THE PRINCIPLES OF INTERNATIONAL LAW AND HUMAN RIGHTS

(On the Compatibility of Two Normative Systems)

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I. *The Principle of the Unity of Normative Knowledge*

Just as in the general theory of science the principle of the "unity of knowledge" has to be assumed in order to avoid the logical inconsistencies resulting from the acceptance of diverging criteria of science, science of law understood as a system and not as a mere collection of rules —whose normative status has not been determined— has to assume the unity of the various normative subsystems, which together constitute the object of the science of law. The principle of "the unity of normative knowledge", as postulated by Hans KELSEN[1], implies that always only one normative system can be assumed to be valid. The simultaneous acceptance of diverging normative systems would result in logical contradictions signifying the end of legal science.

One principle of normative knowledge therefore has to be that the various norm systems to be found and which are to be ascribed to different regions of social interaction, are seen as "regional" systems, subsumed under one exclusive universal system. Thus no demands concerning the content of a normative system of natural right are made, but only the fulfilment of the principle of formal stringency, i.e. avoidance of contradiction is required. The proposition that the "unity and exclusiveness of the normative system assumed to be valid",[2] as exemplified by KELSEN's discussion of the relationship

1 *Das Problem der Souveränität und die Theorie des Völkerrechts.* Tübingen, 1928 (reprint Aalen 1960), p. 108. —This concept might however lead to a misunderstanding: "normative" can only be applied to the object of knowledge, not to knowledge itself. The latter is to remain descriptive, if it is to obey the general principles of science.

2 Hans KELSEN, op. cit., p. 105.

between national and international law,[3] is to certain degree to be considered the precondition of all possible legal knowledge.

It is a kind of transcendental precondition of a normative type[4] that must be accepted even by those defending contradictory normative systems, or rather different subsystems of normative reasoning —whether it be natural or positive law— as far as these are intended to be systematic and not a mere conglomeration of rules. This principle of consistency implied therein and here referring primarily to the material content of the norms, is not questioned in any event as the formal region of normative knowledge, but is however not to be separated from the formal epistemological context: material lack of contradiction in a normative system, as described above, is to be seen as a consequence of the demand for (formal) consistency of knowledge, i.e., the theoretical (descriptive) determination of norms. The consistency thus demanded of a legal system of norms can —if one considers the normative systems which modern systems of law have to deal with-only be achieved by the subordination of one normative system to another or the atribution of two equal systems to a third joint system, which again provides the basis for the two systems.[5] A "monistic" construction, to use KELSEN's terminology,[6] is the only possibility of a dogmatic formulation of the relationships between normative systems. A system in the strict sense of the word is therefore only the sum of the universal norms implied in all the subsystems, on which its recognition is based.

II. *Inconsistencies between the Normative Systems International Law and Human Rights*

If the principle of consistency, i.e., of the systematic nature of Law, is a fundamental precondition of all legal knowledge, the present coexistence of contradictory normative systems, as to be seen in the respective declarations stemming from international law or human rights, must be regarded as a dogmatically unsatisfactory if not unacceptable state of affairs. Just as KELSEN in his analysis of the principle of sovereignty revealed the latent contradictions between the areas

[3] Cf. op. cit., pp. 102 ff., as well as: *Reine Rechtslehre.* Wien, 1960, pp. 328 ff.

[4] On the "transcendental "nature of the legal argumentation in Hans KELSEN's work cf. the author's *Zur transzendentalen Struktur der "Grundnorm." Kritische Bemerkungen zur erkenntnistheoretischen Fundierung der "Reinen Rechtslehre,"* in: *Festschrift für Hans R. KLECATSKY zum 60. Geburtstag* (ed. P. PERNTHALER. Wien, 1980).

[5] Cf. KELSEN, Reine Rechtslehre, p. 332.

