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Does General International Law Incorporate the Concept of Social Justice?

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I. Introduction

It is said that happy people live their life as though the law does not exist, which, to tell the truth, is quite disturbing for us jurists. I could also say that, for a long time, happy jurists decided to live as though justice was not a matter of their concern. Indeed, for some, justice would not be an object of analysis for the jurist, neither at the domestic nor at the international level. For those following a formal positivist approach, the object of analysis or implementation is the law 'as it is', without 'polluting' it with extra-legal 'impurities' such as values or social analysis. For them, it would be enough to say, at most, that everything that is legal is just. For others, introducing the notion of justice would simply be wishful thinking and would deserve to be called just 'utopia'. Yet for others, justice, like ideology, is determined by the economic structure of the society and hence is merely a tool to reproduce exploitation in the capitalist system.

All this rather dark perspective has been rendered even more obscure at the beginning of this century with the still modish concept of 'globalization' and some of the phenomena that accompanied it after the end of the Cold War: the essential concern has turned around efficiency, free market and free play of the economic, political and other factors. With this in mind, we are told that commutative justice is achieved by itself. So, if we follow this idea, there is no need to waste time talking about justice. Indeed, if one believes Friedrich Hayek, 'social justice' is one of the most harmful concepts in vogue in our contemporary societies. It would be opposed to the ideas of

justice *tout court* and freedom. In a market society, 'social justice' does not have any content and makes no sense.¹

In this paper, I will follow another path. This contribution has not been first submitted at Mont Pèlerin, in the canton of Vaud, where Hayek established his society with Milton Friedman, but in Geneva, at the headquarters of the ILO, whose Constitution states in the first sentence of its preamble that 'universal and lasting peace can be established only if it is based upon social justice'. The linkage between peace and social justice must be stressed. The Vienna Declaration and Programme of Action of 1993 also links it with democracy and development in the context of education for human rights.²

My purpose is not to analyze the manner in which the ILO has interpreted and applied the concept of social justice and its impact in international law. I will rather briefly examine whether the notion of social justice has been incorporated into international law in general. To put it otherwise, my question is whether this notion is reflected in the content of contemporary international law. This is, of course, not the place to embark on a general discussion about the concept of justice and its relationship with law. While no doubt examples of unjust legal systems can be offered in abundance, it will suffice to say here that even the most unjust of the legal systems claims to be based on a particular –and often, odious – interpretation of 'justice'. The assumption is that any legal system claims to be closely associated with the idea of justice, as something inherent to it. We will not discuss here either the idea that when the judge or the interpreter ascertains a flagrant contradiction between the law and justice, he or she has to disregard the former.³

Some distinguished scholars have reflected on the relationship between justice and international law. In his General Course at the Hague Academy of International Law, Georges Abi-Saab reminded us that 'le sentiment de justice ou plutôt d'injustice est un moteur puissant de la dynamique sociale

¹ Friedrich August Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (University of Chicago Press 1978).

² Adopted by the World Conference on Human Rights on 25 June 1993.

³ The so-called Radbruch Formula, according to the Gustav Radbruch's analysis in *Gesetzliches Unrecht und übergesetzliches Recht* (Süddeutsche Juristenzeitung 1946) 107.

et [...] le droit international n'est pas totalement étranger à cette finalité ni totalement absent de cette dynamique'.⁴

Georges Scelle was certainly among the first international lawyers to link social justice with international law. In his own words, 'le caractère organique et finaliste du droit se combine avec la notion de justice sociale dont l'éthique lui impose le respect'.⁵

Another precursor of this connection between social justice and international law was Judge Alejandro Alvarez, in his opinions appended to both the first advisory opinion and the first judgment on the merits of the ICJ, respectively delivered in 1948 and 1949. He referred to the new international law that emerged from the Second World War, that he called the 'law of social interdependence', which, according to him, 'is the realization of social justice'.⁶

Half a century later, another Latin American Judge of the ICJ, Antônio Cançado Trindade, referring to the cycle of World Conferences organized by the United Nations during the 1990s in the search for common solutions to the challenges affecting humankind, mentioned that 'a growing call was formed for the pursuance of social justice *among* and *within* nations'.⁷

Oscar Schachter, in his contribution to the *Festschrift* for Wolfgang Friedmann, also analyzed what he called the 'Principles of International Social Justice', focusing on the emerging economic aspects of the question, such as the responsibility to assist countries in need, just prices, world food security, the right to benefit from science and technology and permanent sovereignty over natural resources.⁸

While declaring 20 February of each year as 'The World Day of Social Justice', the United Nations General Assembly also seemed to embrace

⁴ Georges Abi-Saab, *Le droit international dans son environnement* (1987) 207 Recueil des cours 29. See also 33-43 and 105-126.

