# TREATY INTERPRETATION AND CONSIDERATIONS OF JUSTICE

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The current efforts of the International Law Commission to formulate general principles of treaty interpretation raise, *inter alia,* the problem as to whether international justice is served by such a formulation. The word « justice » does not occur in the relevant draft articles. The few phrases contained in them which have ethical connotations, namely « good faith » and « absurd or unreasonable » do not necessarily refer to the principles employed for the determination of what is just or unjust. For acting in good faith may mean rigorous observance even of unjust terms of an agreement and avoidance of absurdity or unreasonableness may mean doing what is in the interest of peace and security and not what is just or in the name of justice. Thus the maxim « *Fiat iustitia pereat mundus* » is not a command of reason but a slogan of fanatics or fools.

At least so much can be taken for granted that the ideas of good faith and reasonableness do not militate against the efforts to achieve international justice, but, on the contrary, that they support these effors if the endeavour to do justice is in harmony with the endeavour to achieve what is expedient or what serves peace and security. A further avenue for considerations of justice in treaty interpretation is opened in the Draft of the International Law Commission by the provision according to which in treaty interpretation « there shall be taken into account... any relevant rules of international law applicable in the relations between the parties ». It can be argued that the Charter of the United Nations contains relevant rules of international law which proclaim that one of the purposes of the United Nations is « to bring about ... in conformity with the principles of justice and international law, adjustment or settlement of international disputes... » (Art. 1 (1)) and that all members of the United Nations « shall settle their international disputes ... in such a

manner that international peace and security, and justice, are not endangered » (Art. 2 (3)). These rules are not, of course, a part of universal international law, but they are still pertinent to most treaties as a part of general international law. It can further be argued that observance of certain elementary considerations of justice is a general principle of law recognised by civilised nations and as such, a rule relevant to all international legal relations. Finally, it may be argued that there is room for considerations of justice in treaty interpretation in view of the fact that no mere formulation of rules of any interpretation can make this a mechanical procedure. Its rules can be no more than guidelines which always call for sound judgment that the interpreter can bring to bear on the interpretation situation confronting him in order to select appropriate canons and to apply them so that a just result is achieved.

Of the existing canons of treaty interpretation the plain terms rule seems to be particularly adverse to giving adequate scope to considerations of justice. International law tolerates the insistence on the maxim « *Dura lex sed lex* »; hence if an iniquitous rule is clearly expressed, considerations of justice in its application may be excluded. However, the plain terms rule as the supreme canon of treaty interpretation has been discredited by most international legal scholars and in the articles which the International Law Commission has drafted on this interpretation it certainly does not have such an elevated status. The draft says only that « a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ». It is further qualified by the subsequent provisions, in particular by the provision according to which a result which is manifestly absurd or unreasonable should be avoided.

The plain terms rule formulated by De Vattel as « It is not permissible to interpret what need not be interpreted » or in the maxim « *Interpretatio cessat in claris* » must itself be rejected as plainly unreasonable. In the first place, it is never certain that what appears to be clear is actually so. Clarity emerges only as an end product of interpretation when all circumstances bearing on the text to be interpreted have been taken into account. Further, any claim that such an end product has achieved clarity can always be challenged, for clarity is a subjective matter : what is clear to some persons may be obscure to others.

From what has been said so far, it appears that neither the classical rules of treaty interpretation nor the formulation of general principles of this interpretation by the International Law Commission excludes considerations of justice on any occasion of ascertainment of the meaning of treaty provisions. For those concerned about justice in international legal relations, this is encouraging. However, now the awkward problem arises about the meaning of « justice » in international legal relations. The provisions of the Charter of the United Nations and of other international legal instruments in which this

word occurs raise involved issues of interpretation. Furthermore there is no general agreement as to what « justice » means even in relations between individual human beings; what it means in relations between States is particularly uncertain. « International justice » is brandished as a political slogan, but the concept of this justice has not found penetrating treatment by international legal scholars. International legal practitioners, too, have rarely addressed themselves to the problem of international justice; they have scarcely made any notable contribution to its clarification or solution.

