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The Meaning of 'International Law'

JASPER DOOMEN*

Abstract

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 two deals with the issue of enforcement. National legislation invariably realizes this, but this is not obvious at the international level. Section three 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.

I. 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?

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, this article will indicate in section one how 'natural law' may be interpreted. The ideas of 'natural law' and 'international law' are, after all, often connected. In section two, the way that 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 three, because of its connection with cross-border legal issues, the topic of human rights is discussed. Whether and to what extent human rights are relevant to this subject matter is questioned.

A. 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 become known. Because of the general theme of this article, it cannot focus on any possi-

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ble perspective of natural law; it will merely deal with the most important positions for the present discussion.

The approaches of two philosophers in particular, Herbert Hart and Thomas Hobbes, are clarifying with regard to the term 'natural law.' A familiar interpretation of 'natural law' is the 'classical' approach that natural law exists in an absolute, immutable, sense and should (morally) be acknowledged as the directive for actual legislation.¹ The truth or rectitude being the same for all and equally known to all insofar as the collective principles of reason are involved.²

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."³ The right to a fair trial, for example, could in this perspective exist before it is laid down by a (human) legislator.

This perspective differs from Hart's. Hart argues that any social organization must contain a "*minimum content of Natural Law*,"⁴ consisting of "universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims."⁵ 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, because some exceptionally powerful individual might easily dominate the others without observing the law.⁶ '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.⁷

The second philosopher who should be mentioned here is Hobbes. For him, 'natural law' means no more or less than the way that one acts based on reason.⁸ In this sense, there are natural laws, such as the most important that one should attempt to live together peacefully with others as far as possible, but can resort to war if this should turn out to be unattainable.⁹ Hence, there is a significant agreement between Hobbes' viewpoint and Hart's.

Although Hart's minimum content of natural law regards circumstances that 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

1. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE COMPLETE WORKS, VOL. 7: 1A2AE SUMMAE THEOLOGIAE A QUAESTIONE 71 AD QUAESTIONEM 114*, at 150, 164, 169, 170, 172, 173 (Rome: Ex Typographia Polyglotta S. C. de Propaganda Fide 1892) (1274).

2. *Id.* at 171.

3. *Id.* at 175 ("Omnis lex humanitus 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.")

4. H.L.A. HART, *THE CONCEPT OF LAW* 189 (Oxford: Clarendon Press 1961).

5. *Id.*

6. *Id.* at 190-91.

7. *Id.* at 184.

8. The (subjective) 'right of nature' is not specified (as, e.g., the right to life) because Hobbes defines the liberty that is part of this right negatively as "the absence of external Impediments." THOMAS HOBBS, *LEVIATHAN* 91 (Richard Tuck ed., Cambridge: Cambridge Univ. Press 2007) (1651).

9. *Id.* at 91-92. His premise in this respect is similar to Hart's when he emphasizes the approximate equality between people. *Id.* at 86-87.

each other, and are of equal 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."¹⁰

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

Is this approach to natural law the most credible one? As this article has said, the treatment of this topic must be summary but it is important to pay some attention to an alternative. This consists of 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,¹¹ but specifies this differently than Hobbes by indicating that it is inherent in natural law to keep one's promises¹² and that people would also have sought out each other if a mutual dependence were not the case.¹³ It is important that not merely reason is involved here, but 'right reason.'¹⁴

It is difficult to see how natural law would compel in this case, as Hobbes observes.¹⁵ Hobbes does not, incidentally, oppose Grotius but Aristotle, who exhibits a similar account of human nature as Grotius.¹⁶ Hobbes disagrees with such a position since, in his view, people only live together stably if they leave the state of nature, by appointing a sovereign.¹⁷ In section two, this topic of 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' 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 is not criticized on its contents, an important criticism can thus be exercised¹⁸ of positions that argue its existence. It cannot be refuted, but its presence can be shown to be redundant.

10. *Id.* at 185.

11. HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] *Prolegomena* § 8, at 9 (Aalen: Scientia Verlag 1993) (1625).