⁵ Georges Scelle, *Manuel de droit international public* (Domat-Monchrestien 1948) 7.

⁶ Individual opinion of Judge Alvarez, *Corfu Channel, Merits, I.C.J. Reports 1949*, 40.

⁷ Dissenting Opinion of Judge Cançado Trindade, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, 956, para 124, footnote 140.

⁸ Oscar Schachter, 'Principles of International Social Justice' in Gabriel M. Wilner (ed), *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (Martinus Nijhoff Publishers 1979) 249.

the idea of the applicability of social justice at the international level. The resolution ‘recognizes that social development and social justice are indispensable for the achievement and maintenance of peace and security within and among nations and that, in turn, social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms’.⁹

II. The meaning of ‘social justice’

Going beyond declamatory analysis, the first difficulty in this endeavour is to grasp the exact meaning of social justice. Just a few words, first, to recall how this concept was incorporated in the preamble of the ILO Constitution. The original draft of the first paragraph mentioned that ‘peace can be established only if it is based upon the prosperity and contentment of all classes in all nations’.¹⁰ These words were changed to ‘peace can be established only if it is based upon social justice’, following a proposal of the Belgian delegate Emile Vandervelde. Until 1918, Vandervelde had been the president of the Council of the Second International, later transformed into the Socialist International. He explained his proposal in the following manner:

We are told that peace can be founded only on the basis of the prosperity and contentment of all classes in all countries. It is therefore asserted that in the peaceful society of the future there will be classes, and that their satisfaction or contentment will contribute to maintaining peace. Now, it is a thesis in formal contradiction with the socialist thesis which affirms, on the contrary, that in a society where there are classes, the opposition of interests exists, that the antagonism is inevitable and that consequently the social peace can only be achieved through the elimination of classes and the creation of a community of workers who are collectively owners of working tools. Of course I am not asking you to adopt the socialist thesis, to declare that it is only collectivism or communism that will make social peace

⁹ UN General Assembly Resolution 62/10 (2007).

¹⁰ Edward J. Phelan, ‘The Commission on International Labor Legislation’ in James T. Shotwell (ed), *The Origins of the International Labor Organization*, vol. 1 (Columbia UP 1934) 132.

prevail, but I think it is quite legitimate that we ask you, on the other hand, not to oppose the contrary view; and that is why I have adopted the formula which reserves doctrines in the presence and, I repeat, seems acceptable to all.¹¹

Those familiar with the debate within the socialist movement that led to the division between social-democrats and communists may recall the furious attack of Lenin against Kautsky and Vandervelde in his well-known pamphlet *The Proletarian Revolution and the Renegade Kautsky*.¹² Lenin's essential accusation was the abandonment – in his view – of a revolutionary line in order to embrace a reformist one. The explanation of Vandervelde for his preamble proposal shows that, at least at that time, socialists had not abandoned the idea of the possibility of existence of a society without classes, even though the means to achieve it could be through reform. And the work of the ILO could certainly contribute to it.

In the Anglo-Saxon literature that followed John Rawls' *Theory of Justice*, 'social justice' is used as synonymous with 'distributive justice'. Even though the latter is a primordial element of it, social justice goes beyond the *suum cuique tribuere*. What follows is an attempt at making an approach to the notion.

¹¹ Translation from the original French: 'On nous dit que la Paix ne peut être fondée que sur la base de la prospérité et du contentement de toutes les classes dans tous les pays. On affirme donc que dans la Société pacifique de l'avenir, il y aura des classes et que leur satisfaction ou leur contentement contribuera à maintenir la paix. Or c'est une thèse en contradiction formelle avec la thèse socialiste qui affirme, au contraire, que dans une société où il y a des classes, l'opposition des intérêts existe, que l'antagonisme est inévitable et que par conséquent la paix sociale ne peut être obtenue que par la suppression des classes et la création d'une communauté de travailleurs propriétaires collectivement des instruments de travail. Bien entendu je ne vous demande pas d'adopter la thèse socialiste, de déclarer que c'est seul le collectivisme ou le communisme qui fera régner la paix sociale, mais je pense qu'il est tout à fait légitime que nous vous demandions, d'autre part, de ne pas vous opposer à la thèse contraire; et c'est pourquoi j'ai adopté la formule qui réserve les doctrines en présence et, je le répète, me paraît acceptable pour tous'; see *La Paix de Versailles: Législation internationale du travail – Conférence des préliminaires de paix – Commission de la législation internationale du travail* (Les Editions internationales 1932) 412-413 <<http://www.ilo.org/public/libdoc/historical/1901-2000/58893.pdf>>.

