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The Principles of International Law and Human Rights[*]

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1. The Postulate of the Unity of Normative Knowledge

In the general theory of science, the "unity of normative knowledge" has to be postulated in order to avoid the logical contradictions arising from the acceptance of conflicting criteria for science. Similarly—and indeed particularly—the legal science has to presuppose the necessary unity of the various constituent normative areas which together form the object of legal knowledge. This follows in as far as legal science is understood as a system and not merely as a collection of rules of conduct whose normative status has not been questioned. According to this postulate of the "unity of normative knowledge," as Hans Kelsen has termed it,[1] only one normative system may be presupposed as valid at a given time. The simultaneous acceptance of different normative systems would lead to logical contradictions, amounting to the invalidation of legal science. We must therefore recognize a fundamental axiom of normative knowledge to be the following: the different existing normative systems (which can be assigned to different areas of social interaction) are to an extent "regional" systems whose contents belong to one universal system. This axiom hence in no way determines the content of a normative system in the sense of natural law; rather, it simply affirms the demand for formal stringency, i.e. the absence of contradiction. Concerning the status of the relationship between international and domestic law, Kelsen set a precedent[2] in his demonstration of the "unity and exclusiveness of the normative system which is presupposed as valid."[3] This is in a certain sense the precondition for the possibility of all

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[*] This article was written a decade before the discussion on the concept of "humanitarian intervention" was initiated in the course of the Gulf War.

[1] *Das Problem der Souvenerität und die Theorie des Völkrrechts.* Tübingen, 1928 (reprint Aalen, 1960), p. 108. –The formulation could, however, lead to misunderstandings: Only the object of knowledge—unlike the knowledge itself—can be "normative." The knowledge itself must remain descriptive if it is to conform to the general criteria of scientific methodology.

[2] Hans Kelsen, op. cit., p. 105.

[3] Cf. op. cit., pp. 102ff., as well as *Pure Theory of Law* (translated by Max Knight). Berkley/Los Angeles, 1967, pp. 328ff.

legal knowledge. It is a quasi-transcendental precondition of the normative type[4] and as such must be accepted by advocates of normative systems which contradict one another at the level of content or by advocates of different systems of normative reasoning—whether they be natural or positive law—in as far as these systems pertain to be *systems per se* and not merely a conglomerate of rules of conduct. The requirement of the absence of contradiction herein implied refers in this context primarily to the substantive (or material) level of the norms themselves; in the formal area of normative knowledge and reasoning, the existence of this requirement has never been doubted. This requirement, however, cannot be separated from the formal epistemological context. According to what we have said above, the substantive (or material) absence of contradiction between norms is a consequence of the requirement of the absence of epistemological contradiction; it relates to the theoretical (descriptive) understanding of the norms in the formal sense. As regards the various normative systems which present-day legal science deals with, one comes to the conclusion that the necessary consistency of the legal system of norms can only be satisfied in two ways: either by subordinating one normative system to another, or by assigning equally ranked systems to a common third system which in turn provides a basis for the other systems.[5] A "monistic" construction (to use Kelsen's terminology once more)[6] is the only possible formulation of the relationship of normative systems among themselves in terms of legal theory. A system (in the strictest sense of the word) can therefore only be understood as the sum of the universal norms which are implied in all subsystems, i.e. on which the validity of the systems is founded.

2. The Contradictions between the Normative Systems of International Law and Human Rights

This postulate of consistency (the characteristic of a system *per se*) is thus the fundamental precondition for every sort of legal knowledge. The present coexistence of normative systems which are incompatible with regard to their content—such as the coexistence of the norms of international law and the norms contained in the declarations of human rights—must be regarded as unsatisfactory and indeed unacceptable in terms of legal theory. In his analysis of

[4] On the "transcendental" nature of Hans Kelsen's theoretical argumentation cf. Hans Köchler, "Zur transzendentalen Struktur der ‚Grundnorm'. Kritische Bemerkungen zur erkenntnistheorethischen Fundierung der ‚Reinen Rechtslehre'" in *Festschrift für Hans R. Klecatsky zum 60. Geburtstag.* Ed. P. Pernthaler. Vienna, 1980, pp. 505-517.
[5] Cf. Kelsen, *Pure Theory of Law*, p. 332.
[6] Cf. ibid., as well as *Das Problem der Souveränität*..., p. 123.

the concept of sovereignty, Hans Kelsen demonstrated the contradictions between the realms of domestic law and international law. He demanded that these contradictions be eliminated through the recognition of the primacy of international law. Similarly, we would like to draw attention to the contradictions existing between the norms of present-day international law and those contained in the declarations of human rights (which were also formulated on the basis of the procedures of international law) by describing the central structures of these normative systems. It is generally assumed that human rights are embodied in international law and that, according to the process of their adoption, human rights are founded on the mechanisms of international law. We will attempt to demonstrate, however, that human rights constitute a separate system of norms, one which stands in normative opposition to the present-day principles of international law. On the basis of this analysis, we would like to attempt a reformulation of the relationship between these two normative systems in terms of legal theory: The principles of human rights are to be understood as the "common third" to which both of international law and domestic law are assigned. (From this standpoint, the current discussion concerning the relationship between international humanitarian law and human rights may be regarded as an example of the lack of normative reflection in the doctrine of international law, which, until now has mainly been guided by pragmatic rather than theoretical considerations.) In his treatise "Ethik und Außenpolitik,"[7] Rudolf Kirchschläger has already pointed out the problematic nature of the discrepancies between the normative systems of international and individual conduct. He demands that consistency be achieved between international, national and individual principles of conduct by subordinating them to a general system of ethics. We view this demand as crucial with regard to the necessary unity of normative knowledge.

