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# International Legal Norms

The political developments in the years after World War II have led to a considerable number of rules and views at the international level, the complex of which is now recognised as ‘international law’. In this article, the domain as such, rather than a specific part of this whole, is examined from a meta-legal perspective. The meaning of ‘international law’ is considered 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. Coming to the fore here is the question of the extent to which human rights are relevant to this subject.

## 1. The legal basis at the national level

It is important to determine which elements are constantly (implicitly) present in national law. Through this approach, a possible contrast with the rules at the international level may come to light. Because of the general theme of this article, I cannot address all possible perspectives 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, provide clarification with regard to this matter. A familiar interpretation of ‘natural law’ is the ‘classical’ approach; this consists of a standard indicating that a natural law exists in an absolute, immutable, sense and should (in moral terms) be acknowledged as the directive for actual legislation<sup>1</sup>, the truth or rectitude being the same for all and equally known to all insofar as the collective principles of reason are involved.<sup>2</sup>

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’<sup>3</sup>. The right to, for example, a fair trial could from this perspective be taken to exist before it is laid down by a (human) legislator.

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<sup>1</sup> T. Aquinas. *Summa Theologiae* [1274]. Complete Works, Vol. 7: 1a2ae, *Summae Theologiae a quaestione 71 ad quaestionem 114*. Rome: Ex Typographia Polyglotta S. C. de Propaganda Fide 1892, Q 90, Article 2 (p. 150); Q 93, Article 3 (p. 164); Q 94, Article 2 (pp. 169, 170); Q 94, Article 5 (pp. 172, 173).

<sup>2</sup> *Ibid.*, Q 94, Article 4 (p. 171).

<sup>3</sup> Aquinas (see Note 1) wrote: ‘Unde 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’. – Q 95, Article 2 (p. 175).

This perspective differs from Hart's. He argues that any social organisation must contain a '*minimum content of Natural Law*'<sup>4</sup>, consisting of 'universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims [...]'<sup>5</sup>.

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 could easily dominate the others, without observing the law.<sup>6</sup> '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.<sup>7</sup>

The second philosopher who should be mentioned here is Hobbes. For him, 'natural law' refers to no more or less than the way in which one acts on the basis of reason.<sup>8</sup> In this sense, there are natural laws, the most important of which is that one should attempt to live peacefully alongside others as far as possible, and might resort to war if this should turn out to be untenable.<sup>9</sup> Hence, there is significant agreement between Hobbes's viewpoint and that of Hart, at least in this respect.

Although Hart's minimum content of natural law pertains to 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 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 [...]'<sup>10</sup>

Both thinkers make an important contribution to determining the basic elements of law. If someone should, for example, be capable of subjugating 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 that impede him.

Is this approach to natural law the most credible one? As I have said, the treatment of this topic must be of a summary nature, but it is in order to pay some attention to an alternative. This consists in positive law being ideally modelled 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<sup>11</sup> but specifies this differently than (for example) Hobbes, by indicating that it is inherent in natural law to keep one's promises<sup>12</sup> and that people would also have sought each other out if the situation did not involve mutual dependence.<sup>13</sup> It is important that not merely reason is involved here but also 'right reason'.<sup>14</sup>

It is difficult to make explicit how natural law would compel in this case, as Hobbes observes<sup>15</sup>—who doesn't, incidentally, oppose Grotius but Aristotle, whose work exhibits a similar account of human nature<sup>16</sup> (people, in Hobbes's view, can live together firmly only if the state of nature is abolished and a

<sup>4</sup> H.L.A. Hart. *The Concept of Law*. Oxford: Clarendon Press 1961, p. 189.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, pp. 190, 191.

<sup>7</sup> *Ibid.*, p. 184.

<sup>8</sup> The (subjective) 'right of nature' is not specified (as, for example, is the right to life), as Hobbes defines the liberty that is part of this right negatively as 'the absence of external Impediments'. See T. Hobbes. *Leviathan* [1651]. Cambridge: Cambridge University Press 2007 with R. Tuck (ed.), p. 91 (in Chapter 14); see p. 145 (in Chapter 21).

<sup>9</sup> *Ibid.*, pp. 91, 92 (in Chapter 14). His premise in this respect is similar to Hart's when he emphasizes the (approximate) equality between people. See Hobbes (see Note 8), pp. 86, 87 (in Chapter 13).

<sup>10</sup> *Ibid.*, p. 185 (in Chapter 26).

