Will "Justice" Bring Peace?

International Law
Selected Articles and Legal Opinions

Yehuda Z. Blum

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Introduction

The title of this work requires some words of explanation. It is based on Psalm 85:11 which says: "Justice and peace will meet." This statement is, of course, not devoid of some serious difficulties, which will be discussed below.

The prevailing dictionary definition of "justice" is rather vague. The Concise Oxford English Dictionary defines it as "just conduct," and Merriam-Webster as "the quality of being just." Quite apart from the fact that both these definitions of justice speak of 'just conduct'—thus using the undesirable, or even impermissible, circular definition (*definitio idem per idem*)—the problematic character and vagueness of this concept become perfectly obvious.

The blame for this deficiency should not be laid at the feet of the lexicographers. After all, how are we to define such an illusive concept, which by its very nature clearly defies an objective characterization, since what is just and fair means different things to different people at different times. In other words, what is just and fair is to be found in the eye of the beholder.

This difficulty has haunted philosophers and jurists since the days of Plato and Aristotle until our own times. Clearly, the subjective character of justice, rather than being conducive to the cause of peace, will more often than not foster disagreement and conflict. The history of the twentieth century serves as a perfect illustration to substantiate this claim. How does one reconcile the views of what is just and fair of Nazi Germany, the Soviet Union and the Western-style democracies? Moreover, there have appeared on the international scene scores of new state actors (and even some non-state actors) who in the name of justice demand to put an end to a state of things which they regard as unjust, unfair and discriminatory. The divergent views on "justice" may not infrequently escalate into violence, witnessed also in recent years, culminating in what Samuel Huntington called "The Clash of Civilizations" over two decades ago. All these and other factors clearly destabilize societies—both domestic and international. It is small wonder, then, that virtually all commentators on this verse of the Psalm, in their attempt to evade the inherent real-world conflict between "justice" and "peace," have relegated the applicability of the concept alluded to in the title of this work to the realm of the Messianic era.

Due to the "revolutionary" and destabilizing character of the concept of justice, those giving preference to social stability over justice, have lowered their aspirations by concentrating on the more modest concept of "law." In contrast to "justice," law seeks an objective determination of what constitutes its rules. The most common definition of law regards it as the minimum ethical

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principles recognised by organised society as being necessary for stability and predictability for the orderly functioning of the institutions of such a society. Such principles are converted into binding rules emanating from the decision-making organs of society. In democratic societies of our time this will usually be the legislative organ, and the laws adopted by it will be enforced by the executive and interpreted by the judiciary. In the international arena the picture is even more complex, due to the fragility of the international legal order. This is also evidenced by Article 38 of the Statute of the International Court of Justice, which lists the sources of international law.

In contrast to the "revolutionary" concept of justice, "law," then, favouring stability and order, is naturally more conservative in its outlook. Since it seeks primarily the attainment of stability, it mostly lags behind the pace of change and development within the society in which it functions. Here once more the Psalmist envisions for the Messianic era a rapprochement between law and justice when he states that "law will again accord with justice" (Psalms 94:15). Given the real-world discrepancy between law and justice, the former is often accused of seeking to preserve the *status quo*, thus favouring the privileged groups within society. In truth, it seeks a gradual transformation, based on the broadest possible support of society. This, in turn, slows down the pace of change, but once such change occurs, it will be able to count on broad societal acceptance.

The clash between justice and law already emerges from a comparison between the title of this work with its subtitle. The scepticism of the author regarding the applicability of "justice" is indicated also by the question mark in the title. By comparison, the subtitle, by referring to international law, makes it clear that the Articles and Legal Opinions included in this volume reflect what the author perceived at the time of writing to be expressions of the relevant rules of international law.

The author does not subscribe to the proposition that it is only law that may be unjust in certain instances. It is often overlooked that the same can be true also of justice. A pertinent example is the case of self-determination, which in recent decades has been equated with independence. It is by virtue of this approach that the former possessions of the colonial powers in Africa, Asia and the Pacific, as well as most countries in Central and Latin America and the Caribbean, have achieved their independence. However, when Biafra claimed in the 1960s the right of self-determination for itself in order to secede from Nigeria, itself having achieved independence by virtue of self-determination, even U Thant, the Burmese Secretary-General of the United Nations and himself a national of a former colonial territory, stated in unequivocal terms that such secession would violate the sovereignty and territorial integrity of

Nigeria. Thus, he was relying on the traditional rules of international law as against the alleged right of self-determination. The selective application and manipulation of the concept of self-determination became also evident in the case of Bangladesh, which seceded from Pakistan (itself having seceded from India, in the first place), but whose secession was recognised by the international community.