12. *Id.* *Prolegomena* § 15, at 11. Hobbes also promulgates this, HOBBS, *supra* note 8, at 100, but not based on a 'social appetite as Grotius does, GROTIUS, *supra* note 11, *Prolegomena* § 7, at 8, because without a sovereign to preserve the peace, people do not stably unite. HOBBS, *supra* note 8, at 88. Instead, Hobbes promulgates this based on self-interest. *Id.* at 93.

13. GROTIUS, *supra* note 11, *Prolegomena* § 16, at 12.

14. *Id.* at 34 ("Ius naturale est dictatum rectae rationis." ["Natural law is the dictate of right reason."]). The phrase 'right reason' is also used by Hobbes, for whom the notion lacks the moral connotation it has with Grotius. HOBBS, *supra* note 8, at 32.

15. HOBBS, *supra* note 8, at 471.

16. ARISTOTLE, *Politica*. Opera, VOL. 2 at 1253a (Immanuel Bekker ed., Darmstadt: Wissenschaftliche Buchgesellschaft 1960) (± 350 BCE).

17. HOBBS, *supra* note 8, at 88.

18. By means of the approach known as Occam's razor, after an interpretation of part of William of Occam's epistemology. GUILLELMI DE OCKHAM, SCRIPTUM IN LIBRUM PRIMUM SENTENTIARUM, ORDINATIO, OPERA THEOLOGICA, VOL. 4, DISTINCTIONES 19-48, at 317, 322 (Girard Etzkorn & Franciscus Kelley eds., NY: St. Bonaventure University 1979) (± 1319).

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 'approximate equality,' for example, this is not found between states. In section two, the consequences of this state of affairs are expounded.

B. 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 provide a viable basis to argue the existence of 'international law.' In this section, the issue is approached from a different perspective: inquiring into the relevance of enforceability. This section 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 to have an enforcement mechanism. For example, Article 310 of the Dutch Penal Code,¹⁹ 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 (ICJ), the state itself must have recognized the jurisdiction of the Court.²⁰ The same rule applies to a situation in which parties appear before the International Criminal Court (ICC).²¹

In this way, the ICJ and the ICC lack the unconditional authority of national courts of law, whose decisions can actually be executed irrespective of the will of the parties involved.²² A sovereign at the international level is absent, the consequences of which are evident: the parties have not transferred their competences, so the judge merely rules in the cases that are willingly submitted to his discretion. One may wonder whether this state of affairs can be deemed a practice of law.

In this case, the supposed *basic* contract is not the basis on which, in Hobbes' model, the contracting parties appoint a sovereign²³ that 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, the form of 'rules of adjudication' through which judges are given the power to judge.²⁴ This has no merit without the additional possibility of imposing sanctions.

Hart resists the idea that the sovereign is above the law.²⁵ 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

19. Article 310 Wetboek van Strafrecht [Criminal Code].

20. Statute of the International Court of Justice art. 36, para. 2, June 25, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

21. Rome Statute of the International Criminal Court art. 12(2), July 17, 1998, 2187 U.N.T.S. 90.

22. See, e.g., Article 553 Wetboek van Strafvordering [Criminal Proceedings Act].

23. HOBBS, *supra* note 8, at 120.

24. HART, *supra* note 4, at 94.

25. *Id.* at 218.

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.²⁶

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 does not apply, as appears from the behavior of some powerful states. There, the lack of a sovereign is severe: there is license. 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 nonetheless implies the presence of law. Still, how should this be appraised? The following from the U.N. Charter 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."²⁷ Because the permanent members have the right of veto,²⁸ in a number of cases there will be no legal enforcement.²⁹

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"³⁰ and "may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council"³¹ if they haven't acted in accordance with the principles of the Charter.³² Permanent members may prevent sanctions issued against them. This already points to an important given: some states are more powerful than others, while, as described in the previous section, not a decisive factor at the national level, nevertheless impedes or renders impossible the enforcement of decisions at the international level.³³ It is not without reason that countries such as Japan attempt to acquire permanent membership.