The present-day normative system of human rights was embodied in international law by the two Intercontinental Covenants which entered into force in 1976. The system is subdivided into individual freedoms (civil and political rights) and economic, social and cultural rights. Thus, these fundamental rights, which are derived from the principle of human dignity, are to be viewed as the *jus cogens* of international law as formulated by the United Nations. This follows especially from Resolution 2442 of the UN General Assembly of December 19, 1968 (formulated with respect to articles 55 and 56 of the UN Charter), in which the obligation of all members of the international community towards the realization of the fundamental rights was expressly formulated. The non-binding nature often attributed to the Universal Declaration of Human Rights (1948) was lost, at the latest, when this resolution

[7] In *Philosophie und Politik*. Ed. Hans Köchler, Innsbruck, 1973, pp. 69 ff.

of the General Assembly was adopted. From this point on, the principles of human rights have enjoyed the exclusiveness belonging to a normative system whose validity is presupposed (their precise foundation in natural law—or any other foundation these principles may have—does not concern us here). As a consequence of their exclusiveness, their validity cannot be nullified by any other normative system. In the realm of normative logic, there is only room for an either-or: Either one recognizes a normative system as universally valid and invalidates the norms of a subsystem which contradict it, or one rejects the whole system. This strictness is characteristic of normative validity; as we have seen, it is closely connected with the general scientific principle of contradiction and highlights the inconsistency of the contemporary system of international law as concerns its normative subsystems.

Principles such as *effectiveness* and *national sovereignty* are commonly regarded as essential principles of international law. It is possible to show, however, that neither is compatible with the (universal) validity of the principles of human rights which are also embodied in international law. This systematic inconsistency in contemporary international law presents a serious problem in terms of legal theory. Until now, this problem has hardly been confronted; rather, it has for the most part been obscured with declarations. It reveals that international law, when compared with domestic law, remains rudimentary and pragmatic. International law has hitherto evidently consisted of a conglomerate of norms formulated to solve the specific problems of international relations. The principle of effectiveness is a clear case in point. It stipulates that, before a community may be recognized as a state, an effective and stable government be established over the territory in question. This ultimately means that states or governments are to be granted legal recognition, even in cases where the permanently effective control exercised over a region was achieved by means of human rights violations or is maintained with the help of such violations (for instance, by military means).[8] Thus, the conspicuous recognition of the principle "*ex factis, i.e. injuria* [H.K.] *jus oritur*" is implied in the principle of effectiveness. Such a recognition ultimately amounts to the invalidation of any legal order whatsoever.[9] As a result, scholars of international law in this century have taken care to point out that this principle cannot be generally valid, that it must indeed be restricted through the principle "*ex injuria jus non*

[8] Cf. also Hans Kelsen, *Pure Theory of Law*, p. 337.

[9] Julius Stone has demonstrated this very clearly with reference to the conclusion of legally binding peace treaties in the wake of armed conflicts; in this context, Stone describes the application of the principle of effectiveness as a "morally outrageous rule" (*Quest for Survival: The Role of Law and Foreign Policy.* Cambridge, Mass., 1961, p. 62).

oritur."[10] They thereby oversee, however, that a norm cannot be valid "with restrictions." If the principle "*ex injuria jus non oritur*" is installed as a correction to the principle of effectiveness, then the latter loses its validity (in the strictly normative sense), for two contradictory norms cannot be recognized simultaneously. In our context, this means that the universal validity of the principles of human rights precludes the normative recognition of the principle of effectiveness. Let us suppose that this latter principle is nevertheless applied for the purpose of regulating interstate relations (especially with regard to the diplomatic recognition of states or governments). In such a case, if one were consistent—and if one wished to uphold the principles of human rights as the *jus cogens* of international law—one would have to admit that one is making use of a merely pragmatic criterion and not of a norm in the legal sense. A subordination of the normative to the factual is manifested in the assertion of the principle of effectiveness. International law (in the normative sense described above) is thereby reduced—as L. J. Bouchez has also hinted at[11]—to a pragmatic dimension in which it could be replaced by a social science of international relations without a concomitant loss of its theoretical foundation. From the perspective of legal theory, this arbitrariness goes hand in hand with the acceptance of the "normative power of the factual" and allows a sociologically founded theory of international relations to replace a systematic legal science as normative knowledge.[12] This arbitrariness displays itself on an almost daily basis in the diplomacy of state recognition, in as far as the recognition of governments is implied. The principle of effectiveness is often applied by a state in accordance with its own national interests—that is to say, if this principle does not run counter to the state's own national interests, an "effective" government will be recognized—regardless of whether this government brings about or exercises its rule in conformity with human rights. If the national interests—taken here in the broadest sense to be the considerations of foreign policy and power politics—are against the recognition of the "effective" government, the state abstains from applying the principle (which, after all, is purely pragmatic) and instead recognizes an "ineffective" government—a precedent which has been set my many states, as for instance in the case of Cambodia. In this instance, even states which had made human rights the guideline of their foreign policy were prepared to place the principle of non-intervention above the fundamental principles of human rights. These states thus recognized—for tactical reasons

[10] Cf. Alfred Verdross and 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 Tijdschrift voor International Recht*, vol. 9 (1962), p. 159. –In a more consistent systematic manner: H. Lauterpacht, *Recognition in International Law*. Cambridge, 1947, p. 413.
[11] Op. cit., p. 156.
[12] On the basic problem of the recognition of the principle of effectiveness as related to the validity of norms in general cf. Köchler, "Zur transzendentalen Struktur der Grundnorm", pp. 4ff.

pertaining to the international power struggle—the earlier *Khmer Rouge* government, which was driven from power (through measures which formally qualify as intervention) after committing human rights violations in the dimensions of a holocaust. In the cynical practice of states, as shown by this example, the principle of effectiveness can be applied at discretion and can also be replaced by the principle of non-intervention (in other words, the principle of state sovereignty) if the state policy so decrees. This practice is characteristic—as the case of Cambodia has taught us—of even those states which otherwise claim to place the principles of human rights above all other principles of international law and which oppose the thesis that violations of human rights should be viewed as belonging to the "internal affairs" of the state.