¹² See, in particular, its Appendix II: 'Vandervelde's New Book on the State' <<https://www.marxists.org/archive/lenin/works/1918/prrk/append02.htm>>.

First, 'social justice' emphasizes the idea of community's justice, as differentiated from individual justice. It is the society as a whole that becomes the recipient of justice. It ultimately means a just society, from the point of view of its organization, including its governance, and of the sharing of the commons. Second, and in a narrower conception, social justice refers to the rights of the most deprived actors or those who need special protection by society. Third, and in the same vein, social justice alludes more broadly to justice to be rendered to those who produce social goods, and who may be disadvantaged in the distribution of their fruits. In these last two approximations, social justice concerns the relationship between political power and the economic sphere of society – the distribution of social goods in an equitable manner.

III. Social justice at the international level

Certainly, the aspects of social justice referred to above have influenced societies at the national level and the work of ILO has contributed to this. Hence, the question here is whether the same can be said at the international level. Can social justice be pursued only domestically? My answer is certainly not. My contention is that there are certain areas in which the notion of social justice has found its way into international law, whereas other areas are not at all concerned and yet others still need to incorporate such value.

I will mention some premises for the application of social justice at the international level. A first premise is the existence of an inclusive universal international society. A restricted Eurocentric international community for the few, as it classically existed, was simply incompatible with the ideal of social justice. The universalization of the international society is something that started to be constructed after the major divide that meant the end of the Second World War. The right of peoples to self-determination, one of the most revolutionary changes in contemporary international law, is not only the first necessary rule for the implementation of social justice at the international level, it is the basic condition for its very existence. The impact is twofold: not only States, but also peoples, become holders of rights and obligations at the international level, and for the first time in history, some given human communities – the 'peoples' – are recognized as having the right to create their own sovereign States and see their territorial integrity respected,

as the ICJ has just declared in its last advisory opinion of 25 February 2019.¹³ It is through the universalization of the international community that the principle of sovereign equality expanded to all States and peoples.

A second premise for the application of social justice at the international level is the existence of a duty of cooperation, recognized as a fundamental principle of international law in the Friendly Relations Declaration adopted in 1970.¹⁴ The passage of a pure international law of coexistence to an international law of cooperation highlights this condition.¹⁵

A third premise is international solidarity, which goes beyond cooperation and which should not be confounded with charity. The United Nations Millennium Declaration seems to mix both when affirming – under the heading of solidarity – that ‘global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most’.¹⁶

IV. Has the concept of social justice entered international law?

The question is whether those premises were taken into account in the formulation of rules in specific areas of international law. Human rights, international economic law and environmental law are good candidates. Since other contributions to this collective work address these particular areas of international law, I will limit myself to just a few comments. One would think that the emergence of the so-called second and third generations of human rights constitute examples of the inclusion of social justice in this particular field. Yet, economic, social and cultural rights, as well as the right to peace, or those related to the environment remain vastly programmatic.

International social justice demands fair trade and the fulfillment of the right to development, a fundamental pillar of the ‘new international

¹³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, para 160. See also, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, 436, para 79.

¹⁴ UN General Assembly Resolution 2625 (XXV) (1970).

¹⁵ *Abi-Saab* (n 4) 319-323.

¹⁶ UN General Assembly Resolution 55/2 (2000).

economic order' that has never really emerged, despite the efforts of the Third World in the 1970s, particularly at the UN General Assembly and/or through UNCTAD. The 'Permanent Sovereignty over Natural Resources' Resolution of 1962,¹⁷ the Declaration for the Establishment of a New International Economic Order, the Charter of Economic Rights and Duties of States¹⁸ and the Programme of Action of 1974 are all a testament to those efforts that were largely superseded by what essentially followed after the end of the Cold War and the reign of what Georges Abi-Saab called 'marketheism'.¹⁹

True, in considering whether social justice has penetrated international law, a key element is the application of the principle of special and differential treatment for developing States, or States facing a disadvantageous situation in particular fields, such as land-locked States. The number of treaties and other international instruments reflecting this principle is important, and the fields that are incorporating it are in constant expansion, such as trade, environment, health, law of the sea, intellectual property rights and many others.²⁰ This is an undeniable evidence of the acceptance by States of the existence of a social need for this treatment.