[6] Cf. ibid., as well as: Das Problem der Souveränität. . . , p. 123.

of natural law and international law and hoped to remove them by demanding the recognition of the primacy of international law, we shall attempt to describe the central elements of the normative structures of both present-day international law and present-day human rights –also formulated in the terms of international law– to show up the contradictions existing between the two systems and to point out that human rights, though generally assumed to be based on international law and to rely on the mechanisms of international law, form a separate and independent system of norms, contrary to the present principles of international law. Starting from this assumption a new dogmatic definition of the relationship between these two normative systems will be attempted, assuming the principles of human rights to provide a common element to which both the areas of international and national law can be related. From this point of view the present discussion about the relationship between humanitarian international law and human rights will prove to be a good example of the lack of theoretical reflection on the normative status of the present, primarily pragmatically orientated doctrines of international law, which are not guided by considerations derived from the theory of law. In his paper entitled "Ethics and Foreign Policy" Rudolf KIRCHSCHLAGER has already pointed to the problems resulting from the divergence of normative systems of international and individual behaviour by demanding the unification of international, national and individual norms by submitting them to general ethical principles.[7] In view of the necessary unity of normative knowledge this demand has to be fulfilled.

The basic principles of international law are, for example, assumed to be the principles of effectiveness and national sovereignty. Both principles can be shown to be incompatible with the universal recognition of the principles of human rights based on international law. This fundamental inconsistency in present international law is a serious problem in dogmatic law, which has hardly begun to be solved and has been rather obscured by various declarations, points to the rudimentary and pragmatic nature of international law, which appears to be a mere collection of norms designed to solve specific problems in international relations. This fact becomes particularly evident in the case of the principle of effectiveness, which requires that prior to the international recognition of a state the effective and lasting control over the territory in question is asserted. This implies that also the states or governments are accepted whose lasting control over a

[7] In: Hans KOCHLER (ed.), *Philosophie und Politik*. Innsbruck, 1973. pp. 69 ff.

certain territory has been achieved and is maintained by infringements of human rights (i.e. military force.[8] The acceptance of the principle "*ex factis, i.e. iniuria* (H.K.), *ius oritur*" as implied in the principle of effectiveness in the final analysis points to the end of any system of law.[9] Thus scholars of international law of this century have been anxious to point out that the principle was not of general validity and that it is restricted by the principle "*ex iniuria ius non oritur.*"[10] What is overlooked is that a norm cannot be restricted in its validity. If the principle "*ex iniuria ius non oritur*" is proposed as a corrective to the principle of effectiveness tent –in a strictly normative sense of the word– it is invalid, as two contradictory norms cannot be accepted at the same time. Within our discussion this implies that the universal validity of the principles of human rights excludes the accepted in international relations –particularly as concerns diplomatic recognition of states and governments– one would, in order to be consistent, have to concede that the principle acts as a pragmatic criterion and not as a norm in the legal sense of the word, providing one wishes to maintain human rights as the *ius cogens* of international law. If, however, inspite of the subordination of the normatives to the factual as resulting from the principle of effectiveness, one continues to speak of a normative system as defined above, international law is reduced to a merely pragmatic level –as L.J. BOUCHEZ suggests[11] – on which it could be replaced by a sociology of international affairs without loss in theoretical status.[12] Such an arbitrary decision, which from the point of view of a theory of law is equivalent to the recognition of the "normative power of the factual" and would allow science of law as a system of normative knowledge to be replaced by a sociological theory of international relations, is common practice in the diplomatic recognition of States as far as governments are concerned: the principle of effectiveness is frequently employed to further

8 Cf. Hans KELSEN, Reine Rechtslehre, p. 337.

9 As concerns the conclusions of peace treaties according to international law these were clearly drawn by Julius STONE, who described the application of the principle of effectiveness as "*a morally outrageous rule*" in this context (*Quest for Survival. The Role of Law and Foreign Policy.* Harvard University Press, Cambridge, Mass, 1961, p. 62).