There is no need to take a defeatist attitude to the problem of justice in international legal relations despite the wilderness which prevails in the area of fundamental ethical thought about international law. « Justice », however vague its meaning may be, is not only an inspiring idea for international lawyers but also of considerable practical and theoretical relevance for them. Though it is repugnant for a lawyer to say « *Fiat iustitia pereat mundus* », world-minded lawyers are likely to be inclined to approve the amended version of this maxim : « *Fiat iustitia ne pereat mundus* ». Thus the Charter of the United Nations, ostensibly wisely, does not only impose a duty on its signatories to avoid endangering international peace and security but also international justice. This calls for an attempt to ponder what « justice » may mean in international legal relations and how considerations of justice could operate in treaty interpretation.

In order that there may be any reasoning about matters of justice at all (and not just mere arguing), the partners to reasoning must have some communicable notion of what each of them has in mind when the word « justice » is employed. It is not indispensable that all of them entertain the same ideas about the defining characteristics of justice; it is sufficient that they know on what they agree and on what they disagree as regards the concept of justice. In this way at least talk at cross purposes can be avoided in discussions of problems of justice, and if the partners to reasoning cannot reach a common understanding about the object of their discussions, at least they can better inform each other about their divergent views.

The concept of justice operating as a thought-formation by the aid of which reasoning about justice can be conducted pertains to the formal aspect of justice. The criteria by recourse to which it can be determined whether something is to be deemed just pertain to the material aspect of justice. As to the former, it may be submitted that the relevant history of ideas and the current notions warrant the statement that justice is a positive ethical value attributed to relations in which a right of a person corresponds to a duty of another person and *vice versa;* in other words, justice is a positive ethical value attributed to relations which are actually or potentially legal relations. It may be submitted that this statement provides the *genus proximum* of the concept of justice. According to a widely held view, the *differentia specifica* of the concept of

justice lies in the concept of equality. This view is challengeable on the following grounds : First, something that appears to be inequality rather than equality is essential for distributive justice. This is perhaps the most important kind of justice; it is characterised by the requirement of proportionality. In order to make it possible to speak of equality here, recourse is made to the notion of equality of ratios. However, such an equality applies to mathematical magnitudes, which are usually alien to justice-relations. Second, in the relations to which the concept of justice is applicable, the relevant service and counter-service, performance and counter-performance, act and counter-act, may be entities of altogether different kinds and thus not amenable to being equated. This is particularly obvious in case of crime and punishment. Hence choice of equality as the decisive characteristic of justice leads to artificial constructions. The concept of equality can therefore count only as one of the *naturalia* of justice not as one of its *essentialia;* the *differentia specifica* of the concept of justice must therefore be sought in another notion. The classical idea of « *suum cuique* », that is, the conception that when justice is done, a person receives what is due to this person, appears to be an appropriate choice.

The concept of justice defined by the aid of the concept of one's due proves to be an open-ended, indeterminate concept; what is one's due is a question which defies a definite answer. However, this does not appear to be tragic if it is considered that the purpose of the concept of justice is only to attend to the formal aspect of justice and not to settle its material issues. In order to pass judgment about what is just or unjust in a given situation, recourse is to be made to the criteria of justice relevant to this situation. Thus the formal aspect of justice has the material aspect of justice as a complementary problem area. Invocation of the concept of justice in any given justice-situation contains a relegation to available criteria of justice. The concept of justice operates as a frame of reference for the purpose of communication of ideas of justice; the criteria of justice are resorts for deciding whether something is just or not.

Whereas no ideological differences need arise in connection with the formal aspect of justice, the material aspect of justice contains seeds for dissensions of various kinds. There are only few criteria of justice which in our civilisation have gained universal respectability and universal approval. These few occur in a very abstract and rather indefinite form, which in every instance implies an important qualification whose only denominator is a rather hazy notion of reasonableness. As instances of the criteria of justice which have gained a fairly solid status in our civilisation the following may be mentioned : the Golden Rule, the Categorical Imperative, the maxims of decisional impartiality (« *Nemo iudex in causa sua* » and « *Audiatur et altera pars* ») and, more specifically, the maxims « To everyone according to his deserts », « To everyone according to his contributions », « To everyone according to his worth », « To everyone according to his needs », and « To everyone according to his

social role ». Since these principles do not stand in a hierarchical relation to each other, conflicts between them are possible, whose resolution can happen only by recourse to reason. The precise import of this supreme regulative principle is itself controversial.