Certainly, whether and how the provisions of special and differentiated treatment are operationalized is a different matter. Key issues are that the provisions in question should not discriminate between developing States themselves and that the granting and withdrawal of such preferences should not be left to the unilateral decision of the conceding States. As Georges Abi-Saab wrote, 'preferences, have to be uniform in their content and general in their personal scope of application, in the sense of being granted by all developed countries and enjoyed by all developing ones'.²¹

¹⁷ UN General Assembly Resolution 1803 (XVII) (1962).

¹⁸ UN General Assembly Resolution 3281 (XXIX) (1974).

¹⁹ Georges Abi-Saab, 'The Changing World Order and the International Legal Order: The Structural Evolution of International Law Beyond the State-Centric Model' in Yoshikazu Sakamoto (ed), *Global Transformation: Challenges to the State System* (United Nations University 1994) 457.

²⁰ Juan Nicolás Guerrero Peniche, *The principle of special and differential treatment for developing states in international law. A study of the differences in rights and obligations derived from differences in development*, PhD thesis (Graduate Institute of International and Development Studies, Geneva 2012).

²¹ Georges Abi-Saab, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order: Analytical Study*, UN doc. A/39/504/Add.1 (1984) para 142.

Irrespective of persistent deficiencies, it can be concluded that the differentiation of rights and duties of States based on the reality of economic inequalities is a concrete manifestation of the application of social justice at the international level.

V. Social justice at the international level requires common action

Promoting international social justice is not confined to the normative dimension. It also requires common action. ILO action has contributed to the acceptance that there are existing situations at the domestic level that are matters of international concern, and consequently that any State has the right to raise them at the international level. Indeed, ILO action has preceded the international law of human rights in this respect. *Erga omnes* obligations and *actio popularis*, today widely recognized, can find their origin in ILO practices. It is not by coincidence that Judge Jessup, in his separate opinions in the *South West Africa* cases brought by Ethiopia and Liberia against South Africa, referred to the first sentence of the preamble of the ILO Constitution to support his views.²²

One might be tempted to mention the ‘Responsibility to Protect’ as another example.²³ Yet, this widely used concept has not added anything to the normativity of international law relating to the use of force and to the international protection of human rights.

Another element to be taken into account is the manner in which adjudicative bodies rely on it or its associated tools. The ICJ has largely used the idea of equity, and stressed that ‘as a legal concept is a direct emanation of the idea of justice’, as mentioned in the *Tunisia/Libya* case.²⁴ Certainly, in the same case, while analyzing the equitable principles applicable to the delimitation of the continental shelf, the Court advanced ‘the principle that

²² Separate opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, 426.

²³ *A more secure world: Our shared responsibility. Report of the High-Level Panel on Threats, Challenges and Change*, UN doc. A/59/565 (2004); *Implementing the Responsibility to Protect. Report of the Secretary-General*, UN doc. A/63/677 (2009).

²⁴ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, 60, para 71.

there can be no question of distributive justice'.²⁵ This is a striking example of an area in which social justice does not play a role – the delimitation of land and maritime boundaries. Indeed, the territorial distribution of the world is the product of history and that of maritime areas is essentially tributary of geography. The advisory opinion of the Seabed Disputes Chamber of the ITLOS on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* is a good example.²⁶

To be effectively applied, social justice also requires a change both in concrete compliance and a structural change in the organic constitution of the international community. Effective inequality is still preponderant in key areas of global governance, such as in the Security Council and the Bretton Woods institutions.

VI. Conclusion

From the above it can be concluded that although the concept of social justice has entered contemporary international law in different fields, it is far from being concretely crystallized. Yet in other fields, such as investment arbitration, the concept remains widely ignored. The mainstream in this area focuses on the interest of foreign investors, completely neglecting the very purpose for which the World Bank, the institution that created ICSID, allegedly emerged – reconstruction and development.

John Maynard Keynes wrote that 'the political problem of mankind is to combine three things: economic efficiency, social justice and individual liberty'.²⁷ To favour the first, neglecting the two others, leads indeed not to a new international order, but to further disorder. The struggle for international social justice is open-ended. When it seems that progress has been made, we discover new social needs that have to be faced. Let have social justice as the guiding star that is always followed with the knowledge that it will never be attained.

²⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, 40, para 46.

²⁶ ITLOS, Case No. 17, 1 February 2011.

²⁷ John Maynard Keynes, *Essays in Persuasion*, part IV (Macmillan 1931) <<https://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html>>.