<sup>11</sup> H. Grotius. *De Iure Belli ac Pacis* [1625] (On the right of war and peace). Aalen, Germany: Scientia Verlag 1993, p. 9 (Prolegomena, §8).

<sup>12</sup> *Ibid.*, p. 11 (Prolegomena, §15). Hobbes also promulgates this—Hobbes (see Note 8), p. 100 (in Chapter 15)—but not in the same way as Grotius (that is, on the basis of a 'social appetite'; see Grotius (*ibid.*), p. 8 (Prolegomena, §7)), since without a sovereign to preserve the peace, people don't (stably) unite (Hobbes (see Note 8), p. 88 (in Chapter 13)). Instead, they do so on the basis of self-interest—e.g., Hobbes (see Note 8), p. 93 (in Chapter 14).

<sup>13</sup> Grotius (see Note 11), p. 12 (Prolegomena, §16).

<sup>14</sup> Grotius states that natural law is the dictate of right reason ('*Ius naturale est dictatum rectae rationis*') (see Note 11), on p. 34 (Book 1, Chapter 1, §10). The term 'right reason' is used by Hobbes too (see Note 8), p. 32 (in Chapter 5), for whom the notion lacks the moral connotation it has with Grotius.

<sup>15</sup> Hobbes (see Note 8), p. 471 (in Chapter 46).

<sup>16</sup> Aristotle. *Politica* [c. 350 BCE]. Opera, Vol. 2. Darmstadt: Wissenschaftliche Buchgesellschaft 1960 with I. Bekker (ed.), 1253a.

sovereign is present<sup>\*17</sup>) and, so, echoes 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 that does not involve this sort of natural law. Even if this isn't criticised as to its content, an important criticism can thus be made<sup>\*18</sup> of positions that argue for 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 for qualification of the national domain. The question arises of whether this applies to the international domain as well. With respect to the 'approximate equality', for example, it is obvious that this is not found between states. Section 2 expounds on the consequences of this state of affairs.

## 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 in argument for the existence of 'international law'. In this section, the issue is approached from a different perspective, enquiry into the relevance of enforceability. I will start again with the analysis at the national level; this time, the contrast with 'international law' receives more attention than it did in the first section.

It is, among other things, characteristic of **national** legislation that it can be enforced. An example at that level can be found in Article 310 of the Dutch Penal Code, which makes theft punishable—this has no value if a perpetrator of this felony cannot be tried before a court of law. How is the issue settled internationally? If one wants to summon a state before the International Court of Justice, that state must itself have recognised the jurisdiction of said court (Article 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 (Article 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 respect, the unconditional authority of national courts of law, whose decisions can actually be enforced, irrespective of the will of the parties involved (see, for example, Article 553 of the Dutch Criminal Proceedings Act for the Dutch situation). A sovereign at the international level is lacking; the consequences of this are evident: there is no instance to which parties have transferred their competencies, 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.

This case, of course, involves not the (supposed) *basic* contract on the basis of which, in Hobbes's model, the contracting parties appoint a sovereign<sup>\*19</sup> 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.<sup>\*20</sup> This has no merit without the additional possibility of imposing sanctions.

Hart resists the idea that the sovereign is above the law.<sup>\*21</sup> In his model, moreover, the position of a sovereign is not a central issue, because of the following reasoning: 'There are [...] two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which

<sup>17</sup> Hobbes (see Note 8), p. 88 (in Chapter 13).

<sup>18</sup> By means of the approach known as Occam's razor, after an interpretation of part of William of Ockham's epistemology. See G. de Ockham, *Scriptum in Librum Primum Sententiarum Ordinatio* [c. 1319], *Distinctiones 19–48*. *Opera Philosophica et Theologica: Opera Theologica*, Vol. 4. St. Bonaventure University, New York: St. Bonaventure University 1979 with G. Etzkorn, F. Kelley (eds), *Distinctio 30, Quaestio 1* (p. 317), *Quaestio 2* (p. 322); cf. *Distinctio 27, Quaestio 2* (p. 202).

<sup>19</sup> Hobbes (see Note 8), p. 120 (in Chapter 17).

<sup>20</sup> Hart (see Note 4), p. 94.

<sup>21</sup> *Ibid.*, p. 218.