The principle of non-intervention—in its systematic connection with the principle of state sovereignty—presents a further example of the inconsistent nature of the current normative system of international law. According to Kelsen, the legal significance of sovereignty is comprised by the "unity and exclusiveness" of the system of law described as sovereign.[13] Hence, a sovereign system of law (in the strict sense of the word) cannot be subordinated to any other normative system. This leads to a contradiction between the principle of state sovereignty and the universal validity of human rights: When the organs of a state violate human rights, the unlimited validity of sovereignty is asserted (irrespective of the exemptions provided for in articles 5 and 6 of the UN Charter, which are inconsistent in terms of legal theory) as the practice of states has proved all too often. In this manner, an intervention with the aim of reinstating human rights is rejected as violating international law.[14] In international law, as a consistent system of norms, the binding force of the principles of human rights would be made possible only by abrogating the principle of sovereignty—and vice versa. Their coexistence is conceivable only in a pragmatic system that renounces normative stringency and that—according to the circumstances and factual considerations—prefers human rights in one instance and sovereignty in another and thereby abstains from systematizing the principles which serve as guidelines for decisions within its framework. The problematic nature of this contradiction between the norms of human rights and the principle of national sovereignty was seen especially clearly by the theoreticians of international law in

[13] *Das Problem der Souveränität...*, p. 189.

[14] This normative conflict is rooted in the Charter of the United Nations itself (Article 2, par. 7 ["Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…"] and articles 1, 55, 56 ["the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction…"]). – Cf. Rolf Gössner, "Der Menschenrechtsschutz im Rahmen der Vereinten Nationen. Internationaler Menschenrechtsschutz und Staatliche Souveränität," in *Demokratie und Recht*, vol. 6 (1978), pp. 266ff.

the former socialist states. These theoreticians, however—for reasons pertaining not only to the logic of norms but also to internal politics—opted for the primacy of national sovereignty and the principle of non-intervention.[15] –The claim to sovereignty stipulates that only a system which is neither contained in nor derivable from another system is sovereign.[16] On the basis of a theory maintaining the primacy of international law, let us suppose sovereignty to be the essence of a national entity's direct relationship to international law.[17] Let us further suppose that the claim to sovereignty (in the absolutist sense), which competes with the claim of international law to universal validity, is dropped. Even in this case, the conflict with the claim of human rights to universal validity fundamentally remains in as far as, at this level, the principle of non-intervention (as a criterion of sovereignty) is upheld as well. A theoretically stringent solution to this problem could only be achieved by a redefinition of the concept of national sovereignty in a way which rids the state of its power to make the ultimate decision on the status of human rights of its citizens. The path towards this solution has already been marked by the exemption clauses of the UN Charter quoted above and has been indicated by many theoreticians of international law in the West as the sole possibility of globally assuring human rights.[18] The attempt at integrating the concept of sovereignty into the normative context of a universal legal system—whose subject at any time can only be the individual person—points in this direction. In the end, only the individual person is sovereign, as he/she holds inalienable rights arising from his/her subjectivity, which cannot be reduced to the status of a mere object. Hence, the characterization of a community (of a state, if legally organized) as "sovereign" can only be of *derivative* significance. Such a community derives its claim to being accepted as independent (as opposed to being subordinate, having the status of a mere object) solely from its members' individual claim to sovereignty. This individual claim to sovereignty results from the irreducibility of the human person.[19] The claim is expressed, though, at a more fundamental level—even if only indirectly—in the conception of a universal community of international law to which each person—in his or her claim to being protected as an individual—is directly assigned. The sovereignty of the state as an entity in international law is thus of a merely derivative nature in a second sense: It can only exist if it

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[15] Cf. V. Chkhikvadze, "Human Rights and Non-Interference in the Internal Affairs of States," in *International Affairs*, Moscow, December 1978, pp. 22-30. – V. Kartashkin, "Human Rights and Peaceful Coexistence," in *Human Rights Journal*, vol. 9 (1976), pp. 5-20. – V. Kartashkin, "International Relations and Human Rights," in *Soviet Studies in Philosophy*, vol. 16 (Winter 1977/78), pp. 78-95. – Franciszek Przetacznik, "L'attitude des Etats socialistes à l'égard de la protection internationale des droits de l'homme," in *Revue des droits de l'homme,* vol. 7 (1974), pp. 175-206.

[16] Cf. Kelsen, *Das Problem der Souveränität*..., p. 13.

[17] Cf. Kelsen, *Pure Theory of Law*, p. 217.

[18] Cf. Otto Kimminich, *Einführung in das Völkerrecht*. Pullach bei München, 1975, pp. 81ff.

