the local level, as on that level tax laws might do the job better,50 on the global level there is no realistic alternative.

B. Global Torts: "Hard" and "Soft" Liability of Individuals and Corporations

1. Global Jurisdiction for Civil Liability Suits

According to the U.S. Alien Tort Claims Act of 1789 ("ATCA"),51 also known as the Alien Tort Statute ("ATS"), U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."52

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47. See Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
49. It has been noted that the weakening of Europe’s welfare state has caused a dramatic increase in tort litigation in the Old Continent, leading people to seek their own self-help remedies, often through legal action. See SustainAbility, supra note 31, at 6.
The ATS was “exhumed from obscurity”53 in *Filártiga v. Peña-Irala*,54 in which Mr. Filártiga, a Paraguayan citizen whose son Joelito was kidnapped and tortured to death by Pena, Inspector General of Police in Asuncion, Paraguay, succeeded in claiming the jurisdiction of the U.S. Court of Appeals for the Second Circuit in New York. The court declared that its jurisdiction stemmed from the fact that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”55

But the United States is not the only country where universal jurisdiction for civil liability is being successfully tested. In the case of *Lubbe et al. v. Cape Plc.*,56 the UK House of Lords opened the English courts to foreign plaintiffs injured overseas as a consequence of the operations of British companies or their subsidiaries. The decision allowed the claim for damages of 3,000 South African plaintiffs, who alleged that they were made ill while working with asbestos in the employment of a subsidiary of a UK company.57 And the European Court of Justice in *Group Josi Reinsurance Company SÀ v. Universal General Insurance* against a wide range of companies: Texaco, ExxonMobil, Royal Dutch Petroleum, Del Monte Foods, Dyncorp, Chevron, Gap Clothing, UNOCAL, Southern Peru Copper, Coca-Cola, Rio Tinto, Freeport-McMoRan, Talisman Energy, and Union Carbide/Dow. Plaintiffs’ groups have consisted of union leaders, workers, and residents from Ecuador, Indonesia, Papua New Guinea, Nigeria, Sudan, India, Siapan, Burma, Peru, Colombia, and Guatemala.


54. 630 F.2d 876 (2d Cir. 1980).


57. In *Berezovsky v. Michaels and Others; Glouchkov v. Michaels and Others* (2000) 2 All E.R. 986 (H.L.) (appeal taken from Eng.) (U.K.), the House of Lords was challenged by inventive counsel to decide whether an internationally disseminated libel constituted a number of separate torts in each country of publication or whether it should, at least for some purposes, be viewed as a “global tort.” U.S. law has solved the issue on the interstate level with the Uniform Single Publication Act, which in effect provides that, with respect to a single publication, only one action for damages is maintainable. *See RESTATEMENT (SECOND) OF TORTS § 577A (1976)*; William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 994 (1953).
Company\textsuperscript{58} held that a plaintiff domiciled in a State that was not a contracting party to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters could still invoke the rules of the Convention. It is a safe bet that the trend is likely to continue, with other countries, such as Japan and Belgium, experiencing lawsuits testing universal jurisdiction for civil liability.\textsuperscript{59}

2. Courts of Law and the Court of Global Public Opinion

In the end, Mr. Filártiga failed to receive any monetary compensation or any other substantial remedy, international politics getting in the way; but, as an influential commentator has pointed out, defendants in such cases, “[f]rom the broader perspective of ‘moral liability’ . . . can ‘win’ the legal battle but ‘lose’ in the court of public opinion.”\textsuperscript{60}

Indeed, the court of global public opinion is a most potent deterrent for corporations and individuals in the global game, enforced by the possibility of a publicity disaster brought by a (perhaps even, in the end, ineffective) tort claim for violation of international standards of avoiding harm. As the influential UK


\textsuperscript{60} Bill Baue, \textit{Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights}, BUS. ETHICS, Summer 2006, at 12, \texttt{available at http://www.globalpolicy.org/intljustice/atca/2006/06winlose.pdf.}

Indeed, even legal victories can be very costly, as McDonald’s found in the aftermath of the so-called McLibel trial. McDonald’s was awarded £40,000 in damages after winning a lengthy legal battle against a small group of activists that had circulated defamatory leaflets. In addition to incurring costs estimated at £10 million, McDonald’s also lost huge amounts of credibility and goodwill through negative media coverage. Indeed, the case generated huge publicity for the activists’ case, and the offending leaflets are still on the Internet. \textit{See}, \texttt{e.g.}, http://www.mcspotlight.org/case/pretrial/factsheet.html.
think-tank SustainAbility reported in the findings of a London workshop held in 2005:

