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Review

A realistic perspective on international legislation

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The status of 'international law' is examined critically. In the first section, the basis of (national) legislation is described. This consists of an inquiry into a credible meaning of 'natural law'. It is focused on the question of whether universal principles exist and, if so, of what kind. Section 2 deals with the issue of enforcement. National legislation invariably realizes this, but this is not obvious at the international level. Section 3 deals with human rights. It is discussed whether their presence points to the existence of 'international law'. To this end, a possible reason for these rights to have developed is expounded.

Keywords: International law, human rights and Legislature

INTRODUCTION

The political developments over the period after World War II have led to a considerable number of rules and views at the international level, the complex of which is now recognized as 'international law'. In this article, the domain as such, rather than a specific part of this whole, is inquired from a meta-legal perspective. The meaning of 'international law' is concerned here; how should this be qualified?

In order to ascertain this, a general analysis of the basis of positive law (i.e., the law as it is established) is useful. To that end, I will indicate in section 1 how 'natural law' may be interpreted. The ideas of 'natural law' and 'international law' are, after all, often connected. In section 2, the way in which rules at the international level operate is dealt with; it will be shown how these are observed and whether they may be enforced. Finally, in section 3, the topic of human rights is discussed, because of its connection with cross-border legal issues. The question comes to the fore to what extent human rights are relevant to this subject matter.

1. The legal basis at the national level

It is important to determine which elements are constantly (implicitly) present in national law. In this way, a possible contrast with the rules at the international level can come to light. Because of the general theme of this article, I cannot treat any possible perspective on natural law; I will merely deal with the most important positions for the present discussion.

I mention the term 'natural law'; the approaches of two philosophers in particular, Hart and Hobbes, are clarifying with regard to this matter. A familiar interpretation of 'natural law' is the 'classical' approach; it consists of a standard indicating that a natural law exists in an absolute, immutable, sense and should (morally) be acknowledged as the directive for actual legislation (Th. Aquinas, *Summa Theologiae* 1a2ae, q. 90, art. 2 (p. 150); q. 93, art. 3 (p. 164); q. 94, art. 2 (pp. 169, 170); q. 94, art. 5 (pp. 172, 173), the truth or rectitude being the same for all and equally known to all insofar as the collective principles of reason are involved (Th. Aquinas, *Summa Theologiae* 1a2ae, q. 94, art. 4 (p. 171)).

It may accordingly be said that "every posited human law contains the rationale of the law to the degree in which it is derived from the law of nature. If it, however, in any way, discords with the natural law, it will no longer be a law, but a corruption of law ("[…] omnis lex humantitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur. Si vero in aliquo a lege naturali discordet, iam non erit lex, sed legis corruptio." Th. Aquinas, *Summa Theologiae* 1a2ae, q. 95, art. 2 (p. 175))." The right to a fair trial, e.g., could in this perspective be taken to exist before it is laid down by a (human) legislator.

This perspective differs from Hart's. He argues that any social organization must contain a "[…] *minimum content* of Natural Law […]" (H. L. A. Hart, *The Concept of Law*, p. 189), consisting of "[…] universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and

aims […] (H. L. A. Hart, *The Concept of Law*, p. 189)."

This means that basic rules (according to Hart even 'truisms') have to be present in order for human coexistence to be possible. There has to be 'approximate equality', for example: people must be approximately equally strong, since some exceptionally powerful individual might easily dominate the others, without observing the law (H. L. A. Hart, *The Concept of Law*, pp. 190, 191). 'Natural law' is clearly given a different meaning from the usual one mentioned above; Hart connects this with the laws of nature, such as the law of gravity (H. L. A. Hart, *The Concept of Law*, p. 184).

The second philosopher who should be mentioned here is Hobbes. For him, 'natural law' means no more or less than the way in which one acts, on the basis of reason (The (subjective) 'right of nature' is not specified (as, e.g., the right to life) as Hobbes defines the liberty that is part of this right negatively as "the absence of externall Impediments" (*Leviathan*, p. 91 (Chapter 14); cf. p. 145 (Chapter 21))). In this sense, there are natural laws, such as the most important one, that one should attempt to live together peacefully with others as far as possible, and can resort to war if this should turn out to be unattainable (Th. Hobbes, *Leviathan*, pp. 91, 92 (Chapter 14). His premise in this respect is similar to Hart's when he emphasizes the (approximate) equality between people (Th. Hobbes, *Leviathan*, pp. 86, 87 (Chapter 13))). Hence, there is a significant agreement between Hobbes's viewpoint and Hart's, at least in this respect.