[19] On the "irreducibility" of the individual person cf. the treatise by the author, "Die dialektische Konzeption der Selbstbestimmung," in *Zeitschrift für katholische Theologie*, vol. 101 (1979), pp. 1ff.

respects the claim to self-fulfillment of the individual citizen as a member of the universal community of international law—and, indeed, respects the claim in such a way that the self-fulfillment of all individuals—even those living outside the territory of the state—is also recognized and accepted as the most general norm of the respective *national* legal system.[20] This provides a normative foundation for the concept of sovereignty in international law, based on ethical principles that relate to the individual[21]—which must certainly seem strange to those legal theorists who are used to the pragmatic nature of international law. This foundation, however, does not seem so unusual at all if one considers the attempts—made especially in the framework of the United Nations—towards a codification of a "new international economic order" in international law.[22] In particular, the discussion since the seventies of a new international economic order has greatly focused the attention of the internationally interested public upon the inconsistency inherent in the coexistence of conflicting normative systems. This discussion has also highlighted the necessity for constructing a unified system of norms that are legally practicable and that are founded on ethical principles. In this aspect, the current efforts in international law to codify the revaluated human rights—in the sense of fundamental economic and social rights—coincide with our concern for a normative unification of the legal system.

This means that the principle of national sovereignty derives its binding nature from the absolute claim to validity of the principles of human rights. If separated from the principles of human rights in general legal theory, the principle of national sovereignty would amount to no more than the abstract claim to a self-assertion of a neutral system; this principle would lead to a peace-threatening "anarchy among sovereign states" (*Souveränitätsanarchie*)[23] which characterized the era of imperialist nation-states thought to have been overcome.[24] Surmounting the dogma of national sovereignty—as Kelsen, too, demands[25]—is an essential precondition for the construction of a unified legal system.[26] In

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[20] The recognition of the individual as subject of international law, which follows from this, was, however, decisively rejected by the international law experts in the former socialist states—despite their special emphasis on economic and social rights. Cf. V. Chkhikvadze, "Human Rights and Non-Interference in the Internal Affairs of States," op. cit., pp. 28f.

[21] With respect to the principle of self-determination (which is closely related to the concept of sovereignty), Hans R. Klecatsky has referred to this systematic connection; he thus speaks of a "fundamental interrelationship of the functions of individual law and communal law" (in *Ausgewählte Gegenwartsfragen zum Problem der Verwirklichung des Selbstbestimmungsrechts der Völker*. Ed. Kurt Rabl, Munich, 1965, p. 184.)

[22] Cf. Milan Sahović, "The Universal International Law and the New International Economic Order," in *The New International Economic Order—Philosophical and Socio-cultural Implications*. Ed. Hans Köchler, Guildford (UK) 1980, pp. 49-54.

[23] Cf. Kimminich, *Einführung in das Völkerrecht,* p. 60.

[24] Similarly, Georg Schwarzenberger has criticized the concept of sovereignty as presenting an obstacle to an effective international legal system: *Über die Machtpolitik hinaus?* Hamburg, 1968, pp. 52ff.

[25] *Das Problem der Souveränität...*, p. 320.

such a system, the principles of human rights are consistent with the other constituent normative areas of international law. Hence, the contradiction between the ethics of the individual and inter-collective norms of conduct can be overcome.[27]

3. The Ambiguity of Legal Theory as Exemplified by the Discussion on the Status of International Humanitarian Law

We have tried to display the concrete significance of the postulate of the unity of normative knowledge by referring to the contradiction between the principles of human rights and the traditional principles of international law, as for example the principles of effectiveness and sovereignty. The degree of difficulty which the present-day science of international law still has in upholding this postulate is illustrated by the controversial discussion of the categorization of *international humanitarian law* in contemporary legal theory. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-77), conducted in the framework of the United Nations, postulated a connection between the normative systems of universal human rights and those of international humanitarian law. However, theoreticians of international law such as Henri Meyrowitz perceive therein a conceptual ambiguity causing a dangerous "state of confusion."[28] Seen from an historical perspective, one can certainly understand this criticism, if one considers that international humanitarian law had already been drawn up as a codex of rules of conduct at a time when the general principles of human rights were still treated outside the system of international law. (International humanitarian law was originally developed as a normative system to guide the treatment of the individual person in armed conflicts. It is almost impossible today to conceive that this normative system, in the context of traditional international law, tolerated the acceptance of the *jus ad bellum*. Indeed, it was through the latter that problems of protection were first created, which were thereafter dealt with by international humanitarian law.) Meyrowitz's criticism, however, remains systematically unjustifiable if one upholds the distinction between the context of discovery and the context of justification as providing the foundation of all scientific argumentation. If there is to be talk of conceptual ambiguity, one should rather point to it as lying in the

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[26] In connection with the growing awareness of the economic and social rights (as fundamental human rights), this development towards a redefinition of the concept of sovereignty is portrayed with exceptional clarity by Nicholas Greenwood Onuf: "The Principle of Nonintervention, the United Nations, and the International System," in *International Organization,* vol. 25 (Winter 1971), especially pp. 224f.

[27] Cf. also Rudolf Kichschläger, *Ethik und Außenpolitik*, op. Cit.