[B]usiness is vulnerable to new forms of "legal activism." This reflects three trends: the shift by NGOs away from attacking to exploiting legislation; the emergence, particularly in North America, of a highly profitable class actions industry; and the arrival of a new generation of lawyers, many of whom put correcting social and environmental injustice ahead of salary and career development . . . . Many of companies' traditional protections from liability—separation by geography, incorporation or time—have been attacked and, in some instances, undermined in the last five years.61

The report concludes that for corporations across the world, "hard" legal liability (defined as obligations under local, national, or international regulation or law) and "soft" moral liability (defined as the violation of stakeholder expectations of ethical behavior in such a way as to put business value at risk) are converging.62

Hard legal liability of global corporations has increased by the rise of phenomena such as, first, the so-called "foreign direct liability litigation," for human rights violations in distant geographical locations.63 Second, criminal and civil liability arising from securities litigation has been transformed into a trans-border, global phenomenon, as globalization of corporate capital carries with it the jurisdictional sting and influence of the most demanding national regulatory regimes. Thus the Sarbanes-Oxley legislation in the United States, introduced to combat U.S. corporate corruption, is said to be having an increasing impact also on European companies, both in the United States and at home in Europe.64

Soft moral liability is increasing with new laws on corporate transparency that are being introduced in several industrialized countries65 and that require mandatory disclosure of social and

62. Id. at 6.
65. In the United States, an international group called International Right to Know Coalition is actively promoting legislation that would require U.S.
environmental issues in company annual reports and accounts, which can yield information leading to disastrous publicity and enforce moral responsibility to combat practices such as sweatshop labor arrangements. In the case of Kasky v. Nike, Inc., the issue was whether the U.S. First Amendment protected Nike, Inc. from being sued for violating state consumer-protection laws concerning allegedly false advertising when such statements were made in response to charges by Nike's critics and concerned wages, treatment, and safety conditions of Nike's workers at overseas factories. The U.S. Supreme Court refused to overrule the Supreme Court of California, which had ruled that the Nike statements were not protected by the First Amendment. The case shows that corporations are vulnerable to consumer reaction and pressure when making advertising statements, and it also shows that lack of concern for social justice is increasingly bad publicity for global corporate players. But soft moral responsibility issues may also turn quickly into hard liability ones, as the current debate on climate change shows.

Commenting on the U.S. tort litigation system, Lord Peter Levene, former Chairman of Lloyd's of London, has been quoted as saying that "there's concern now that this blight is spreading to Europe . . ." But, as succinctly put by the new Google Vice President for Global Communications and Public Affairs, "[j]ust as commerce has gone global, so liability is going global—and just as it took time for the rules of commerce to become clearly defined, now we're entering an era where the rules of liability are getting sorted out." companies to report on key environmental, human rights, and labor issues. See International Right to Know Campaign, INTERNATIONAL RIGHT TO KNOW: EMPOWERING COMMUNITIES THROUGH TRANSPARENCY (2003), available at http://www.amnestyusa.org/justearth/irtk.pdf.


67. The global reinsurer Swiss Re has included a climate risk in its company directors and officers ("D&O") liability policies. "Premiums should reflect the risk of litigation against senior managers who have failed to protect their companies against such risk." Vanessa Houlder, Swiss Re Changes the Climate, FIN. TIMES (London), Apr. 26, 2004, available at www.ft.com (search "Swiss Re changes the climate"; then follow "Swiss Re changes the climate" hyperlink).

68. SustainAbility, supra note 31, at 12.

69. Id. at 28.
V. Conclusion

As was pointed out at the beginning of this article, justice in a global context may mean more than one thing and is an overwhelmingly broad and complex issue to address. This article has adopted a pragmatic approach and has focused on socio-economic justice. The reason is that the most important driving force of globalization, and the main source of all good and evil, is globalized capital. This makes socio-economic justice a priority.