Therefore, it should not occasion surprise that in the name of self-determination some separatist movements have raised their heads also in Europe, thus causing increased instability and friction. See, for example, countries like Spain (Basques and Catalans), the United Kingdom (Scotland) and Belgium (the Walloon and Flemish regions). In Eastern Europe, however, two countries, the Soviet Union and Yugoslavia have fallen apart, largely in the name of self-determination. (See on this issue the author's article on "The Changing Concept of Self-Determination," on p. 362 below.)

This book comprises two Parts and an Appendix. Part I consists of a selection of articles written by the author, starting in the mid-1960s. These articles are arranged thematically, with two topics predominating: a) some constitutional problems relating to the United Nations Charter; b) the Arab-Israel conflict. Almost all of these articles were written in English. Two of them—"Israel Marriage Law and Human Rights" (p. 314) and "Privileges and Immunities of United Nations Officials in Israel" (p. 284)—were translated into English. At the beginning of each article in Part I it is indicated where it was first published.

In some cases the author would have changed the text of an article, had he written it at the present time. A case in point is the article on "Israel Marriage Law and Human Rights." The reader will notice that nowhere in that article is there any reference to such legal institutions as same sex unions and other manifestations of sexual orientation other than the heterosexual relationship. The plain reason for this is that at the time of writing in the mid-1960s the right of marriage was confined to the heterosexual framework in the international arena, including conventions, draft conventions and the discussions surrounding them. Thus, retaining the article in its original form (and dispensing with the 20/20 hindsight vision adopted by some writers) enables us to measure the radical changes that have taken place on these issues in international law over the past half-century. By the same token, in the same article the non-affiliation of a person with any recognized religious community is considered a marginal phenomenon. However, the influx into Israel of more than one million immigrants from the former Soviet Union in the aftermath of the latter's disintegration has radically changed this situation.

On revisiting some of the articles in this selection, the author has also felt that some arguments voiced in one article were not necessarily consistent with

those in another article. In keeping with his avowed decision of retaining the selected articles in their original form, they have appeared with those inconsistencies notwithstanding.

Similarly, it is quite likely that the article discussing the juridical status of the West Bank in the wake of the Six-Day War of 1967 ("The Missing Reversioner: Reflections on the Status of Judea and Samaria" (p. 191)) would have undergone, if written now, some changes in the light of later developments, primarily the Israel-PLO "Declaration of Principles" of 1992 (commonly referred to as the "Oslo Accords") and subsequent agreements based on it.

In the years 1962–65 the author worked in the Legal Department of the Israel Foreign Ministry as an assistant to the late Dr. Shabtai Rosenne. Part II of the book contains a selection of those legal opinions written at that time which have been released to the author by the former legal adviser, Mr. Ehud Keinan, to whom the author wishes to express his thanks here. With few exceptions these legal opinions were written in Hebrew and have been translated by the author, with some editorial notes, where necessary, for a better understanding of the historical and diplomatic background. Most of the selected opinions deal with various aspects of diplomatic and consular law.

In the years 1978–84 the author served as Israel's Ambassador and Permanent Representative to the United Nations in New York. The Appendix reproduces a letter which he wrote in that capacity to the Secretary-General of the United Nations on the anti-Semitism at the Organization.

In the midst of the work on the present book, I lost my eyesight, in August 2014. Some months later my colleague Ambassador (retired) Avi Benjamin, M.A. (Oxon), from our days at the Israel Mission to the United Nations, came to my help, at first with the translation into English of the two articles originally published in Hebrew and designated for inclusion in this volume, as already mentioned above. Avi and I then read again both texts to ensure their accuracy and to refine them where necessary. In November 2015 Avi undertook the onerous editing work of the entire volume, which we then discussed in countless meetings. Had it not been for Avi's help, this volume in all likelihood would not have seen the light of day. I owe him a tremendous debt of gratitude.

Ms. Marie M. Sheldon, publishing director of international law at Brill Nijhoff, personally interceded in November 2015 at a critical juncture in the production process and thereby ensured that the project be brought to a successful conclusion.

In this year, which marks the 50th anniversary of our marriage, I wish to dedicate this volume to my wife Moriah with love and gratitude.