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 the 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. Disputes over ICC judgments are referred to the ICJ as long as they do not concern the judicial functions of the ICC,³⁴ so the problem just observed occurs here too.

This is also apparent at the European level. If a member state does not adhere to an obligation placed on it by the Treaty on the Functioning of the European Union, the Commission may, having already asked the member state to take the appropriate mea-

26. *Id.* at 113.

27. U.N. Charter art. 94, para. 2.

28. *Id.* at art. 27, para. 3.

29. Hart considers this to be an important objection. HART, *supra* note 4, at 227.

30. U.N. Charter art. 5.

31. *Id.*

32. *Id.* at art. 6.

33. See HART, *supra* note 4, at 191, 214.

34. Rome Statute of the International Criminal Court art. 119(2), July 17, 1998, 2187 U.N.T.S. 90.

tures, bring the case before the European Court of Justice.³⁵ If the European Court of Justice rules in favor of the commission, the member state must take the necessary measures to comply with the Court's judgment.³⁶

This is 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,³⁷ 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 an appeal to them does not enhance the status of European legislation. The provisions in 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: the nation has accepted on its own that European legislation applies.

It is not just the position of the judge that is illustrative for the dubious position of international legislation. The Security Council, an organ of the executive of the United Nations, cannot 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 with veto rights,³⁸ apparently because the states would not adhere to decisions that contravene their interests. This pragmatic solution is commendable, but politics are therefore decisive and there is 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 do not often ensue because it is to the states' advantage if the agreements are kept or because one wants to prevent political difficulties from arising,³⁹ but that does not indicate a recognition of international rules as law.

Hegel views 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."⁴⁰ Although many supranational organizations have been erected, this observation is still correct. In Hegel's view, there can only be a command to obey the rules;⁴¹ the problems might be resolved through moral standards.⁴² For Hegel, positive law and natural law coincide.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

35. Consol. Version of the Treaty of the Functioning of the European Union art. 258, May 9, 2008, 2008 O.J. (C 115) 47.

36. *Id.* at art. 260.

37. *Id.*

38. U.N. Charter art. 23, para. 1.

39. The latter situation may account for behavior that seems to be at odds with the thesis that international law is observed by states if this seems to conflict with their interests. Shirley V. Scott, *Int'l Law as Ideology: Theorizing the Relationship between Int'l Law and Int'l Politics*, 5 EUR. J. INT'L L. 313, 314 (1994).

40. G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE 443 (Stuttgart-Bad Cannstatt: Friedrich Frommann Verlag 1964) (1821) ("Es giebt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d.i. nach besondern Willen.")

41. *Id.*

42. Such a way out does not suffice, in my opinion, but I will not elaborate on that here.

43. There is, in Hegel's perspective, only positive law (Hegel, *supra* note 40, at 42), but this merely follows from the fact that there is no difference between positive law and natural law. HEGEL, *supra* note 40, at 42.

unsatisfactory and the Security Council does not offer an adequate substitute."⁴⁴ 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 is more apt to say that it must follow the same course as national law to function. Franck rightly points out that incidental noncompliance is not decisive; even at the national level, this occurs.⁴⁵ A crucial difference, however, is that actors at the national level who do not observe the law can be punished against their will.⁴⁶

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,"⁴⁷ and that "the idea of a true definition is a superstition,"⁴⁸ so that whether "international law" is law is merely verbal⁴⁹ and needs to be abjured (no pun intended).⁵⁰ 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 if it is common, such as that of a triangle, and thus justified.

The question is, then, which of these two approaches should apply. It should be the second, so that Williams' remarks are enervated, at least with regard to *this* issue. To illustrate this, observe 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 sixth century A.D.⁵¹

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." 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 confusing 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

44. ANTHONY CARTY, *PHILOSOPHY OF INT'L LAW* 81 (2007).

45. Compare Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: Int'l Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 1, 91 (2006), with ANTHONY A. D'AMATO, *INT'L LAW: PROCESS AND PROSPECT* 9 (1995).