[28] "Le droit de la guerre et les droits de l'homme," in *Revue de droit public et de la science politique*, vol. 88 (1972), p. 1079.

separation between the areas of international humanitarian law and human rights. The rules assigned to both areas may, indeed, *factually* relate to different, regionally demarcated situations of the subjects affected; however, with regard to the normative *context of validity*, the system of human rights norms is of a more general nature, one from which the principles of international humanitarian law may be derived. This is the only satisfactory solution in terms of legal theory, as it is the only way to uphold the postulate of the unity of normative knowledge. If, however, one wishes at the outset to exclude human rights from the normative context of international law, one confronts a large body of protective clauses in international humanitarian law which cannot be derived from the general norms of international law and which, normatively speaking, are unfounded. Indeed, these clauses refer to a normative system that—in the sense described above—contradicts the general normative system of international law. Therefore, the above-mentioned reformulations undertaken in the framework of the United Nations are to be greeted as a step towards securing a better theoretical foundation for—and consequently the unification of—the traditional theory of international law. The United Nations has initiated a reconsideration of the normative system of international law, as attested to by the discussion of the principles of a "New International Economic Order."[29] To a great extent, this reconsideration also corresponds in a positive way to trends in the contemporary theory of international law, as precisely the discussion of the relation of international humanitarian law to human rights exemplifies. A rudimentary approach may be seen, for example, in the work of Jean Pictet, who subdivides international humanitarian law into the law of war and human rights.[30] He remains inconsistent, however, in as far as he evidently does not recognize the universal nature of human rights, instead equating them with the norms of a subsystem—the protection of the individual in times of peace—derived from them.[31] Otto Kimminich has depicted the systematic connection between both realms—for which we, too, argue—in a way which is more convincing in normative terms; he sees a basic obstacle to the unification of legal theory in the traditional concept of sovereignty, which until now has prohibited the principles of human rights from being applied to the national sphere.[32]

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[29] Cf. Wolfgang Friedmann's contributions towards laying a theoretical foundation of this new dimension of international law: *The Changing Structure of International Law*. New York, 1964. – S. Prakash Sinha has developed a similar approach ("The Anthropocentric Theory of International Law as a Basis for Human Rights," in *Case Western Reserve Journal of International Law*, vol. 10 [1978], pp. 469-502). For Prakash Sinha, the "anthropocentric needs of existence in the transformed relationship of man to the world beyond his state have to be met to a crucial extent on the international level." He sees therein a new task for international law (p. 500).
[30] *Le droit humanitaire et la protection des victims de la guerre*. Leyden, 1973.
[31] Cf. loc. cit.., p. 13.
[32] Cf. *Schutz der Menschen in bewaffneten Konflikten. Zur Fortentwicklung des humanitären Völkerrechts*. Munich, 1979, pp. 31f., 96f. –The reflections of Alessandro Migliazza also point towards theoretical unification

4. The Logical Reorganization of the Normative System of International Law and Human Rights: Outline of a System

This brings us back to one of our primary concerns: the theoretical reformulation of the normative systems of international law and human rights (whose contradictions we exposed above) in a way which eliminates their contradictions by creating an encompassing, unified system. This system should preserve the concern for peaceful coexistence, which is inherent in present-day international law but whose basis—as we would like to show—is decidedly *not* to be found in the traditional principles of sovereignty and of non-intervention, but rather in more fundamental principles. The norms of sovereignty and non-intervention are only a means—prescribed by the factual situation—for the realization of these fundamental principles. (We wish to sketch an universal system which is possible in regard to a consistent formal structure and which attempts to re-organize the factual situation of international relations within a consistent normative context. This context could serve as a frame of reference—at least a preliminary one—for the elimination of a cynical doctrine of "double standards" as manifested in the recognition of power politics as the decisive norm-shaping factor in international law.)

The conflict which we have depicted between the normative systems of international law and human rights still remains despite attempts—which are currently fashionable—to incorporate the latter into the former. It seems to us that we can only solve this conflict if we consistently uphold the postulate of the unity of normative knowledge; if we distinguish sharply between the various (general and specific) normative levels; and, in turn, if we differentiate the latter from the level of descriptive statements of factual events (these, however, may be part of a deduction with a normative conclusion). From the standpoint of this theoretical concern, we view the attempt to integrate general human rights into the normative system of existing international law (as largely characterizes the efforts of the United Nations) as misguided from the start. In keeping with this attempt, human rights may be recognized as the fundamental norms of the various national legal systems and of an international order of peace; as such, they may be laid down as the *jus cogens* of international law. At the very best, however, they still remain—as shown by the international law practice in the United Nations—equally ranked to the other traditional principles of international law, and indeed, in decisive cases—when national sovereignty is affected—they remain subordinate to these other principles. This inconsistency is by no means astonishing if one

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("L'evolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme," in *Collected Courses of the Hague Academy of Law*, vol. 137 [1972/III], pp. 141-241.)

considers that the "validity" of the norms of human rights in international law is thought to be based on the international law of contract,[33] which bases the validity of the *pacta sunt servanda* principle on the sovereignty of each state. This sovereignty is perceived as a supreme norm that is not founded in any more fundamental norm. In contrast to our considerations above, this sovereignty is seen as independent of the irreducible status of the individual as a subject which cannot be reduced to the status of an object and which is at the roots of any collective entity's status as a subject of international law (the latter's claim to sovereignty could only be legitimized by the individual "sovereignty" of the former). This state sovereignty is thus evidently ranked higher than the human rights of the individual; as a result, the universal validity of human rights is by necessity relativized. From the standpoint which takes the individual to be the final, irreducible element of any system of law, this conception of national sovereignty and of the state's exclusive status as a subject of international law appears insubstantial, indeed fictitious. This conception accordingly underlay the international law theory of the socialist states. This theory holds "the state" to be the sole authority (*seul maître*) having the power to decide when and to what extent the rights of the individual should be protected, as F. Przetacznik explained in his depiction of the policy of the socialist states.[34] The individual is thus surrendered to an anonymous authority, the legitimacy of whose rule is not questioned any further. The coexistence of the principles of the state and the individual as subjects of international law thus proves to be systematically unsatisfactory. To prevent the surrender of the individual to the overwhelming authority of the state, one must—in analogy to our reformulation of the principle of sovereignty—eliminate the contradiction between these principles in the following way: Legal philosophy must regard the state's status as a subject of international law as a *derivative* one, based as it is on the immediate subjectivity of the individual in international law. As the holder of inalienable rights, the individual person is directly related to the whole of humanity ("*civitas maxima*"). This relation does not need the mediation of any interposed collectives, from which—according to absolutist tradition—the individual would first have to be "granted" his or her rights. This conception of subjectivity in international law—which in a certain sense may be termed "nominalist"—exposes the relics of state absolutism in the normative system of contemporary international law; the theoreticians of the socialist states, of all people, seemed particularly unaware of the existence of such relics. Our conception seems to us to provide the