Financial globalization has been a powerful source of change and innovation, an attractive prospect for countries of many different political and cultural persuasions. It has overcome national sovereignty and political ideology and is relentlessly undermining the authority of national or, as in the case of international organizations such as the European Union, transnational, sovereign economic planning, bureaucracy, and regulation. Globalized capital advances with an air of invincibility in a Hobbsean vacuum of (global) sovereignty and political control. Powered by unprecedented fast technological change and the Internet, it is ushering in an exciting and liberating age of internationalism, individual freedom, entrepreneurship, inventiveness, and collaboration across political and cultural divides. Dictators and fanatics of all kinds are increasingly looking like failures of an age past, and national political machismo is made to look arid and passé. And, still on the positive side, financial globalization by its own nature has brought with it a shift in the forum of accountability, from the old-fashioned political/sovereign and national to the new communal/social and global; from the formal/legal national, or transnational, courtroom to the moral/public opinion courtroom of the world.

But financial globalization has also brought with it questions of social justice of enormous complexity and urgency. These questions too have to be addressed pragmatically, without delay, by all kinds of experts but, crucially so, by lawyers.

Whether capitalism is on the path to suicide or survival must still be an open question. If the former, it will be from self-inflicted wounds. Since there is no alternative to it in sight; since it has shown itself capable of adapting to society’s values in the past, even if reluctantly and too

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70. Pragmatism: to “let daylight in on magic.” Jane Stapleton, Controlling the Future of the Common Law by Restatement, in EXPLORING TORT LAW, supra note 44, at 263 (citing Walter Bagehot, THE ENGLISH CONSTITUTION 100 (1963)).
slowly, it seems to me worth while for all of us to help bring it into line with the values of the 21st century, so enabling it to merit survival. And in this . . . lawyers have a vital role.  

A few of these questions have been identified in this article, and their scope outlined. It is important to address the issue of property entitlement and its socio-economic boundaries; the issue of poverty; and the issues of principled justice, human rights, and values in different communities.

To be sure, the task of global socio-economic justice as envisaged in this article is no different than that of national or local justice. Capital's power of exclusion, and the poverty that comes with it, are at the same time, and in the same form, a local and global phenomenon. Exclusion from wealth, knowledge, information, and opportunity is localized and reflected on a global scale. The problem of local justice is, therefore, essentially no different than that of global justice. And it is still important, as Hobbes first argued so eloquently, to achieve security and peace locally and globally. However, capital with the power to wound also has the power to heal. Beyond engaging the fundamental issues set out above, lawyers can, do, and must further pursue the peaceful process of responsibility for harm that not only can heal communities but also can practically help the victims of injustice. Traditional legal tools can be used in new transformative ways or serve as prototypes for useful innovations, such as international class actions and universal jurisdiction devices. The future is uncertain, but the emerging pattern is clear: Socio-economic justice in a global world is a bottom-up process, claimant-driven,


72. I am indebted to the wise and perceptive comments of Professor Geoffrey C. Hazard in this connection, after my oral presentation at the symposium.


74. Only the one who wounds can heal, as beautifully told in the story of Tristan and Isolde, Wagner's operatic masterpiece.
and its heroes are not philosophers, politicians, or judges, but litigation lawyers without borders. Finally, it is of course true that merely touching upon some of the fundamental issues of global socio-economic justice as this article tried to do is very far from being fair to the diversity of values and ideologies that inspire members of the human race. But I have no time for more. Poverty, for example, may indeed be a virtue for a Hindu follower seeking righteousness; enforcement of legal rights would be an inelegant and dishonourable way of achieving social harmony for traditional Chinese Confucianism; and a look at the importance of traditional ideas of justice and social fairness in modern Japan, the second largest player in financial globalization, would offer a fascinating alternative view of the future in the quest of global justice.

If justice, like truth, be the daughter of time, it cannot be fully known until all time ends. And then, perhaps, it is too late. I must, here, resist the temptation.

75. On the Hindu concept of law, see the now authoritative account by Werner Menski, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 196 (2d ed. 2006).
76. See the account by Sybille van der Sprenkel, LEGAL INSTITUTIONS IN MANCHU CHINA (1977).
77. The law of the "subtle mind": there is no right and wrong, no black and white, only the grey of human fallibility . . .
78. Veritas filia temporis, Auli Gellii, NOCTIUM ATTICARUM XII, 11, 2.
80. Dedicated to the ones I love.