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.'<sup>22</sup>

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 is apparent from the behaviour of some (powerful) states. There, the lack of a sovereign is problematical: what exists is licence. It turns out that there is only a conditional relationship at this level: the 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' (Article 94, Section 2 of the UN Charter). Since the permanent members have the right of veto (Article 27, Section 3 of the UN Charter), in a number of cases there will be no legal enforcement.<sup>23</sup>

This also applies to sanctions that may be 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' (Article 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 have not acted in accordance with the principles of the charter (Article 6 of the UN Charter). Those who are permanent members may prevent sanctions being imposed against them. This already points to an important given: some states being more powerful than others. While, as described in the previous section, not a decisive factor at the national level, it impedes the enforcement of decisions or renders them impossible.<sup>24</sup> 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 fulfil 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 were to punish a successful businessman differently from a beggar (*ceteris paribus*), this would be considered unacceptable. At the international level, in contrast, that one state is more powerful than another is not only accepted but evidently an established principle.

As for disputes about judgements by the International Criminal Court, the cases are, insofar as they don't concern the judicial functions of the Court, referred to the International Court of Justice if the states cannot come to an understanding amongst themselves (Article 119, Section 2 of the Rome Statute of the International Criminal Court), so the problem just noted occurs here as well.

This is also apparent at the European Union level. If a Member State doesn't adhere to an obligation that is incumbent on it on the basis of the consolidated version of the Treaty on the Functioning of the European Union, the European Commission may, having called upon said Member State to take the appropriate measures, bring the case before the Court of Justice of the European Union (Article 258 of the treaty). If the Court rules in favour of the European Commission, the Member State in question is to take the necessary measures to comply with the Court's judgement (see the treaty's Article 260, Section 1).

This is a straightforward practice. However, should the relevant Member State subsequently fail to comply with the Court's judgement or not pay a 'lump sum or penalty payment' that the Court imposes on it (see Article 260, Section 2) of the treaty, there are no further legal means for inducing action by the Member State. There are, of course, political means by which to manoeuvre, but these exist irrespective of the rules, such that an appeal to them doesn't enhance the status of European legislation. The provisions of 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 crucial entity to the nation, such that, via a detour, national law is concerned: European legislation is here accepted and applied.

It is not just the position of the judge that is illustrative of the dubious standing of international legislation. An organ of the executive of the United Nations, the Security Council (mentioned above), appears

<sup>22</sup> *Ibid.*, p. 113.

<sup>23</sup> Hart (see Note 4, p. 227) considers this to be an important objection.

<sup>24</sup> See Hart (see Note 4), pp. 191, 214.

not to be able to operate on its own. This is clear from the fact that five of the 15 members had to be given the status of permanent member (Article 23, Section 1 of the UN Charter) and thus, moreover, acquired the right of veto, as mentioned above, apparently because they would not have obeyed decisions that run counter to 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 states' behaviour that they acknowledge these as having legal force. Problems seldom ensue, since the issues involved are such that it is to the states' advantage that the agreements be followed, or since one wants to prevent political difficulties from arising<sup>\*25</sup>, but that doesn't indicate the recognition of international norms as law.

Hegel points to the problems at the international level as resulting from 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.'<sup>\*26</sup> Although many supranational organisations have been established, this observation still seems to be correct. In Hegel's view, there can only be a command (expressed with the *Sollen* modality) to obey the rules<sup>\*27</sup>, and the problems might be resolved through moral standards.<sup>\*28</sup> For Hegel, moreover, positive law and natural law coincide.<sup>\*29</sup>

Similar characteristics feature in 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.'<sup>\*30</sup> 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 realised, it is abided by because 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 if it is to function. Franck rightly points out that incidental non-compliance is not decisive. This is manifested even at the national level.<sup>\*31</sup> However, there is a crucial difference: actors at the national level that do not observe the law can be punished against their will.<sup>\*32</sup>

It may be objected that in the above discussion no definition was given of 'law' or of 'right'. This task is not only difficult but perhaps even impossible. To this predicament one may add, as does G.L. Williams, that 'there is no such thing as an intrinsically "proper" or "improper" meaning of a word'<sup>\*33</sup> and that 'the idea of a true definition is a superstition'<sup>\*34</sup>, such that the matter of whether 'international law' is law is merely a verbal<sup>\*35</sup> one and needs to be abjured<sup>\*36</sup> (no pun intended). These observations have merit. A definition is in many cases an inadequate tool for argumentation—viz., if one develops a definition and subsequently asks what follows from it. Various lines of thought may arise thereby that are not mutually compatible or consistent; they may even conflict with each other. Alternatively, a definition may enter common use if justified, as is that of a triangle.