[33] This is similarly rejected by Hermann Meyer-Lindenberg, for he sees the positive recognition of human rights in the international law of contract as "justifying" only those rights "which do not belong to the core group of the elementary rights" ("Die Menschenrechte im Völkerrecht," in *Berichte der deutschen Gesellschaft für Völkerrecht*, vol. 4 [1961], p. 85).

[34] "L'attitude des Etats socialistes à l'égard de la protection des droits de l'homme," op. cit., p. 179.

only way out of the logical dilemma in the current discussion of human rights and international law.

The unity of a normative system as required by legal theory can only be attained in the following way: Human rights—which refer in every instance to the individual rather than to a collective "legal person"—must be regarded as a general normative system[35] from which the normative systems of both national and international law are derived (and not vice-versa). The "neutral" function of contemporary international law to ensure the coexistence among divergent legal systems[36] may in this manner be brought into accord with the other normative realms.[37] In the process, we must distinguish between various levels of normative regulations, whose validity as specific normative systems is founded in a general normative system in the form of a so-called "common third"—in line with Kelsen's model of the unification of normative knowledge[38]—, which serves as the unifying common denominator. The concrete normative systems lie on another—i.e. derived, secondary—normative level. The general normative system, however, may only be realized through them, whereby in the resulting conclusion a factual premise comes to bear. Through this normative connection, we hope to overcome the inconsistency of the current system of international law. The formal structure of this connection may be represented as follows: A *general* normative premise (P_n), in conjunction with a descriptive premise (P_d) (relating to facts), results in a normative conclusion containing a *specific* normative proposition. In this manner, the so-called "normative power of the factual" is reduced to its only tenable legal significance: Factual considerations may be incorporated into specific normative formulations, whereby one of the premises must always be a norm. With regard to the legal problem dealt with here, the formal connection may be concretely depicted as follows: Human rights, as codified by the United Nations in the form of fundamental economic and social rights (HR_1), can be regarded as the general normative system (P_n). These fundamental rights constitute a normative system whose final goal is the protection of the *physical integrity* of the individual. They thus provide the precondition for the civil and political rights (HR_2) which are traditionally subsumed exclusively under the concept of human rights. The fundamental economic and social rights provide the necessary precondition for the concrete significance of the civil and political rights. Without the recognition of the rights to securing one's existence in basic economic and

[35] This corresponds to the systematic approach laid down by Hermann Meyer-Lindenberg, op. cit., p. 85.
[36] Cf. Wolfgang Friedmann, op. cit., p. 85.
[37] With regard to the theory of international relations, the author has expounded this approach more thoroughly; cf. "Kulturphilosophische Aspekte internationaler Kooperation," in *Zeitschrift für Kulturaustaush*, vol. 28 (1978), pp. 40ff.
[38] Cf. above (section 1) as well as Kelsen, *Das Problem der Souveränität*..., pp. 104ff.

social terms, the latter rights would be meaningless; in other words, the latter must—as special norms guiding social interaction—imply these general norms (HR_1). Singling out the civil and political rights as an independent, and therefore absolute normative system—i.e., one ranked equally to the HR_1-area—would lead to a normative inconsistency which we intentionally wanted to avoid.

The traditional principles of international law, such as sovereignty and non-intervention, should by no means be introduced as premises into this logical scheme (this would lead to the theoretical problems discussed above). Rather, in our deductive model, they represent the *normative conclusion* which results if one combines the general normative system (HR_1), as the normative premise (P_n), with a descriptive premise (P_d), i.e. a statement about the factual situation. We can best demonstrate this by considering the discussion—in the context of international law—of the legitimisation of interactions which are undertaken to protect human rights (in the sense of civil and political rights [HR_2]).[39] If the norms of the HR_2-area are violated on the territory of a certain state, the general validity of the HR_1-system of norms must be taken into account in order to evaluate the legitimacy of a possible intervention. Therefore—the formal scheme outlined above suffice to back this assertion—a restoration of a state of affairs conforming with the HR_2-area should never lead to a negation of the validity of the norms in the HR_1-area, which we presuppose to be the most general normative premises in this consideration. As a descriptive premise (P_d), let us introduce the following factual observation: in the course of the intervention, which has the aim of restoring in a particular nation a state of affairs conforming with the HR_2-area, an armed conflict is unleashed with the government exercising the effective control over this territory in order to assist those individuals whose rights have been violated. This conflict results from the will of the affected territorial authority to maintain its power. Through the conflict, a state of affairs is brought about which is contrary to the HR_1-system of norms and which, therefore, negates the HR_2-area as well (due to the latter's derived nature). Given this descriptive premise, we are led to formulate as a conclusion the normative proposition that interventions—in the sense of violent interference in the internal affairs of a state—should be avoided. This formulation of the principle of non-intervention is negative (in the formal sense of the term) and could be understood as a "functionalist" formulation of the principle of sovereignty, for the latter is regarded as merely a function of the recognition of the validity of the HR_1-area. This