Although Hart's minimum content of natural law regards circumstances which apply independently of agents whereas Hobbes focuses on reason and, consequently, the agent, both make it clear that actual circumstances are the issue. Natural law is transposed into positive law; the contents are even alike: "The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature […] are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before […] (Th. Hobbes, *Leviathan*, p. 185 (Chapter 26))."

Both thinkers provide an important contribution to determining the basic elements in law. If someone should, e.g., be capable to subject all others to himself, it may be argued that the existence of legislation would be irrelevant to him. After all, it would not be in his interest to submit to rules which impede him.

Is this approach to natural law the most credible one? As I said, the treatment of this topic must be summary, but it is in order to pay some attention to an alternative. This consists in positive law being ideally modeled after 'classical' natural law, or natural law in the narrow sense, as it may be called. This alternative is adhered to by many, amongst whom Hugo Grotius is an important exponent. He argues that natural law follows from human nature (H. Grotius, *De Iure Belli ac Pacis*, p. 9 (Prolegomena, § 8)), but specifies this differently than (for example) Hobbes, by indicating that it is inherent to natural law to keep one's promises(H. Grotius, *De Iure Belli ac Pacis*, p. 11 (Prolegomena, § 15). Hobbes also promulgates this (*Leviathan*, p. 100 (Chapter 15)), but not in the same way as Grotius, namely on the basis of a 'social appetite' (H. Grotius, *De Iure Belli ac Pacis*, p. 8 (Prolegomena, § 7) – since without a sovereign to preserve the peace, people don't (stably) unite (*Leviathan*, p. 88 (Chapter 13)) –, but on the basis of self-interest (e.g., *Leviathan*, p. 93 (Chapter 14))) and that people would also have sought out each other if a mutual dependence weren't the case (H. Grotius, *De Iure Belli ac Pacis*, p. 12 (Prolegomena, § 16)). It is important that not merely reason is involved here, but 'right reason' (Natural law is the dictate of right reason." ("Ius naturale est dictatum rectae rationis […].") (H. Grotius, *De Iure Belli ac Pacis*, p. 34 (Book 1, Chapter 1, § 10)). The phrase 'right reason' is also used by Hobbes (*Leviathan*, p. 32 (Chapter 5)), for whom the notion lacks the moral connotation it has with Grotius).

It is difficult to make it clear how natural law would compel in this case, as Hobbes observes (Th. Hobbes, *Leviathan*, p. 471 (Chapter 46)) – who doesn't, incidentally, oppose Grotius but Aristotle, who exhibits a similar account of human nature (Aristotle, *Politica*, 1253a) (people can, in Hobbes's view, only live together firmly if the state of nature is abolished and a sovereign is present (Th. Hobbes, *Leviathan*, p. 88 (Chapter 13))), and, so, a specific part of the latter's political philosophy. In section 2, this topic, the enforceability of law, will receive attention.

As for the question of whether this opinion is tenable, it is difficult to ascertain how the existence of natural law in the narrow sense may be maintained. Natural law in Hart's and Hobbes's sense can be defended empirically, but the alternative's claims exceed the means of its proponents to justify them. It is at least possible to describe a system of law without involving this sort of natural law. Even if this isn't criticized on its contents, an important criticism can thus be exercised(By means of the approach known as Occam's razor, after an interpretation of part of William of Occam's epistemology (G. de Ockham, *Scriptum in Librum Primum Sententiarum Ordinatio*: Distinctiones 19-48, Distinctio 30, Quaestio 1 (p. 317), Quaestio 2 (p. 322); cf. Distinctio 27, Quaestio 2 (p. 202))) of positions that argue its existence. It cannot be refuted, but its presence can be shown to be redundant.

The situation Hart and Hobbes describe is a valuable starting-point to qualify the national domain. The question arises whether this applies to the international domain as well. With respect to the 'approximate equality', e.g., it is obvious that this is not found between states. In section 2,

the consequences of this state of affairs are expounded.