10 Cf. Alfred VERDROSS, Bruno SIMMA, *Universelles Völkerrecht. Theorie und Praxis.* Berlin, 1976, p. 65. –L.J. BOUCHEZ, *The Concept of Effectiveness as Applied to Territorial Sovereignty Over Sea Areas, Air Space and Outer Space,* in: *Nederlands Tijschrift voor International Recht,* vol. 9 (1962), p. 159.– More systematically dealt with in: H. LAUTERPACHT, *Recognition in International Law.* Cabridge, 1947, p. 413.

11 Op. cit., p. 156.

12 On the basic problem of the recognition of the principle of effectiveness related to the validity of norms in general cf. the author's: *Zur transzendentalen Struktur der Grundnorm,* as quoted.

one's own national interests. This means that when one's own national interests are not threatened, an effective government is acknowledged —irrespective of whether the task of government is fulfilled in agreement with human rights or not. If, however, national interests— i.e. considerations derived from foreign policy and power politics —are opposed to the recognition of an effective government, then this (purely pragmatic) principle is discarded and also ineffective governments are recognized, as was the case in Cambodia. Here even those states which have otherwise declared human rights the governing principles of their foreign policy were prepared to place the principle of non-intervention before the fundamental principles of human rights and —for purely tactical reasons in power politics— were prepared to recognize the earlier government, which, after the infringements of human rights had reached the dimensions of an holocaust, was removed from power by what came close to being an intervention. Thus, as this example proves, the harsh expedient of international relations demands that the principle of effectiveness is applied according to preference and can be replaced by the principle of non-intervention (i.e. from another point of view, the principle of sovereignty), if national interests so require. And, as experience in the case of Cambodia shows, this is also true of states purporting to place the principles of human rights above any other principles of international law and opposing the claim that infringements of human rights belong to the internal affairs of the respective states.

III. *The Logical Reorganization of the Systems of International Law and Human Rights: Outline of a System*

The object is to reformulate the normative systems of international law and human rights —whose contradictions have been pointed out— in such a way as to enable us to overcome these contradictions by establishing a comprehensive and consistent system which maintains the principle of peaceful coexistence contained in present international law. As we wish to show, the foundation of this principle lies not in the traditional tenets of sovereignty and non-intervention, but in more fundamental principles, for which the norms of international law are merely means to their realization —as determined by the respective actual situation. (We shall attempt to outline a theoretically feasible system that attempts to place the actual situation of international relationships into a stringent normative system, which provides at least rudimentary guidelines to the removal of the cynical moral double standards present in the acceptance of "the normative power of the factual" in international law.)

The mentioned conflict between the normative systems of international law and human rights, which remains inspite of the general tendency to include the latter in the former, can only be overcome if the principle of the unity of normative knowledge is maintained and the respective normative levels (general or specific) are clearly separated and distinguished from the level of statements of fact —which may form a part of normative conclusions. From the point of view of the theory of law an attempt at including general human rights in the normative system of international law (as is generally characteristic of United Nations policy) is doomed to failure. Even if human rights are accepted as the basis of the legal systems of individual nations and of international peace and is thus established as *ius cogens* of international law, they will remains —as shown by the general interpretation according to international law as practised by the United Nations— at best on the same level as the other traditional principles of international law, and in important cases, when conflicting with the principle of national sovereignty, will be subordinated. This inconsistency is by means astronishing if one considers that the recognition of human rights in international law is based on international law of contract,[13] which bases the validity of the *pacta sunt servanda* principle on the sovereignty of the individual states.

This sovereignty is assumed to the first and foremost principle, which cannot be derived from any more fundamental norm. As —contrary to our suggestion— sovereignty is assumed to be independent of the absolute and irreducible claim to individuality of the subjects forming a collective subject of international law (whose individual "sovereignty" is in fact the justification of the claim to sovereignty of the collective subject of international law), in the dominant theory it is obviously placed above individual human rights and thus can only result in a modification of the universal recognition of human rights. Regarding the situation of the individual as the final, irreducible and unifying element in a system of law, is an insubstantial and fictitious conception of sovereignty with its extension that the state as the one and only subject before international law has formed the logical tenet in the international law of the socialist states, according to which the state is seen as the only authority (*"seul maître"*) competent to decide when and to what extent the rights of the individual are to be protected, as F. PREZETACZNIK argues in his description