[39] The problem resulting from an ethnocentric interpretation of the HR_2-area—the discussion of which would have to precede any argument about the justification of intervention—cannot be treated at length here. In the formal theoretical context it is not relevant. It is, however, of prime importance in legal philosophy—insofar as it relates 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," op. cit.

formulation allows us to iron out the hitherto ambiguous situation in legal theory. The principle of non-intervention—in other words, of sovereignty—is no longer a norm which competes with the general validity of the normative system of human rights. Rather it is a norm which is *derived* in a process of deduction involving the normative premise HR_1 and a descriptive premise which is based on empirically observable structures of international relations. In this manner, the entire catalogue of norms of international law which have hitherto been classified is not discarded; it is merely systematically rearranged. One of the basic functions of traditional international law—to ensure the coexistence among sovereign states, as became particularly evident in the formulation of the principle of non-intervention—is thus maintained, albeit in a completely modified theoretical context. What has been hitherto held to be an unalterable general principle of international law—and thus by necessity has conflicted with the validity claimed by the norms of human rights—in this new context is only valid as a conditional principle, its precondition being a certain connection between normative and descriptive premises. In the context we have outlined, only the fundamental principles of human rights (HR_1) are introduced as a general normative system; all other norms—whether of national or international law—have a solely *relative* validity.[40] This normative reformulation of the entire context of international law sheds a different light on the traditional principles of the latter; it was not possible for a point of view which simultaneously incorporated conflicting normative systems to depict these traditional principles in this way. Until now, the claim to sovereignty of the states as subjects of international law has been understood as absolute; hence it has contradicted the rights of the individual. As a consequence of our reformulation, however, the present-day international politics of coexistence and peace within the framework of the United Nations can be interpreted more consistently and credibly—if one regards the respect for state sovereignty as conditional, i.e. as a necessary precondition to avoid circumstances which contradict the HR_1-area. Only this reinterpretation of the context of international law from the perspective of human rights ensures that international legal norms no longer contradict those principles underlying the norms of domestic law; as a result, this reinterpretation overcomes the "double standards" of former legal theory.[41]

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[40] Johannes Müller has a similar conception—albeit one in need of further systematic development—when he writes that "human rights are an integral part of true peace among nations and therefore have an unlimited claim to the structuring of the relations between individuals and peoples" (foreword to: Wilhelm Kaufmann, *Grundrechte und notwendige Völkergemeinschaft*. Basel, 1976, p. 7.)

[41] Rudolf Kirchschläger (going beyond our purely theoretical concern) has shown that a connection with the principles of individual ethics must, in the final analysis, be drawn; cf. "Ethik und Außenpolitik," op. cit., pp. 69ff.

5. The Inconsistency of an Absolute Principle of Effectiveness

We have redefined the status of the principle of sovereignty according to the postulate of the unity of normative knowledge; the only element contained in this principle which cannot be reduced to other normative categories is the principle of equality between the states as subjects of international law. In our theoretical endeavor, however, we must not stop short of the other pillar of present-day international law, the principle of effectiveness. The normative system of human rights may indeed be seen in a factual-political light; from this perspective, the respect for human rights at the national level supports a climate of peaceful international cooperation. If, however, we also view the system of human rights with regard to its significance in the context of the norms of international law (as we have attempted to do here), then we cannot so readily accept the contradictions referred to previously which arise from the recognition of the principle of effectiveness. This is above all the case if we are serious about the creation of a unified system of norms and if we refuse to subordinate the validity of norms to a principle which threatens the unity of the normative system itself. This principle assumes vast significance in the theory set forth by Kelsen, who introduced the principle of the "unity of normative knowledge." We will thus briefly deal with the contradictions in Kelsen's system which arise from the recognition of the principle of effectiveness. We will thereby clarify our demand for the primacy of human rights in any system of law. According to the point of view represented in the *Pure Theory of Law*, the principle of effectiveness in international law legitimises "a normative coercive order" as a valid legal order "for the territory of its actual effectiveness." According to the rules of international law, this is the precondition for the recognition of the respective community—which is constituted by this compulsory system of norms—as a state.[42] This principle of effectiveness—as a formal, "neutral" norm, so to speak—legitimizes virtually every political entity as a system of law, without regard for how the system came to establish its power and how this power is exercised.[43] As we demonstrated in the second chapter of the present paper, this contradicts the claim of the universal validity of human rights. In order to ensure a logically coherent and consistent normative system, the principle of effectiveness must either by wholly discarded or modified in such a way to permit it to be integrated into the overall system as a subsidiary norm.

[42] Op. cit., pp. 214f.
[43] Op. cit., p. 215.