The Hebrew University, Jerusalem,
May 2016

Y. Z. B.

PART I

Selected Articles

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United Nations Membership and Representation

1

UN Membership of the "New" Yugoslavia: Continuity or Break?*

On May 22, 1992, the United Nations General Assembly admitted three new members—Slovenia, Bosnia and Hercegovina, and Croatia—all of them, in the past, constituent republics of Yugoslavia. Since June 1991, these three republics—as well as Macedonia—have seceded from the Yugoslav federation, which leaves only the two remaining republics—Serbia and Montenegro—to claim the name of Yugoslavia, as well as its rights and international status, including membership in the United Nations.

After the General Assembly admitted the three new members, the Permanent Representative of the United States to the United Nations, Ambassador Edward J. Perkins, in his first statement to the Assembly, charged "the Belgrade authorities" with "overwhelming responsibilities [*sic*] for the terrible events that have occurred" on the territory of the former Yugoslav federation, adding that the changes in that country

> have fundamentally altered the previous structures. If Serbia and Montenegro desire to sit in the United Nations, they should be required to apply for membership and be held to the same standards as all other applicants. Specifically, they must prove to the Members of the United Nations that the so-called Federal Republic of Yugoslavia is a peace-loving State.[1]

This attempt to call into question the legitimacy of rump Yugoslavia as a member of the United Nations is of course an expression of the international revulsion prompted by the tragic events in Yugoslavia, responsibility for which has generally been laid at the doorstep of the Serbian-dominated government in Belgrade. What must be questioned, however, is the compatibility of the views expressed by Ambassador Perkins with the practice that has developed and crystallized in this regard since the United Nations was established.

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* Previously published in *The American Journal of International Law*, Vol. 86 (1992), pp. 830–833.

1 UN Doc. A/46/PV.86, at 22 (1992).

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First, it is worth pointing out a glaring inconsistency in the position taken by the U.S. delegation: if, indeed, in its view, "Serbia and Montenegro," like the three newly admitted states, were required to apply for membership in the United Nations, the United States logically should have objected to allowing the delegation of "Serbia and Montenegro" to occupy the seat of Yugoslavia at the meeting. This the U.S. delegation—or any other delegation, for that matter—failed to do, thus at least by implication admitting the right of "the Belgrade authorities" to claim the seat of Yugoslavia—one of the original members of the United Nations.

For present purposes, we need not dwell upon the meaning of "peace-loving State," referred to by Ambassador Perkins. This term is taken from the conditions for the admission of new members listed in Article 4(1) of the Charter, which requires, inter alia, that the applicants be "peace-loving states."[2] Obviously, if rump Yugoslavia is to be considered such an applicant, it is reasonable to expect compliance on its part with this requirement.[3]

The question we are confronted with here relates to the break-up of the structures of a UN member state as a result of the secession of one or more of its provinces and its ensuing loss of territory and population. Since its establishment, the United Nations has faced this problem on various occasions. The first occurred in 1947, when British India—an original member of the Organization—became independent and was simultaneously partitioned into two states, India and Pakistan. In response to that situation, the UN Secretariat pointed out in a memorandum that,

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2 For the history and practical meaning of the term "peace-loving," see Hans Kelsen, The Law of the United Nations 69–70 (1950); Leland Goodrich, Edvard Hambro & Anne P. Simons, Charter of the United Nations 89–92 (3d rev. ed., 1969). According to Feuer, "[a]u vu de tout ce qui s'est passé depuis 1945, cette condition pourrait faire sourire." Guy Feuer, *Article 4, in* La Charte des Nations Unies 165, 170 (Jean-Pierre Cot & Alain Pellet eds., 1985).

3 While, on the formal level, a state is required to be "peace-loving" at the time of its admission to the United Nations, it is generally accepted (although somewhat ironic) that, once admitted, members apparently are no longer formally held to the fulfillment of this condition. For the purposes of suspending or expelling a member state, the Charter has laid down different criteria. Suspension requires that "preventive or enforcement action has been taken by the Security Council" against the member in question (Art. 5 of the Charter), while the condition for expulsion is that a member state "has persistently violated the Principles contained in the present Charter" (Art. 6). In both instances, the decision is taken by the General Assembly by a two-thirds majority of the members present and voting (Art. 18(2) of the Charter) upon the recommendation of the Security Council. No member state has ever been suspended or expelled from the United Nations.