13 This argument is also rejected by Hermann MEYER-LINDENBERG, as for him the positive recognition of human rights in international law can only justify those laws which do not belong to "the fundamental group of human rights." (*Die Menschenrechte im Völkerrecht*, in: *Berichte der deutschen Gesellschaft für Völkerrecht*, vol. 4 (1961), p. 85).

of the policy of socialist states.[14] To surrender the individual to an unquestioned and anonymous authority can only be avoid if one —as in the redefinition of the principle of sovereignty suggested by us— rids oneself of the logically unsatisfactory coexistence of the principle of the state and the individual as subjects of international law by considering the treatment of the state as a subject of international law to be a mediated one, i.e. as based on the immediate subjectivity of the individual before the law, who as individual is the bearer of inalienable rights in relations to all mankind ("*civitas maxima*") —and this without mediation by interposed societies that have to grant these rights in the tradition of absolute government. This is some way "nominalist" conception of subjectivity before international law "which exposes the relics of absolute government on the present normative system of international law and is obviously not recognized by the theoreticians in the socialist states, appears to us to be the only way out of the logical dilema characteristic of the present discussion on human rights and international law.

Only if one sees human rights as a general normative system[15] referring to the individual —and not to a collective subject of law— from which both the national and international normative systems is defived (and not viceversa), can the theoretically required unity of the normative system be achieved. Thus it will also be possible to make the neutral function of ensuring peaceful coexistence, fulfilled by present international law,[16] agree with the remaining normative system.[17]

Here various levels of normative rulings have to be distinguished, which as specific normative subsystems, are based on a general system of norms and which —according to the unifying model proposed by KELSEN—[18] provide the unifying common denominator of the two.

The realization of this normative system should be made possible by those specific normative systems lying on a different derived normative plane thereby a factual premise comes to bear in the conclusion. The formal structure of the logical relationship, with which we aim to overcome the inconsistency of the present normative system of

[14] *L'attitude des Etats socialistes à l'égard de la protection des droits de l'homme*, in: Revue des droits de l'homme, vol. 7 (1974), p. 179.

[15] This would agree with the dogmatic approach devised by Hermann MEYER-LINDENBERG (op. cit., p. 85).

[16] Cf. Wolfgang FREIDMANN, *Nouveaux aspects du droit international*. Paris, 1971 (originally as: *The Changing Structure of International Law*. New York, 1964), pp. 189 ff.

[17] In regard to international relationships this approach has been expounded in: *Kulturphilosophische Aspekte internationaler Kooperation*, in: Zeitschrift für Kulturaustausch, vol. 28 (1978), p. 40 ff.

[18] Cf. above, section I, and KELSEN, *Das Problem der Souveränität*. . . , pp. 104 ff.

international law, can be described as follows: a *general* normative premise (P_n) in combination with a descriptive premise (P_d) (referring to facts) results in a normative conclusion, containing a *specific* normative statement. By this method the principle of the normative power of the factual is reduced to an acceptable size for the theory of law: it merely implies that specific redefinitions can be made on the basis of statements of fact, although one of the premises always has to remain a norm. In view of the theoretical problem discussed in this context the formal relationship can be defined as follows: the principles of human rights can be considered a general normative system (P_n), as basic social and economic rights specified by the United Nations (HR_1). As a system of norms referring to the physical integrity of the individual this normative system is a prerequisite for the civil and political rights traditionally subsumed under the concept of human rights (HR_2). The former are an essential condition for the concrete normative meaning of the latter.

Political and civil rights would be meaningless without the recognition of the right to economic security, i.e. as particular norms concerning social interaction they have to include these general norms (HR_1). If they are singled out as a separate and as such an absolute system of norms, i.e. are placed in opposition to HR_1 on an equal footing, then this will result in the logical inconsistency we wish to avoid.