46. As Hobbes puts it: "if any man had so farre exceeded the rest in power, that all of them with joynd forces could not have resisted him, there had been no cause why he should part with that Right which nature had given him." THOMAS HOBBS, *DE CIVE: THE ENGLISH VERSION* 186 (Howard Warrender ed., Oxford: Clarendon Press 1983) (1647).

47. Glanville L. Williams, *Int'l Law and the Controversy Concerning the Word "Law"*, 22 BRIT. Y.B. INT'L L. 146, 148 (1945).

48. *Id.* at 159.

49. *Id.* at 157.

50. *Id.* at 157.

51. 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. because, *inter alia*, it did not compose a systematic whole.

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.⁵²

If such a position is opted for, the discussion comes to an end prematurely, because “international law” is then supposed to include international politics. In any event, it seems to be clear that the obligations 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), he concludes 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.”⁵³ 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 is needed.

Does this mean that the state of nature, for the time being at least, continues to exist between states? Hobbes affirms this.⁵⁴ This does not 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.”⁵⁵

The objection that the differences between states are greater than those between individuals, which is sometimes offered as evidence that Hobbes’ depiction of the state of nature does not apply to the international level,⁵⁶ is not decisive because various reasons why countries do not attack other countries may exist (*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’ position is no realistic alternative, either. He, too, emphasizes the role of enforcement: it is the law that enforces.⁵⁷ The power to sanction flows, in his opinion, from natural law itself.⁵⁸ Sovereigns impose sanctions, but this is rather a result of natural law than of their positions as rulers.⁵⁹ Natural law itself lacks force, but is still effective.⁶⁰

52. CHRISTOPHER C. JOYNER, *INT’L LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* 5-6 (2005).

53. D’AMATO, *supra* note 45, at 14-15.

54. HOBBS, *supra* note 8, at 90, 163.

55. *Id.* at 88.

56. A. Nuri Yurdusev, *Thomas Hobbes and International Relations: From Realism to Rationalism*, 60 *AUSTL. J. INT’L AFF.* 305, 316 (2006).

57. GROTIUS, *supra* note 11, at 34.

58. *Id.* at 511.

59. *Id.* at 509.

60. *Id.* Prolegomena § 20, at 13 (“Neque . . . quamvis a vi destitutum ius omni caret effectū”).

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.⁶¹

Hart points out that the law can't be reduced to "general orders backed by threats given by one generally obeyed,"⁶² but the enforceability that, as was indicated, is characteristic for the national level is a necessary condition to distinguish between rules of law and requests or commandments⁶³ as long as the law has not been internalized by the prospective subjects of law. Hart does not want to infer that international law does not exist from the fact that there is no enforceability at the international level,⁶⁴ but he does not make it clear what this would mean. A reference to the fact that states actually keep to the rules is not sufficient here because they do this based on self-interest.

In this regard, one may argue that states, acting only if gains are to be expected,⁶⁵ 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"⁶⁶ is justified, with the caveat that this implies the conceptual existence of separate domains of "international law" and "norms." The difficulty of the former this article has 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.

C. 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 such as 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, be conceded because of this?

Those who contend that international law has been settled in these documents 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, their universality is obviously limited: they are universal treaties on *human* rights. There are principles that 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.⁶⁷ 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?

61. *Id.* Prolegomena § 8, at 9.

62. HART, *supra* note 4, at 24.

63. Apart from the Ten Commandments, which are supposed to have consequences if not obeyed.

64. HART, *supra* note 4, at 215.

65. ANDREW T. GUZMAN, HOW INT'L LAW WORKS: A RATIONAL CHOICE THEORY 121, 180 (2007).

66. *Id.* at 217.

67. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) 21 U.N. GOAR Supp. (No. 16) at 52, art. 15, U.N. Doc. A/6316 (Mar. 29, 1967).