> [f]rom the viewpoint of international law, the situation is one in which a part of an existing State breaks off and becomes a new State. On this analysis, there is no change in the international status of India; it continues as a State with all the treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations.[4]

The representative of Argentina in the General Assembly's First (Political) Committee objected to this procedure, stating that it "constituted an unfounded discrimination, since both Dominions should have been regarded as original Members, or alternatively, both should have been considered new Members."[5] The First Committee referred the matter to the Sixth (Legal) Committee, which stated in its reply:

1. As a general rule, it is in accordance with principle to assume that a State which is a Member of the United Nations does not cease to be a Member from the mere fact that its constitution or frontiers have been modified, and to consider the rights and obligations which that State possesses as a Member of the United Nations as ceasing to exist only with its extinction as a legal person internationally recognized as such.
2. When a new State is created, whatever the territory and the population which compose it, and whether these have or have not been part of a State Member of the United Nations, this State cannot, under the system provided for by the Charter, claim the status of Member of the United Nations unless it has been formally admitted as such in conformity with provisions of the Charter.
3. Each case must, however, be judged on its merits.[6]

This position was embraced by the General Assembly: India continued its membership in the United Nations, unaffected by the loss of territory and population, while Pakistan was admitted as a new member of the United Nations on September 30, 1947.

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4 UN Press Release No. PM/473 (Aug. 12, 1947), *reprinted in* [1962] 2 Y.B. Int'l L. Comm'n 101, UN Doc. A/CN.4/SER.A/1962/Add.1. See also 13 Marjorie M. Whiteman, Digest of International Law 201 (1968).

5 UN GAOR 1st Comm., 2d Sess., 59th mtg. at 5 (1947).

6 UN GAOR 6th Comm., 2d Sess., 43d mtg. at 38–39 (1947).

Similarly, when Bangladesh seceded from Pakistan in 1971, the latter's UN membership remained unaffected by the loss of its eastern province, while Bangladesh applied for membership as a new state and was admitted in 1974.[7]

Most recently, this practice was followed on the disintegration of the Soviet Union: Russia took over the former Soviet seat (including the USSR's permanent seat on the Security Council),[8] while most of the other newly independent republics applied for membership in the United Nations and were admitted as new members.[9]

From the legal point of view, the Yugoslav situation closely resembles the India-Pakistan and Pakistan-Bangladesh situations. If anything, there is greater justification to follow the India-Pakistan practice for Yugoslavia than there was for Russia. In the latter instance, eleven of the twelve republics that constituted the Soviet Union at the time of its dissolution met in Alma-Ata, the capital of Kazakhstan, on December 21, 1991, for the purpose of establishing the Commonwealth of Independent States; they formally declared that, "[w]ith the establishment of the Commonwealth... the Union of Soviet Socialist Republics ceases to exist,"[10] and thus extinguished the Soviet Union

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7 Likewise, in 1961 when Syria seceded from the United Arab Republic, which had been formed three years before as a result of Syria's merger with Egypt, the UAR's membership in the United Nations remained unaffected by that secession. Syria, incidentally, resumed its seat without going through the customary admission procedure, on the theory that, as an original member, it did not require readmission and was merely "resuming" its former status within the Organization. See Whiteman, *supra* note 4, at 204–05; Richard Young, *The State of Syria: Old or New?*, 56 AJIL 482 (1962).

8 See UN Doc. 1991/RUSSIA (Dec. 24, 1991), a circular letter to the UN membership from the Secretary-General containing, as an appendix and annex, respectively, a letter from Russian President Boris N. Yeltsin to the Secretary-General, and a letter of transmittal signed by the Permanent Representative of the Soviet Union, both dated December 24, 1991.

9 Until the summer of 1991, the Soviet Union consisted of 15 republics. On September 6, 1991, the State Council of the Soviet Union released the three Baltic republics (Estonia, Latvia and Lithuania) from its ranks and recognized their independence. N.Y. Times, Sept. 7, 1991, at A4. They were admitted to the United Nations on September 17. Following the dissolution of the Soviet Union in December 1991, eight republics (Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan) applied for UN membership and were admitted on March 2, 1992. Georgia was admitted on July 31, 1992. Belarus and Ukraine were original UN members and consequently did not require admission upon their accession to independence.

10 Fifth operative paragraph of the first Alma-Ata declaration, *reprinted in* 31 ILM 148, 149 (1992). The twelfth republic, Georgia, while not formally a participant in the meeting, attended as an observer.