2. Enforceability as a necessary element in a system of law

In the previous section, some problems with natural law in the narrow sense were pointed out. Accordingly, it does not seem to provide a viable basis to argue the existence of 'international law'. In this section, the issue is approached from a different perspective, by inquiring into the relevance of enforceability. I will start again with the analysis at the national level; this time, the contrast with 'international law' will receive more attention than it did in the first section.

It is characteristic, among other things, for *national* legislation that it can be enforced. To provide an example at that level: art. 310 of the Dutch Penal Code, which makes theft punishable, has no value if a perpetrator of this felony cannot be tried before a court of law. How is this settled internationally? If one wants to summon a state before the International Court of Justice, this state must itself have recognized the jurisdiction of the Court (art. 36, section 2 of the Statute of the International Court of Justice). The same rule applies to a situation in which parties appear before the International Criminal Court (art. 12, section 2 of the Rome Statute of the International Criminal Court).

The International Court of Justice and the International Criminal Court lack, in this way, the unconditional authority of national courts of law, whose decisions can actually be executed, irrespective of the will of the parties involved (cf., e.g., art. 553 of the Dutch Criminal Proceedings Act for the Dutch situation). A sovereign at the international level is lacking, the consequences of which are evident: there is no instance to which parties have transferred their competences and the judge, accordingly, merely rules in the cases that are willingly submitted to his discretion. One may wonder whether this state of affairs may be deemed a practice of law.

In this case, of course, it is not the (supposed) *basic* contract on the basis of which, in Hobbes's model, the contracting parties appoint a sovereign (Th. Hobbes, *Leviathan*, p. 120 (Chapter 17)) which is involved but the fact that rules must be enforceable. Hart distinguishes between primary and secondary rules; the first sort of rules indicate what one must do or is forbidden to do, while rules of the second sort determine, besides the coming about and changing of the primary rules, in the form of 'rules of adjudication', that judges are given the power to judge (H. L. A. Hart, *The Concept of Law*, p. 94). This has no merit without the additional possibility of imposing sanctions.

Hart resists the idea that the sovereign is above the law (H. L. A. Hart, *The Concept of Law*, p. 218). In his model, moreover, the position of a sovereign is not a central issue, because of the following: "There are […] two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials (H. L. A. Hart, *The Concept of Law*, p. 113)."

If these conditions are indeed met, a sovereign may not be required (although it should still be possible to sanction a transgression of the rules). At the international level, this situation doesn't apply, as appears from the behavior of some (powerful) states. There, the lack of a sovereign is severe: there is license. It turns out that there is only a conditional relation at this level: parties agree on something and accept that a judge may render a verdict.

The fact that there is a judge seems nonetheless to imply the presence of law. Still, how should this be appraised? The following from the Charter of the United Nations is illustrative: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council […]." (art. 94, section 2 of the UN Charter). Since the permanent members have the right of veto (art. 27, section 3 of the UN Charter), in a number of cases there will be no legal enforcement (Hart considers this to be an important objection (*The Concept of Law*, p. 227)).

This also applies to possible sanctions imposed by the Security Council: members of the United Nations "[…] may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council." (art. 5 of the UN Charter) and "[…] may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." if they haven't acted in accordance with the principles of the Charter (art. 6 of the UN Charter). Those who are permanent members may prevent sanctions issued against them. This already points to an important given: some states being more powerful than others, which is, as described in the previous section, not a decisive factor at the national level, impedes the enforcement of decisions or renders these impossible (Cf. H. L. A. Hart, *The Concept of Law*, pp. 191, 214). It is not without reason that countries such as Japan attempt to acquire permanent membership, while it would at the moment probably be unrealistic to expect countries such as Belgium, Finland and Estonia to fulfill this role.

The status of the member states appears to be decisive for the position they occupy. Similar issues may present themselves at the national level, but in those cases they are excesses. If a national court of law punished a successful businessman differently than a beggar (*ceteris paribus*), this would be considered unacceptable. At t he

international level, by contrast, the perspective that one state is more powerful than another is not only accepted, but evidently one of the (established) principles. Article 2, section 1 of the UN Charter does state: "The Organization is based on the principle of the sovereign equality of all its Members." However, this simply refers to another issue, namely member states' sovereignty when their internal affairs are concerned. The sovereign positions are indeed equally respected – except, on the basis of article 2, section 7 – in cases covered by Chapter VII (articles 39-51), but in such cases, each state's sovereignty may – again – equally be affected (At least formally legally. Politically important differences may remain when it comes to the decisions and implementations).

