
Introduction: International Law and Inequalities

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Equality is both a premise and a promise (or at least much lip service is paid to such) of today's international law. Customary international law and instruments such as the United Nations Charter, the Universal Declaration of Human Rights and other foundational treaties of the multilateral system are premised on the equality of states, the right to self-determination and the fundamental equality of human beings. With the era of decolonization, international law also became a battleground for material equality.¹ In the wake of the 2008 financial crisis, (economic in-)equality once again entered the limelight in a number of disciplines, not as a premise or promise but as a challenge. In the field of international law, Third World Approaches to International Law (TWAAIL) scholarship had already been pushing equality to the centre of attention. There is good reason indeed to subject the relationship between international law and (in)equality to critical interrogation.

In September 2019, the pre-COVID era, we therefore issued a call for papers in which we invited submissions for a Symposium reflecting on the ways that international law – its practice and scholarship – relates to inequalities.² We chose the plural – inequalities – as we did not want to narrow the Symposium's scope to particular forms or

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¹ J. Von Bernstorff and Ph. Dann (eds), *The Battle for International Law* (2019).

² <https://www.ejiltalk.org/announcing-our-second-ejil-symposium-june-2020-call-for-papers-on-inequality-and-international-law/>.

actualizations of inequality. As examples we mentioned phenomena as diverse as inequality in access to, or enjoyment of, public resources; the state's duties to ensure equalities of opportunity regardless of, among others, gender, religion, nationality, birth; North/South disparities and distribution among states and inequality in countries with affluent or weaker economies. We also raised the issue of inequalities in the external relationships of states with other actors (state and non-state) in the international system, as enduring legacies of colonialism and in post-conflict peacebuilding; as ongoing asymmetries in the efforts to achieve accountability and international justice for victims of internationally wrongful acts; as well as through contested modes of governance of the world's environment, global commons and natural resources.

We invited contributions that would conceptualize and problematize the notion of inequality and that would examine its doctrinal significance and its usefulness and appropriateness as an analytical concept or as a common concern in international law. We further called for papers that would address questions regarding empirical, quantitative and qualitative assessments of inequality within and across societies and states and that would assess international law and institutions as cause as well as remedy to inequality. We welcomed doctrinal, historiographical, genealogical and sociological engagements with past and present regimes, initiatives, institutions and instruments and their relationship with inequality as well as biographical engagements with scholars and practitioners who in their work have paid particular attention to the question of inequality in international law. Finally, we encouraged engagement with our responsibility as international lawyers, asking: how do we practise international law ethically in light of persisting material inequality, racism and sexism in the world, in our societies, governments and workplaces? What visions or utopias might guide and invigorate our practices? To what extent can we identify persistent inequalities that also suffuse the 'invisible college' of international lawyers, and what can be done within international law from both academic inquiry and norms of professional practice?

The nine articles that we bring together in this Symposium – almost all of which were selected out of the 177 abstracts submitted in response to the call for papers, then developed by the authors, intensely discussed during a virtual meeting of the authors and finally reworked again by the authors – reflect various ways in which international law relates to inequalities. We identify at least five:

- (1) inequalities *intentionally entrenched* in international law;
- (2) inequalities in *international law-making*;
- (3) international law as a *producer* of, or *obstacle to addressing*, inequalities;
- (4) international law as a body that *struggles to identify, let alone challenge*, inequalities; and
- (5) international law as an instrument *to address* inequalities.

International law entrenching inequality is not a new phenomenon. Many examples have been given, from legal instruments referring to 'the standard of civilization' to the special powers of the permanent members of the United Nations Security Council.³ In

³ A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); N. Tzouvala, *Capitalism as Civilization* (2021).

this Symposium, *Petra Weingerl* and *Matjaž Tratnik* focus on European Union law's unequal treatment of EU nationals and migrant workers admitted from third countries in the area of the free movement of workers. A key question regarding any inequality is always whether it can be justified; Weingerl and Tratnik argue that, on balance, it is not justifiable, and that there are strong reasons to treat migrant workers with long-term residence in the EU in the same manner as EU national workers.

Inequality in international law-making is probably also as old as international law itself (no matter the exact birthdate). Who gets to make international law?⁴ Which instruments count as sources of international law?⁵ Are some states more relevant than others?⁶ *Lorenzo Gradoni* and *Luca Pasquet* build on the debates around post-colonial international lawmaking when analysing the more recent process that led to the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. They show how the *Via Campesina*, a global organization representing peasants which in and of itself does not have law-making powers, both adopted and resisted features of international law in order to shape its contents.

No fewer than three of the articles set out how international law produces or fosters inequalities. *David Schneiderman* targets international investment law, arguing that this body of international law privileges the property rights and economic expectations of investors over a state's ability to address domestic economic inequalities by draining the state budget. *Johan Horst*, in turn, looks at the legal infrastructure of the over-the-counter derivatives market and the market for sovereign credit default swaps. He shows that these markets have distributional effects far beyond entities on those markets, for instance by impacting the food prices and sovereign financing, without counterpart international legal rules to directly address these impacts from such credit swaps. *Donatella Alessandrini* focuses primarily on international economic institutions. She argues that they encourage states to adopt deeper trade and investment commitments to sustain value chain trade, whilst such commitments, she argues, often go hand in hand with the deterioration of working and living conditions, particularly of vulnerable groups. *Bernard Hoekman*, however, replies to Alessandrini that international economic institutions and trade agreements are the wrong targets of the critique. They do not, Hoekman stresses, remove a state's right to regulate and there is insufficient evidence to suggest that trade agreements have the impact on global value chains that Alessandrini supposes. He argues that states, not trade agreements or international economic institutions, should be called upon to consider the impact of global value chains on reproductive and informal labour.

International law's struggle to challenge inequalities is illustrated by *Dimitri Van Den Meerssche*. He takes us to the 'virtual border' to show the inequalities that machine learning and data analytics import into the domain of global governance. Our existing legal vocabulary, Van Den Meerssche argues, struggles to register, let alone

⁴ A. Boyle and C. Chinkin, *The Making of International Law* (2007).

⁵ E.g. J. Castañeda, *Legal Effects of United Nations Resolutions* (1969).

⁶ Heller, 'Specially-Affected States and the Formation of Custom', 112(2) *American Journal of International Law* (2018) 191.

undo, the social hierarchies produced by data-driven forms of grouping, grading and decision-making.

The Symposium ends with two articles that identify a role for international law to address inequalities. After having set out ‘the uneasy interplay’ between digital inequality and international economic law, *Shin-yi Peng* argues that international economic law can be an instrument to confront and perhaps even redress digital inequality. In their article, *Amrita Bahri and Daria Boklan* also argue for creative usage of international trade agreements. As revealed by their captivating title, ‘Not Just Sea Turtles, Let’s Protect Women Too’, they argue that trade agreements should not only protect endangered species but also allow states to take trade-restrictive measures to advance women’s economic interests.

Very few of the submitted abstracts addressed the questions in the call for papers about the role of international lawyers in an unequal world, including an unequal academic world. We would have been prouder of an even more diverse table of contents – an aim we have had from the outset of the Symposium. Unsurprisingly, this Symposium has not been able to overcome inequalities in international law scholarship. The above-listed questions on inequality and international lawyers, together with many of the other mentioned and unmentioned questions, thus remain open. We hope that they inspire more research into international law and inequalities. Such research could also inquire into the very concept of inequality and raise questions about context: when do we value equality of opportunity, and when do we cherish equality of result?