The traditional principles of international law, such as those of sovereignty and non-intervention, are not to be introduced into this logical structure (as this would lead to the above-mentioned theoretical problems). They rather represent *normative conclusions* to our deductive scheme, which results from combining a general normative system (HR_1) as a normative premise (P_n) with a descriptive premise (P_d), a statement referring to actual facts. This can be best illustrated by the discussion concerning the possible legitimation of an intervention for the protection of human rights, i.e. civil rights (HR_3),[19] If in a certain nation norms related to HR_2 are violated, then considerations concerning the possibility of intervention must take into account the general validity of the normative system HR_1. A restoration of a state of affairs which is in accordance with HR_2 must under no circumstances —for the formal reasons given— negate the validity of the

[19] The problems resulting from an ethnocentric interpretation of HR_2, the discussion of which would have to precede any argument about the justification of intervention, cannot be paid detailed attention to here. In the formal theoretical context it is not relevant. It is, however, of prime importance in legal philosophy insofar as it refers to the problem of justifying the content of norms. —cf. S. Prakash SINHA, *The Anthropocentric Theory of International Law as a Basis for Human Rights*, in: Case Western Reserve Journal of International Law, vol. 1o. (1978).

norms of the area HR_1, which as the most general normative premise is already presupposed in what can be considered the conclusion. If as a descriptive premise the statement of fact, that the restoration of a state of affairs in accordance with HR_2 by means of intervention —in support of the rights of the individual and in opposition to the government effectively controlling the territory— will lead to a state of war resulting from the assertion of power of the respective territorial authority and that this again will bring about a state of affairs incompatible with the HR_1 normative system which —due to the logical subordination— will also result in a violations of HR_2, then the normative conclusion to be drawn can only be that an intervention by force in the internal affairs of the state is to be abstained from. This, as it were, negative definition of the principle of non-intervention (which one could see as a "functional" definition of the principle of sovereignty, as it is now seen as a function of the recognition of the validity of HR_1 enables us to overcome the hitherto dogmatically confusing situation. The principle of non-intervention —or rather sovereignty is no longer a norm conflicting with the general recognition of the normative system of human rights. It is a norm *deduced* from the normative premise (HR_1) and the descriptive premise based empirically on observations concerning international relations. Thus the complete normative system of international law is not overthrown but merely reorganized on a systematic basis. The function of international law to ensure peaceful coexistence, as illustrated by the principle of non-intervention, is maintained —although in a completely different dogmatic context. For that which was hitherto assumed to be an absolute and general principle of international law and thus had to result in a conflict with the claims of human rights is in this context only seen as a derived principle, i.e. one valid due to a certain logical relationship between normative and descriptive premises. As a general system of norms only the fundamental principles of human rights (HR_1) are accepted in this context and all other normative principles —national and international— are valid only *in relation* to this area.[20] A theoretical redefinition of the complete context of international law makes the traditional principles appear in a different light than they would have appeared from a viewpoint including divergent normative systems. Due to this approach present politics of peaceful inter-

20 A similar —though unsystematic— approach is proposed by Johannes MULLER, for whom "human rights are a necessary par of *true* world peace and thus enjoy an unlimited claim to the determination of personal and international relationships" (preface, in: Wilhelm KAUFMANN, *Grundrechte und notwendige Völkergemeinschaft*, Basel, 1976, p. 7).

national coexistence can be interpreted more consistently and convincingly –if the recognition of national sovereignty is seen as a necessary precondition to avoid situations conflicting with HR_1 – rather than the principle of the sovereignty of nations in international law being viewed as absolute and thus contrary to the rights of the individual. It is only the reinterpretation of the normative context of international law that is able to ensure that the system of international norms does not stand in contradiction to the principles governing national law and thus overcomes the "double standards" of past theory of law.[21]