In virtually every society there seems to be a basic set of standards (see section one of this article), though one may even call this into question.⁶⁸ This article will not deal with the opinions of those who argue a fundamental relativism in this respect. This cannot be refuted *a priori*, but is more radical than what this article puts forward here. If such a position is accepted, it will only have even more extensive consequences for the appraisal of law.

There are primitive societies where certain fundamental norms are not maintained, but what is the relevance of this? It is unclear whether one can really call them a society. It 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 law⁶⁹ or the laws of nature,⁷⁰ in which the domain for positive law to have a breeding ground at all is made explicit (*cf.* section one)—a number of values, such as the right to life⁷¹ and a fair trial,⁷² that are indeed necessary conditions. If one should, for example, not deem one's life protected properly by the enforcers of the law, anarchy might be imminent. From this it is concluded that the basic rights and laws that 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 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 United States and the subordinate position of minorities in various places.

At various moments in time 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"⁷³ or it may be advanced that in some cases reason was acknowledged as a criterion. As to the first possibil-

68. PETER WINCH, *ETHICS AND ACTION* 57 (1972). Winch himself does not deny, incidentally, that a pattern can be discerned. *Id.* at 58.

69. See HART, *supra* note 4.

70. See HOBBS, *supra* note 8.

71. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) 21 U.N. GOAR Supp. (No. 16) at 52, art. 6, U.N. Doc. A/6316 (Mar. 29, 1967).

72. *Id.* at art. 14.

73. RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 35 (2006).

ity, it will be difficult, if not impossible, to make clear what this means,⁷⁴ and, apart from that, why even if it is acknowledged to be correct it does not extend to other beings besides 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,⁷⁵ because 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 to claim a particular right. In this case it is important to discern being able to use one's reason in establishing rights and acknowledging reason as a criterion for attributing certain rights. That this distinction is not always made does not 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 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; one reason is that these creatures cannot observe a difference between private and public interests.⁷⁶

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 do not have access to this domain cannot appeal to these rights. In this way, one may act on this basis (and does not oneself act from the conviction that natural law in the narrow sense applies) to withhold basic rights to beings deemed not to possess reason.

The difficult matter of what reason is and which beings may be said to possess 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 would in that case have an even more fundamental precursor here.

Animal rights have been laid down in legislation rudimentarily.⁷⁷ Fundamental rights are in some places recognized—the German Constitution contains them, for in-

74. 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. *Id.* at 9. This is not anything more than an appeal to common sense, which cannot serve as a basis.

75. Schopenhauer already points to this. ARTHUR SCHOPENHAUER, SÄMTLICHE WERKE, BAND 4, DIE BEIDEN GRUNDPROBLEME DER ETHIK. 162 (Wiesbaden: Eberhard Brockhaus Verlag 1950) (1840).

76. HOBBS, *supra* note 8, at 119-20.

77. If one believes, perhaps on the basis of an account similar to the one described above, the criterion of whether a being can suffer, which Jeremy Bentham famously advances as the pivotal issue, JEREMY BENTHAM,

stance⁷⁸—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 why this process is possible is not clear, only the actual development can be observed.

The same consideration as the one mentioned in section one 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. This article has indicated above that the second approach is the more persuasive one.

What does this entail for the question of 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 *does not* play any role, the debate is concluded even sooner.

II. Conclusion

This article has 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. The article 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.

In section two this was elaborated upon; it was also determined what this means at the international level. It turned out that hard questions arise 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 three, exhibit international patterns. It does not follow from this, however, that international principles are concerned.

THE WORKS OF JEREMY BENTHAM, VOL. 1. at 143 (J. Bowring ed., New York, NY: Russell & Russell 1962) (1789), is decisive, animals' suffering is to be avoided, at least to some degree.

78. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 20a (F.R.G.).

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 by respecting the rights they want to have bestowed upon themselves.

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 ICJ it does so because this renders more favorable results (economically or politically) than the alternative.

To resolve this state of affairs, conglomerates were formed, such as Europe, but this does not 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.