The above listed criteria of justice have become crystallised in the experience of interhuman intercourse and the subjects whose conduct these principles or maxims are supposed to regulate have been considered to be individual human beings. An underlying idea of all of these precepts has been the so called human dignity, a quality which every man is supposed to have and which calls for certain elementary consideration and respect to be shown to every human being. This raises the question as to whether States as subjects of justice-norms have something corresponding to human dignity. *Prima facie* this is the case, for according to the classical and still current conceptions of international law, States do have a right to respect, that is, to be treated in an honorable manner, however humble entities they may be because of their physical weakness or political debilities. The fact that there have been States which have occasionally or even persistently behaved like robber bands may be contended to affect their basic dignity as little as the fact that certain human beings have been inveterate robbers has been considered to affect their basic human dignity.

The above stated similarity between individual human beings and States in their role as justice-subjects is, however, superficial. There is this essential diffenrence between them : whereas human dignity can be postulated as an ethical principle of intrinsic value, the dignity of States can be postulated to be only of instrumental value. Today it is no longer believed that States are ends in themselves, whilst it may still be held that every human being or humanity at large are such ends.

Conflicts between interests of individual human beings or humanity on the one hand and States on the other are not only possible but emerge as acute actualities. The resolution of these conflicts can occur only by subordinating the interest of lower rank to those of higher rank. Since the States exist for men's sake and not men for State's sake, the State interests must be regarded as being of lower rank than the interests of the individual human beings, unless what is in the interest of a State can be shown to be of superior value for individual human beings. Doing justice to States under the relevant criteria of justice may entail doing injustice to individual human beings and disservice to humanity. Treating States too generously under applicable criteria of justice may involve perpetuating unjust situations for men as men, which may create states of affairs catastrophic for everyone and for all.

The above considerations suggest that application of the principles of justice to the relations between the States is a delicate matter calling for caution.

This is eminently so today when is has become obvious that the organization of the world into States as they exist today has become increasingly obsolescent. Contempary States are not internally organized in such a way that their governments would be sufficiently capable of responsible and efficient action in the interest of their own citizens and for the sake of mankind. The time has arrived to consider seriously, extensively, and anxiously what is to be done to overhaul the political organization of the States so that mankind would be able to cope with omnious problems of our age. Whereas only time of grace is given to perform this task, there are still only modest beginnings in requisite thought and action. And there are still only speculations as to what a workable and worthwhile world order might be which can be achieved in view of the relevant contemporary political and technological realities.

In the light of the above reflections, it appears that those parts of the Charter of the United Nations in which the word « justice » occurs are to be interpreted in such a manner that the concept of justice does not relate solely to justice which ought to be done to States as such but also, and eminently, to justice which ought to be done to individual human beings as denizens of the world. The phrase « international... justice » in Art. 1 (1) can be understood to mean justice between men in their international concerns, that is, men in their international roles and affected by international events. This interpretation would harmonise with the requirement of international peace and security expressed in the same provision, for it appears that international conflicts can best be managed when the greatest possible regard is paid to what is due to individual human beings under the relevant criteria of justice.

The International Law Commission has chosen not to include the word « justice » in the articles which it has drafted on treaty interpretation. The reasons for this choice have not been stated. Perhaps it was felt by the members of the Commission that a world of such indeterminate meaning as « justice », especially as employed in reference to States, would have not served any purpose in these articles. It might have provided an additional opportunity for the interpreter to exercice its discretionary judgment; but this would have been unnecessary because the general principles of treaty interpretations are « constitutionally » so pliable, so indeterminate, that they give the desired opportunity to the interpreter to display his *esprit de finesse* in performing his tasks. Nevertheless this omission does not eliminate considerations of justice in treaty interpretation. The regulative idea of justice can be brought into any interpretation through the « rule of reason » which is a regulative idea for all legal and political activities. Moreover, those who interpret treaties are individual human beings and as such morally entitled to claim their due in performing their tasks under the principles of justice applicable to men in certain social roles. What is above all due to them under these principles is that they have

the freedom to act as reasonable men responsible to mankind rather than men whose ultimate allegiance belongs to those whose servants they are.

The above reflections have led to invocation of the concept of reason. Although a widely used word in all essential human pursuits, its meaning is far from definite. It has distrubing emotive overtones and sentimental connotations. Nevertheless, in its sober use, « reason » has come to mean a principle of thought and action which requires reasoning according to established norms of logic and of methodology of science, opportunity of argumentation in intellectual detachment and integrity, and readiness to listen and to learn.