IV. *The Revaluation of Traditional Principles of International Law*

It has not been the aim of our theoretical undertaking to *eliminate* the existing principles of international law, which are generally considered necessary preconditions of preserving world peace,[22] but rather their "*redefinition*" by placing them in a different normative context, i.e. their subordination to an universal (more general) system of norms by means of a normative-descriptive conclusion. It is only by this method that the principle of the unity of normative knowledge as required by the theory of science can be observed. The systematic attempt to view the principles of sovereignty and effectiveness merely as derived norms and to recognize them only in their dependence on the general principles of human rights (RH_1) as part of the system of international law will perhaps help to expose the cynical attitude of a purely pragmatic foreign policy, which does not consider these norms of international law to be derivative and thus avoids the need to apply a logical argument of the kinds mentioned. The coexistence of the equal principles of human rights and international law has –apart from its theoretical inadequacy– facilitated the promotion of national interests, as "moral conflicts" could be avoided by referring to an abstract system of norms was independent of individual rights.

21 That here, in the final analysis, a relationship is to be established to the principles of individual ethics has been pointed out by Rudolph KIRCHSCHLAGER: cf: *Ethik und Außenpolitik*, op. cit. pp. 69 ff.

22 This point is particularly emphasized by the theorists of international law in the socialist states, cf. V. KARTASHKIN, *Human Rights and Peaceful Coexistence*, in: Human Rights Journal, vol. 9 (1976), pp. 5-20.

If we accept the normative primacy of human rights,[23] this is no longer possible as one is forced to rearrange the specific norms in relationship to an universal system and to provide every norm with a specific position in the system. The system suggested, which gives to the principles of basic economic and social rights (HR_1) the central position within the normative system –which could formally i.e. logically be replaced by a different system as long as it is consistent– makes the question concerning the primacy of national or international law, as discussed by KELSEN in detail, appear to be of secondary importance. In our context both spheres are seen as subsystems which are dependent on the system of fundamental human rights as the "common denominator". As regards the relationship between national and international law this fundamentally *monistic* construction[24] exposes the need for reform in the present system of international law, which from this point of view appears more as a conglomeration of specific norms resulting from the demands of international relations[25] rather than a consistent system. The dogmatic "inclusion" of the mentioned norms of international law in an universal systematic context –which can after all refer to the concept of a world community of nations as stated in the United Nations resolution, although the theoretical consequences implied have not yet been realized– might contribute to the understanding between socialist and Third World states and the countries of the West on the other hand, as the controversy concerning the primacy of the principles of sovereignty for human rights can thus be transformed into a discussion concerning the consistency of the conclusions drawn.

However philosophical and abstract this may seem, it is merely an attempt at an ideal construction related purely to the theory of law and therefore does not enter into political and tactical questions. Yet the overcoming of the dualism of the normative systems appears to be a precondition of a more rational, i.e. logically transparent discussion concerning the principles of international relationships.

23 If one wishes to establish a connection with jurisdiction relevant to International Law, an implicit recognition of a primacy of this kind might be found in the justification of a veredict of the International Court of Justice, in which there is mention of fundamental humanitarian principles which are "more absolute in peace than in war" and should be viewed as the basis of international obligations (Affaire du Détroit de Corfou, (Fond), Cour Internationale de la Justice, Recueil 1949A). –cf. also: CIJ Recueil 1951, p. 23: ". . .*principles which are recognized by civilized nations as binding on states, even without any convention or obligation.*"

24 This construction is not "monistic" as seen by KELSEN in the normative subordination of one region to the other (cf. *Das Problem der Souveränität*–, pp. 143 ff.), but meant as the subordination of both systems as subsystems to an universal "third" system.

25 Cf. Wolfgang FRIEDMANN, op. cit., p. 191.

The normative reorganization, which shows the principles of effectiveness and sovereignty to be derivative, provides a theoretically satisfactory picture of the function of international law which Walter KAUFMANN described as the (national) "will to power" being replaced by the "will to justice for all members of the human race".[26] To overcome the dualism of the normative systems also seems to be the main problem of the current discussion concerning international law as related to the definition of a "New International Economic Order" suggested by the United Nations.

26 *Grundrechte und notwendige Völkergemeinschaft* (ed, Johannes MULLER), Basel, 1976, p. 39.