As for disputes about judgments by the International Criminal Court: these are, insofar as they don't concern the judicial functions of the Court, if states cannot come to an understanding amongst themselves, referred to the International Court of Justice (art. 119, section 2 of the Rome Statute of the International Criminal Court), so that the problem just observed occurs here as well.

This is also apparent at the European level. If a Member State doesn't adhere to an obligation which is incumbent on it on the basis of the Consolidated version of the Treaty on the Functioning of the European Union, the Commission may, having summoned the Member State to take the appropriate measures, bring the case before the Court of Justice (art. 258 of the Consolidated version of the Treaty on the Functioning of the European Union). If the Court rules in favor of the Commission, the Member State in question is to take the necessary measures to comply with the Court's judgment (art. 260, first section of the Consolidated version of the Treaty on the Functioning of the European Union).

This is still a straightforward practice. Should the Member State, however, subsequently fail to comply with the Court's judgment, nor pay the 'lump sum or penalty payment' the Court can impose on it (art. 260, second section of the Consolidated version of the Treaty on the Functioning of the European Union), there are no further legal means to induce the Member State. There are, of course, political ways through which to maneuver, but these already exist, irrespective of the rules, so that an appeal to them doesn't enhance the status of European legislation. The provisions in the Consolidated version of the Treaty on the Functioning of the European Union directed at the Member States may be invoked by individuals before a national court of law, but this shifts the crucial element to a nation, so that, via a detour, national law is concerned: European legislation is there accepted and applied.

It is not just the position of the judge that is illustrative for the dubious position of international legislation. An organ of the executive of the United Nations, the Security Council (mentioned above), appears not to be able to operate on its own. This is clear from the fact that five of the fifteen members had to be given the status of permanent member (art. 23, section 1 of the UN Charter) (which, moreover, as was remarked above, acquired the veto right), apparently because they would not have adhered to decisions that contravene their interests. This pragmatic solution is commendable, but in this way politics are decisive and there seems to be no room for a (separate) domain of law.

It is, then, difficult to demonstrate that international law exists. Agreements have been made, but it cannot consistently be inferred from the behavior of states that they acknowledge these as legal. Problems don't often ensue since issues are involved in which it is to states' advantage that the agreements are met, or since one wants to prevent political difficulties to arise (The latter situation may account for behavior which seems to be at odds with the thesis that international law is observed by states if this seems to conflict with their interests (S. V. Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics", p. 314)), but that doesn't indicate a recognition of international rules as law.

The situation may evolve at the European level with the adoption of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (This Treaty was signed on March 2, 2012 by 25 of the 27 member states. It has yet to be ratified), which stipulates (art. 7) that the European Commission may submit proposals or recommendations – which the member states that are contracting parties must then support – if a member state should be in breach of the deficit criterion (art. 3). If such a proposal or recommendation can indeed be enforced (e.g. by withholding a member state the right to express its views on a certain matter), there will be law at that level.

Hegel points to the problems at the international level as a result of a lack of enforceability: "There is no magistrate; there are at best arbitrators and mediators between states, and these merely coincidentally, i.e., according to specific wishes ("Es giebt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d.i. nach besondern Willen." G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, § 333, Anmerkung (p. 443))". Although many supranational organizations have been erected, this observation still seems to be correct. In Hegel's view, there can only be a command ('Sollen') to obey the rules (G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, § 333 (p. 443)); the problems might be resolved through moral standards (Such a way out doesn't suffice, in my opinion, but I won't elaborate on that here). For Hegel, moreover, positive law and natural law coincide (There is, in Hegel's perspective, only positive law (*Grundlinien der Philosophie des Rechts*, § 3 (p. 42)), but this merely follows from the fact that there is no difference between positive law and natural law (*Grundlinien der Philosophie des Rechts*, § 3, Anmerkung

(pp. 42, 43))).