<sup>25</sup> The latter situation may account for behaviour that seems to be at odds with the thesis that international law is observed by states even if this seems to conflict with their interests. See S.V. Scott. *International law as ideology: Theorizing the relationship between international law and international politics.* – *European Journal of International Law* 1994 (5)/1, p. 314.

<sup>26</sup> 'Es giebt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d.i. nach besondern Willen', states G.W.F. Hegel. *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* [1821]. Bad Cannstatt, Stuttgart: Friedrich Frommann Verlag 1964, §333, note on p. 443.

<sup>27</sup> *Ibid.*, §333 (p. 443).

<sup>28</sup> Such a way out doesn't suffice, in my opinion, but I won't elaborate on that here.

<sup>29</sup> There is, from Hegel's perspective, only positive law (Hegel (see Note 26), §3 (p. 42)), but this merely follows from the fact that there is no difference between positive law and natural law (see his note in §3, on pp. 42, 43).

<sup>30</sup> A. Carty. *Philosophy of International Law.* Edinburgh: Edinburgh University Press 2007, p. 81.

<sup>31</sup> T.M. Franck. *The power of legitimacy and the legitimacy of power: International law in an age of power disequilibrium.* – *American Journal of International Law* 2006 (100)/1, p. 91; see A. D'Amato. *International Law: Process and Prospect.* Irvington, New York: Transnational Publishers 1995, p. 9.

<sup>32</sup> 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'. T. Hobbes. *De Cive* [1651] (English version, entitled in the first edition 'Philosophicall Rudiments Concerning Government and Society'). Oxford: Clarendon Press 1983 with H. Warrender (ed.), Chapter 15, §5 (on p. 186).

<sup>33</sup> G.L. Williams. *International law and the controversy concerning the word 'law'.* – *British Yearbook of International Law* 1945 (22), p. 148.

<sup>34</sup> *Ibid.*, p. 159.

<sup>35</sup> *Ibid.*, p. 157.

<sup>36</sup> *Ibid.*, p. 163.

The question is, then, which of these two situations—one proceeds from a definition and constructs a line of thought on this basis or one uses a definition justifiedly—applies. In my opinion, it is the second, so that the remarks of Williams 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 this is so, whereas it would be easy to argue that (part of) it *was* law during the 6th century AD.<sup>\*37</sup>

This approach does not necessarily entail ‘international law’ not being law, of course: there are people who use the word ‘law’ to refer to ‘international law’ (otherwise there would be little point in the present article, after all). This usage appears to result from an unwarranted expansion of the domain to which ‘law’ may be said to refer. One easily brings the political process into the discussion when referring to the international domain, thus confounding politics and law: [A]ssurances 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.<sup>\*38</sup> 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 clear that the obligations that the law imposes need to be enforceable; lack of permissiveness is characteristic of 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 some punishments are not physical (e.g., a monetary fine), one may conclude 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’.<sup>\*39</sup> Yet (physical) force is invariably needed if the initial punishment is not effective (if the 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 means of backup is needed.

Does this mean that the state of nature, for the time being at least, continues to exist between states? Hobbes affirms this.<sup>\*40</sup> This, according to his line of thought, does not mean 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 [...]’.<sup>\*41</sup>

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<sup>\*42</sup>, is not decisive, since various reasons may exist for countries not attacking other countries—e.g., the danger that they will, in turn, be attacked themselves by countries that have a special interest in retaliatory measures, or the value they accord to the economic interests that can be satisfied peacefully being greater than the gains that may result from an act of aggression.

Here also, Grotius’s position is not a realistic alternative. He too emphasises the role of enforcement: it is the law that enforces.<sup>\*43</sup> The power to sanction flows, in his opinion, from natural law itself<sup>\*44</sup>; sovereigns impose sanctions, but this is a result of natural law rather than of their positions as rulers.<sup>\*45</sup> Natural law itself lacks force but is still effective (*‘Neque [...] quamvis a vi destitutum ius omni caret effectu’*).<sup>\*46</sup> Natural law would then, in the absence of authority for taking action, have to ‘force’, which is difficult to support rationally without an appeal to a (presupposed) human nature (see Note 11).

<sup>37</sup> 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 AD. It is doubtful whether the legislation was predominant even before 568 AD—*inter alia*, since it did not constitute a systematic whole.

<sup>38</sup> C.C. Joyner. *International Law in the 21st Century*. Lanham, Maryland, US: Rowman & Littlefield Publishers 2005, pp. 5, 6.

<sup>39</sup> D’Amato (see Note 31), pp. 14, 15.

<sup>40</sup> Hobbes (see Note 8), p. 90 (in Chapter 13); p. 163 (in Chapter 22).

<sup>41</sup> *Ibid.*, p. 88 (in Chapter 13).

<sup>42</sup> A.N. Yurdusev. Thomas Hobbes and international relations: From realism to rationalism. – *Australian Journal of International Affairs* 1996 (60)/2, p. 316.

<sup>43</sup> Grotius (see Note 11), p. 34 (Book 1, Chapter 1, §9).

<sup>44</sup> *Ibid.*, p. 511 (Book 2, Chapter 20, §40).

<sup>45</sup> *Ibid.*, p. 509 (Book 2, Chapter 20, §40).

<sup>46</sup> *Ibid.*, p. 13 (Prolegomena, §20).

Hart points out that the law can't be reduced to 'general orders backed by threats given by one generally obeyed'<sup>47</sup> and that the enforceability that, as indicated above, is characteristic of the national level is a necessary condition for distinguishing between rules of law and requests or commandments<sup>48</sup> as long as the law has not been internalised by the subjects of law (or, rather, prospective subjects of law). Hart does not want to infer from the fact that there is no enforceability at the international level that international law does not exist<sup>49</sup>, but he doesn't make it clear what this lack of enforceability might 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<sup>50</sup>, 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'<sup>51</sup> 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 upon above; the problems with the latter require 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 agreements have been signed to protect human rights, among them 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, if one sets the enforceability issue to the side, 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 the world over. On the other hand, the 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 something being punishable should proceed from a legal basis, which is established in both national legislation and international treaties—e.g. in Article 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 (see Section 1), though one may call even this into question.<sup>52</sup> I will not address the opinions of those who argue for fundamental relativism in this respect. This stance can't be refuted *a priori* and 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 wherein necessary fundamental norms, such as the duty to abstain from killing one another, are (or were) not maintained, but what is the relevance of this? It is unclear whether one may really call these societies; the matter depends on one's definition of 'society'. To what extent do affinities or alliances justify employing the concept of society? If one merely associates at times of mutual dependence, an atomic whole (given that one does not consider oneself, at least primarily, to be a part of a greater whole) remains the background for each relationship.

At any rate, the fact that societies acknowledge basic standards independently of each other is no proof of the existence of natural law in the narrow sense. One can point to—besides the minimum content of natural law<sup>53</sup> or the laws of nature<sup>54</sup>, in which the domain for positive law to have a breeding ground at all is

<sup>47</sup> Hart (see Note 4), p. 24.

<sup>48</sup> Apart from the Ten Commandments, which are not supposed to be without consequences if not obeyed.

<sup>49</sup> Hart (see Note 4), p. 215.

<sup>50</sup> See A.T. Guzman. *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press 2008, pp. 121, 180.

<sup>51</sup> *Ibid.*, p. 217.

<sup>52</sup> See P. Winch. *Ethics and Action*. London: Routledge & Kegan Paul 1972, p. 58.

<sup>53</sup> See Hart (see Note 4).

<sup>54</sup> See Hobbes (see Note 8).

made explicit (see Section 1)—a number of values, such as the right to life (Article 6 of the ICCPR) and a fair trial (Article 14 of the ICCPR), which 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 may be 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 could exert the greatest power in society were able, once rights had been established, to determine which rights would be enshrined in social systems 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, for instance, the respective moments at which women received suffrage in Europe and the USA, and the subordinate position of minorities in various places.

At some point (the moments varied), 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 recognised that these groups of people should not be disfavoured. This thesis is difficult to support. 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 possible way to explain the rise of these rights. One may, alternatively, appeal to human life as being 'of intrinsic importance'<sup>55</sup>, or the idea may be advanced that in some cases reason was acknowledged as a criterion. With respect to the first of these two possibilities, it is difficult, if not impossible, to clarify the meaning of the notion of intrinsic value<sup>56</sup>, 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 its role as the criterion but maintain that this is done only 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 at some point become subject to debate. Reason would no longer serve as a standard and would have to be replaced by another one. A new standard is absent, however, which is why this issue was brought up in the first place. It is reasonable beings who maintain reason as a criterion<sup>57</sup>, since this is a property they share (and through which they can distinguish themselves in relevant respects from other beings), a factor that continually serves as a minimum condition for claiming of a particular right. In this case, it is important to distinguish between being able to apply one's reason in establishment of rights on the one hand and acknowledging reason as a criterion for assignment of certain rights on the other. 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 allocate a specific domain for themselves and those like them, wherein 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 realise the systematic organisation 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 for a number of species of bees. There is no need here to realise legislation: mutual competition which is characteristic of humans is absent, for one reason because these creatures don't (or even can't) observe a difference between private and public interests.<sup>58</sup>