Similar characteristics pertain to the current situation: "A clear weakness of international law […] is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute (A. Carty, *Philosophy of International Law*, p. 81)". This is not all there is to say on this issue; international law may originate in the same manner as national law. Once international law is realized, it is abided by because the enforceability is a given. Accordingly, it is not in the nature of international law that it could not exist; it would be more apt to say that it must follow the same course as national law in order to function. Franck rightly points out that incidental noncompliance is not decisive; even at the national level, this is manifested (Th. M. Franck, *The Power of Legitimacy and the Legitimacy of Power*, p. 91; cf. A. D'Amato, *International Law: Process and Prospect*, p. 9); a crucial difference, however, is that actors at the national level that do not observe the law can be punished against their will (As Hobbes puts it: "[…] if any man had so farre exceeded the rest in power, that all of them with joyned forces could not have resisted him, there had been no cause why he should part with that Right which nature had given him […]." Th. Hobbes, *De Cive* (the English version), Chapter 15, §5 (p. 186)).

It may be objected that in the preceding no definition was given of 'law' or of 'right'. This is not only difficult but perhaps even impossible. To this predicament one may add that "[…] there is no such thing as an intrinsically "proper" or "improper" meaning of a word." (G. L. Williams, "International Law and the Controversy concerning the Word "Law"", p. 148), and that "[…] the idea of a true definition is a superstition. (G. L. Williams, "International Law and the Controversy concerning the Word "Law"", p. 159)", so that the matter whether 'international law' is law is merely verbal (G. L. Williams, "International Law and the Controversy concerning the Word "Law"", p. 157) and needs to be abjured (G. L. Williams, "International Law and the Controversy concerning the Word "Law"", p. 163) (no pun intended). These observations have merit. A definition is in many cases an inadequate tool in setting up an argumentation, viz., if one coins a definition and subsequently inquires what follows from it. Various lines of thought may thus arise that are not mutually compatible or consistent; they may even conflict. Alternatively, a definition may be used (in common) if it is justified, such as that of a triangle.

The question is, then, which of these two situations (one starts with a definition and constructs a line of thought on this basis, or uses a definition justifiedly) applies. In my opinion, it is the second, so that Williams's remarks are enervated, at least with regard to *this* issue. To illustrate this, I point to the way the word 'law' is used. If someone were to say that the *Corpus Iuris Civilis* is law at present, he would have a hard time explaining why, whereas it would be easy to argue that (part of) it *was* law during the 6th century A.D (The legislation was initially limited to the Eastern Roman Empire; upon the recapture of the provinces of the Western Roman Empire that had fallen to the Ostrogoths, it was introduced there as well. The restored unity did not last, however, as the empire was invaded by the Lombards in 568 A.D. It is doubtful whether the legislation was predominant even before 568 A.D., inter alia since it did not compose a systematic whole).

This approach does not entirely entail that 'international law' is not law, of course: there are people who use the word 'law' to refer to 'international law' (indeed, otherwise the present article would largely be moot). This usage appears to result from an unwarranted expansion of the domain to which 'law' may be said to refer. One easily introduces the political process to the discussion when referring to the international domain, thus confounding politics and law: "[…] assurances for securing compliance with [customs, principles, and norms that function as rules to regulate conduct by persons in their mutual relations as members of a political community] need not be predicated on the assertion of force or the promise of swift, certain punishment of wrongdoers. In the international dimension, guarantees of law for regulating states remain primarily couched in international public opinion and the political will of governments to make the law work in their national interest (C. C. Joyner, *International Law in the 21st century*, pp. 5, 6)". If such a position is opted for, the discussion comes to an end prematurely, since 'international law' is then supposed to include international politics, which evidently do exist.

In any event, it seems to be clear that the obligations that the law imposes need to be enforceable; its lack of permissiveness is characteristic for the law. D'Amato presents an admirably nuanced view in dealing with the matter with regard to the international level, but his interpretation of 'enforcement' seems too broad; pointing out that not all punishments are physical (e.g., a monetary fine), it is concluded that "[…] when we think of legal enforcement, we need not imagine the use of physical force against the person of the law violator, although, of course, in some cases physical force is appropriate (A. D'Amato, *International Law: Process and Prospect*, pp. 14, 15)". Yet (physical) force is invariably needed if the initial punishment is not effective (if a monetary fine is not paid, enforcement will still be necessary). So even if force is not always immediately required, its presence in the form of a back-up is needed.