At any rate, what is under debate 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, wherein one is safe. Those beings without access to this domain cannot appeal to these rights. In this way, one may, if one, in fact, also acts on this basis (and doesn't oneself act upon the conviction—which, as noted above, I do not share—that natural law in the narrow sense applies), withhold basic rights from beings deemed not to employ reason.

<sup>55</sup> R. Dworkin. *Is Democracy Possible Here?* Princeton, New Jersey, Oxford: Princeton University Press 2006, p. 35.

<sup>56</sup> Dworkin does not, in any case, succeed in doing this. He appeals merely to a principle (the 'principle of intrinsic value') that 'almost all of us' are said to share (*ibid.*, p. 9). This does not seem to be more than an appeal to common sense, which cannot, in my opinion, serve as a basis.

<sup>57</sup> Schopenhauer already points to this. See A. Schopenhauer. *Die beiden Grundprobleme der Ethik [1840]. Sämtliche Werke*, Vol. 4. Wiesbaden: Eberhard Brockhaus Verlag 1950, p. 162.

<sup>58</sup> See Hobbes (see Note 8), pp. 119–120 (in Chapter 17).

The difficult matter of 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 conceptions as to its nature may have been prompted, however inadvertently, by a desire to find a distinguishing feature. The need for a specific domain as mentioned above would in that case have an even more fundamental precursor here.

Animal rights have been laid down in legislation rudimentarily.<sup>59</sup> Fundamental animal rights are in some places recognised—the German Constitution addresses them, for instance (in §20a)—but in these cases only very general rights are covered. Many rights are irrelevant for animals, such as freedom of expression. The most important ones, such as the right to life, however, are important. Perhaps some animal rights will eventually be established structurally.

An ever greater number of rights may in this way be laid down, such 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 route allowing insight into this process is not clear, only the resultant visible development can be properly observed.

The consideration mentioned in Section 1 is relevant here. I 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 discussion 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 the concept of natural law in the narrow sense to demonstrate to what extent they **would** exist. Accordingly, the issue revolves around the question of whether it is more credible for such principles to serve as a basis in establishment of human rights or, instead, they should be considered to be generalisations made in hindsight; the choice is between a top-down and a bottom-up approach. I have indicated above that the second approach seems to me to be the more persuasive.

What does this imply for the issue of whether international principles are decisive for law? Rules at the international level are no indication of 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.

## 4. Conclusions

In this article, I have outlined a number of aspects of the domain referred to as ‘international law’ and on that basis problematised the idea that ‘international law’ exists. The first section explored what the minimal conditions are if a system of law is to be considered as such. I pointed out the characteristics that can be found in any system of law. Of special importance is that none of the subjects of law are able to ignore the rules.

Section 2 elaborated upon this, also describing what it means at the international level. It emerged from the discussion that difficult 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 that obtaining at the national level, where a relatively clear process of law can be discerned.

Finally, human rights, which were discussed in Section 3, exhibit international patterns. It doesn’t follow from this, however, that international principles are involved. It is more credible to argue that one is motivated by one’s own needs. People appear to want to optimise their position and can only realise this in a seemingly credible manner by respecting the rights they wish to have bestowed upon them as rights 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 not a merely theoretical issue is clear from the fact that those solutions are invariably of a political nature. For example, if a relatively pow-

<sup>59</sup> If one opines, perhaps on the basis of an account similar to the one described above, that the deciding criterion is whether a being can suffer, which Bentham famously advanced as the pivotal issue (J. Bentham. *An Introduction to the Principles of Morals and Legislation* [1789]. *The Works of Jeremy Bentham*, Vol. 1. New York: Russell & Russell 1962 with J. Bowring (ed.), note on p. 143), animals’ suffering is to be avoided, at least to some degree.

erful state acknowledges the authority of the International Court of Justice, it does so because this yields more favourable results, economically or politically, than does the alternative of not acknowledging its authority.

For resolution of 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 being decisive in the stead of alleged 'international law'—will remain until a supranational system of law emerges that is modelled after those in developed countries. Whether such a system will, in fact, appear is difficult to predict.