Does this mean that the state of nature, for the time being at least, continues to exist between states? Hobbes affirms this (Th. Hobbes, *Leviathan*, p. 90 (Chapter 13); p. 163 (Chapter 22)). This doesn't entail, according to his line of thought, that actual battle need arise, for he distinguishes between war and battle: "[…] WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known […] (Th. Hobbes, n*Leviathan*, p. 88

(Chapter 13))".

The objection that the differences between states are greater than those between individuals, which is sometimes offered as evidence that Hobbes's depiction of the state of nature doesn't apply to the international level (A. N. Yurdusev, "Thomas Hobbes and International Relations: From Realism to Rationalism", p. 316), is not decisive as various reasons may exist why countries don't attack other countries, e.g. because of the danger that they will, in turn, be attacked themselves by countries that have a special interest in retaliatory measures, or because they value the economic interests that can be satisfied peacefully more than the gains that may result from an act of aggression.

Here, Grotius's position is no realistic alternative, either. He, too, emphasizes the role of enforcement: it is the law that enforces (H. Grotius, *De Iure Belli ac Pacis*, p. 34 (Book 1, Chapter 1, § 9)). The power to sanction flows, in his opinion, from natural law itself (H. Grotius, *De Iure Belli ac Pacis*, p. 511 (Book 2, Chapter 20, § 40)); sovereigns impose sanctions, but this is rather a result of natural law than of their positions as rulers (H. Grotius, *De Iure Belli ac Pacis*, p. 509 (Book 2, Chapter 20, § 40).); natural law itself lacks force, but is still effective ("Neque […] quamvis a vi destitutum ius omni caret effectu.") (H. Grotius, *De Iure Belli ac Pacis*, p. 13 (Prolegomena, § 20)). Natural law would then, in the absence of an authority to take action, have to 'force', which is difficult to make insightful without an appeal to a (presupposed) human nature.

Hart points out that the law can't be reduced to "[…] general orders backed by threats given by one generally obeyed […]" (H. L. A. Hart, *The Concept of Law*, p. 24), but the enforceability which, as was indicated, is characteristic for the national level is a necessary condition to distinguish between rules of law and requests or commandments (Apart from the Ten Commandments, which are not supposed to be without consequences if not obeyed) as long as the law has not been internalized by the subjects of law (or rather prospective subjects of law). Hart does not want to infer that international law doesn't exist from the fact that there is no enforceability at the international level (H. L. A. Hart, *The Concept of Law*, p. 215), but he doesn't make it clear what this would mean. A reference to the fact that states actually keep to the rules is not sufficient here, since they do this on the basis of self-interest.

In this regard, one may argue that states, acting only if gains are to be expected (Cf. A. T. Guzman, *How International Law Works. A Rational Choice Theory*, pp. 121, 180), are not bound in the same way individuals are at the national level. The conclusion that "[t]here is no easy or clear way to distinguish international law from either politics or mere norms (A. T. Guzman, *How International Law Works. A Rational Choice Theory*, p. 217)" seems justified, with the caveat that this implies the conceptual existence of separate domains of 'international law' and 'norms'. The difficulty of the former I have attempted to expound above; the problems with the latter requires a treatment that would lead to too great a digression. Still, in the last section a relevant issue will be discussed that borders on this.

3. The import of human rights

In the foregoing, it was shown that it is difficult to demonstrate the existence of international law owing to a lack of enforceability at the international level. Yet the existence of universal human rights seems to point to international law. Many treaties have been signed to protect human rights, among which the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Should the presence of international law, even if one grants the enforceability issue, not be concluded on the basis of this given?

Those who contend that international law has been settled in these documents seem to overlook an important factor. They are indeed universal treaties, in that they focus on the rights of human beings around the entire world. On the other hand, the universality is obviously limited: they are universal treaties on *human* rights. There are principles which transcend the systems of law of countries, such as the principle that a punishable fact should be legally laid down, which is established in both national legislation and in international treaties, e.g. in art. 15 of the International Covenant on Civil and Political Rights (ICCPR). Does this imply the presence of an international domain of principles, to be codified by legislators, or is there another basis of law than the universal human rights?

In virtually every society there seems to be a basic set of standards (cf. section 1). One may even call this into question (Cf. P. Winch, *Ethics and Action*, p. 57; Winch himself doesn't deny, incidentally, that a pattern can be discerned (*Ethics and Action*, p. 58)). (I won't deal with the opinions of those who argue a fundamental relativism in this respect. This can't be refuted a priori, but is more radical than what I put forward here. If such a position is accepted, it will only have even more extensive consequences for the appraisal of law.)

There seem to be (or to have been) primitive societies where certain fundamental norms are (or were) not maintained, but what is the relevance of this? It is unclear whether one may really call this a society. This depends on the scope of one's definition of 'society'. To what extent does a bond justify utilizing the idea of society? If one merely associates at times of mutual dependence, an atomic whole (one does not consider oneself, or at least not primarily, to be a part of a greater whole) remains the background for each relation.

At any rate, the fact that societies acknowledge basic standards independently of each other is no proof for the

existence of natural law in the narrow sense. One can point to – besides the minimum content of natural law (Hart) or the laws of nature (Hobbes), in which the domain for positive law to have a breeding ground at all is made explicit (cf. section 1) – a number of values, such as the right to life (art. 6 of the ICCPR) and a fair trial (art. 14 of the ICCPR), which are indeed necessary conditions. If one should, e.g., not deem one's life protected properly by (the enforcers of) the law, anarchy might be imminent. From this it may be concluded that the basic rights and laws which appear in each system of law owe their existence to their being required for a system of law to be possible at all.

This can be illustrated by a (global) description of the development of the rights of individuals. Those who could exert the greatest power in society could, once rights had been established, determine which rights would be concerned and to whom they would be allotted. It may be argued that gender and race were pivotal factors in this development, which is clear from, e.g., the respective moments women received suffrage in Europe and the U.S.A. and the subordinate position of minorities in various places.

At some time (various moments) the rights of women and minorities were acknowledged. One may wonder whether universal principles were then transmitted into positive law. This would mean that it was recognized that these groups of people should not be disfavored, which is difficult to uphold. It seems more likely that the position of these groups could no longer be ignored as they gained power, partly because of their ability to unite. To deny them their rights would undermine the system of law.

This is, of course, not the only possibility to explain the rise of these rights. One may, alternatively, appeal to human life as being 'of intrinsic importance (R. Dworkin, *Is Democracy Possible Here?*, p. 35)' or it may be advanced that in some cases reason was acknowledged as a criterion. As to the first possibility: it will be difficult, if not impossible, to make it clear what this means (Dworkin does not, in any case, succeed in doing this, appealing merely to a principle (the 'principle of intrinsic value') that 'almost all of us' are said to share (R. Dworkin, *Is Democracy Possible Here?*, p. 9). This does not seem to be more than an appeal to common sense, which cannot, in my opinion, serve as a basis), and, apart from that, why, even if it is acknowledged to be correct, it does not extend to other beings than human beings. In the second case (an appeal to reason), one may grant reason as the criterion, but maintain that this is only the case because certain rights could no longer be withheld. If a being apparently endowed with reason were not granted the basic rights, the grounds for the rights of those already in possession of them would come under discussion. Reason would no longer serve as a standard and would have to be replaced by another one. This is, however, lacking, which is why this issue was brought up in the first place. It is reasonable beings who maintain reason as a criterion (Schopenhauer already points to this (*Die beiden Grundprobleme der Ethik*, p. 162)), since this is an element shared by them (and through which they can distinguish themselves in relevant aspects from other beings), a factor that continually serves as a minimum condition in order to claim a particular right. In this case it is important to discern being able to use one's reason in establishing rights on the one hand and acknowledging reason as a criterion for attributing certain rights on the other. That this distinction is not always made doesn't detract from its merit.

It is decisive that reasonable creatures are the ones formulating the rights and norms. They separate a specific domain for themselves and those like them, where more rights can be appealed to than elsewhere. Only they, by the way, are of course able to accomplish this. Animals (apparently) not only lack the intelligence to reach the level of abstraction required to draft laws, but are even unable to realize the systematic organization that serves as a prerequisite for a forum to produce laws. As far as they are concerned, it seems, there is merely a community. This may be quite large, as seems to be the case in a number of species of bees. There is no need, then, to realize legislation: the mutual competition which is characteristic for humans is absent, for one reason because these creatures don't (or even can't) observe a difference between private and public interests (Cf. Th. Hobbes, *Leviathan*, pp. 119-120 (Chapter 17)).

At any rate, what is at stake is not that it is acknowledged that the rights of reasonable beings ought to be respected, in accordance with natural law in the narrow sense, but that a minimum domain can be isolated, where one is safe; the beings that don't have access to this domain can't appeal to these rights. In this way, one may, if one, moreover, in fact also acts on this basis (and doesn't oneself act from the conviction that natural law in the narrow sense applies, which is also possible, though I would not, as said, concur with this view), withhold basic rights to beings deemed not to dispose of reason.

The difficult matter what reason is and which beings may be said to dispose of it is not explicated here; this is not necessary as only the factual situation is considered (i.e., what 'reason' has been taken – roughly – to be), although what it has been thought to be may have been prompted (perhaps indeliberately) by a desire to find a distinguishing feature. The need for a specific domain mentioned above would in that case have an even more fundamental precursor here.

Animal rights have been laid down in legislation rudimentarily (If one opines, perhaps on the basis of an account similar to the one described above, the criterion whether a being can suffer, which Jeremy Bentham famously advances as the pivotal issue (*An Introduction to the Principles of Morals and Legislation*, p. 143 (note)), decisive, animals' suffering is to be avoided, at least to some degree). Fundamental rights are in some places

recognized – the German Constitution contains these, for instance (in art. 20a) – but in these cases only very general rights are concerned. Many rights are irrelevant to animals, such as the freedom of expression. The most important ones, such as the right to life, however, are of importance. Perhaps some animal rights will eventually be established structurally.

An ever greater number of rights may in this way be laid down, so that the domain of subjects of law gradually expands from white men to human beings to sentient beings. It cannot be inferred from this that universal principles would function as a driving force as it is unclear how the process in which an increasing number of rights are acknowledged develops and why. If the way in which an insight into this process is possible is not clear, only the actual development can be observed.

The same consideration as the one mentioned in section 1 is relevant here. It was argued there that the absence of natural law in the narrow sense cannot be demonstrated, which did not prove to be a decisive objection. The present section adds that it cannot be proved that universal principles exist. Of course, this is not the challenge; on the contrary, it is up to those who maintain natural law in the narrow sense to demonstrate to what extent these *would* exist. Accordingly, the issue revolves around the question of whether it is more credible for such principles to serve as a basis in establishing human rights, or whether these should rather be considered to be generalizations made in hindsight; a top-down- versus a bottom-up-approach. I have indicated above that the second approach seems to me to be the more persuasive.

What does this entail for the matter whether international principles are decisive for law? Rules at the international level are no indication for the existence of natural law in the narrow sense. In international relations, one does not suppose that certain principles of natural law in the narrow sense should be transposed into positive law. If this plays any role, it merely points to a possible justification of natural law in the narrow sense, but if it *doesn't* play any role, the debate is concluded even sooner.

CONCLUSION

In this article, I have outlined a number of aspects of the domain referred to as 'international law' and on that basis problematized the idea that 'international law' exists. In the first section, it was indicated which are the minimal conditions for a system of law to be considered as such. I pointed out the characteristics that can be found in any system of law. Especially the fact that none of the subjects of law is able to ignore the rules is important.

In section 2 this was elaborated upon; it was also described what this means at the international level. It turned out that hard questions issue from the fact that a great number of rules cannot be enforced at that level. If a state can simply ignore certain rules, it is difficult to maintain that there is law, particularly if this situation is compared with the one at the national level, where a relatively clear process of law can be discerned.

Human rights, finally, which were discussed in section 3, exhibit international patterns. It doesn't follow from this, however, that international principles are concerned. It is more credible to argue that one is motivated by one's own needs; people appear to want to optimize their position and can only realize this (seemingly) credibly by respecting the rights they want to have bestowed upon themselves of others as well.

This article's purport is primarily academic: problems at the international level are often – pragmatically – resolved by means to which many parties can assent. That this is nevertheless not a merely theoretical issue is clear from the fact that those solutions are invariably of a political nature. If a relatively powerful state acknowledges the authority of the International Court of Justice, e.g., it does so because this renders more favorable results (economically or politically) than the alternative of not acknowledging its authority.

In order to resolve this state of affairs, conglomerates were formed, such as Europe, but this doesn't produce a consistent solution and leads to ad hoc approaches. This situation – international politics are decisive instead of alleged 'international law' – will remain until a supranational system of law emerges modeled after those in developed countries. Whether this will in fact appear is difficult to predict.

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