According to Kelsen, the principle of effectiveness determines both *the reason for* and *the sphere of validity* of the national legal order.[44] Hence, the legal system of any given state is not legitimized by its conformity to human rights but rather solely by the extra-legal, pragmatic criterion posed by the successful assertion of government authority. The recognition of this principle in the sphere of international law corresponds to the doctrine of legal positivism in the *Pure Theory of Law*, which bind the "validity" of a norm to the effectiveness of the norm.[45] As a general principle of legal theory, effectiveness in the end reduces normativity to the level of the factual; it also relativizes the systematic claim of "pure" jurisprudence to demonstrating the *a priori* validity of norms which is supposed to lie beyond the empirical realm. Analogously, as a specific principle of international law, effectiveness reduces the question of the legitimacy of the normative system of a state to a context of power politics that can be described in sociological terms; regarded in a strict sense, jurisprudence is thereby transformed into social science. If a legal system is only "valid" as long as "its norms are *by and large* effective (that is actually applied and obeyed),"[46] then the concept of "normative" validity (as we tried to demonstrate in another context)[47] loses all meaning whatsoever. In this manner, the "normative power of the factual" is once again implicitly recognized as a principle. The same applies to the system of international law as formulated by Kelsen: The specific principle of effectiveness which is part of international law has the same systematic status as the *basic norm* of international law proposed by him, which—as a formal principle—is based solely on the factually observable international custom. Kelsen assumes that the basic norm of international law—the norm on which its validity is founded—consists in the rule that the governments of states in their mutual relations ought to behave in such a way—or coercion of state against state ought to be exercised—under the conditions and in the manner "that conforms with the custom contributed by the actual behavior of the states."[48] This amounts to no more than recognition of the principle of effectiveness—i.e. the factual assertion of state practices that are dictated by power politics—as a principle on which the validity of every norm of international law is based. If we postulate the effective practice of states to be "a law-creating fact,"[49] we by necessity give up all claims to a legal theory dealing with questions of the validity of norms. The system of human rights norms can only be integrated into such a conception of

[44] Op. cit., p. 336.
[45] Cf. op. cit., pp. 211ff.
[46] Op. cit., p. 212.
[47] Cf. "Zur transzendentalen Struktur der ‚Grundnorm'," op. cit., pp. 4f.
[48] *Pure Theory of Law*, p. 216.
[49] Ibid.

international law in as far as it corresponds to a "given international custom." What, then, lies at the crux of a positivist theory of law—such as that found in the *Pure Theory of Law*—with regard to international law? It appears that the lack of content in the formulation of specific norms—due to epistemological reservations—is less important in this regard than the implicit equating of the principles of effectiveness with the basic norm of international law. This excludes at the outset any determination of the normative content of international law on the basis of the principles of human rights. The basic norm of international law is thus subordinated to the empirical sphere comprised by the actual course of events—and this international practice has hitherto always disregarded human rights when "vital" interests have been at stake.[50] Hence, in terms of legal theory, by implicitly postulating the principle of effectiveness as a basic norm of international law, one cannot realize the theoretical concern in the *Pure Theory of Law*, namely the creation of a unified, consistent normative system. The general formulation of the principle of effectiveness amounts in itself to a relativization of the concept of the validity of the norm in the *Pure Theory of Law*; the specific formulation of the principle of effectiveness as a basic norm of international law constitutes a further restriction—additional to the formal aspect of normative validity. This restriction occurs because, through the principle of effectiveness, the system of international norms becomes bound to international custom—i.e. to the *past* practice of states. The significance of the legal norm is thereby completely lost. Any norm—whether moral or legal—constitutes an appeal to the free will and is thus directed towards a future practice. By presupposing the principle of effectiveness, Kelsen's legal theory precludes at the outset the possible definition of specific norms of human rights as the *jus cogens* of international law. This must lead us by necessity—analogous to what we demonstrated in regard to the concept of non-intervention—to recognize the principle of effectiveness as a merely derived (secondary) principle, in as far as it forms the conclusion in a scheme of deduction with the structure P_n/P_d (which we worked out above.)

6. The Revaluation of the Traditional Principles of International Law

With our theoretical approach, we have thus not tried to achieve the *invalidation* of the existing principles of international law, which are generally regarded as an essential precondition for the maintenance of peace. Rather, we have attempted a "*reformulation*" of

[50] In this critical analysis, the author is in the company of many theoreticians of international relations; cf. Georg Schwarzenberger, *Über die Machtpolitik hinaus?* Hamburg, 1968.

these principles by arranging them in a different normative context—that is to say, we have subordinated them to a universal (more general) normative system by means of a normative-descriptive scheme of deduction. Only in this way can one uphold the postulate of the unity of normative knowledge. This systematic effort interprets the principles of sovereignty and effectiveness as being merely derived norms and recognizes them as part of the system of international law solely by virtue of their relation to the general norms of human rights (HR_1). This effort may also help to expose the cynicism of a purely "pragmatic" foreign policy which regards the traditional norms of international law as something absolute and hence, when put to the test, evades the task of outlining the kind of scheme of deduction and evaluation described above. The recognition of the norms of international law and human rights as equally valid—irrespective of the contradictory nature of such an assumption in legal theory—has made it much easier for states to promote their own interests. Power politics has thereby been spared the scrutiny of moral standards; on the contrary, it has been provided with a convenient set of rules of international behavior as defined by "international custom." The citizen's claim to human rights has never been accounted for in this context of foreign policy. If one postulates the *normative primacy* of human rights,[51] as we have done, such practice is no longer possible. Rather, one is forced to group the specific norms of international law in relation to a universal system and to give each norm its specific (limited) status within the system. The system we have recommended grants the principles of the fundamental economic and social rights (HR_1) the central systematic status. In the context of this system, the question of the primacy of national or international law (as treated in depth by Kelsen) assumes a secondary significance for legal theory; both legal spheres appear as subsystems which are assigned to the system of fundamental human rights as the "common third." With regard to the relationship between national and international law, this construction is basically *monistic*.[52] It highlights how desperately the codex of contemporary international law needs to be reformed. Viewed in this new light, international law appears to be more a conglomerate of specific norms (created by the practical requirements of foreign

[51] The implicit recognition of this primacy can be seen in the formulation of a judgement of the International Court of Justice. This judgment makes mention of "elementary considerations of humanity, even more exacting in peace than in war" which should be viewed as the foundation for obligations in international law (*The Corfu Channel Case [Merits], Judgement of April 9th, 1949*: International Court of Justice, Reports, Leyden, 1949, p. 22 –Cf. also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*: International Court of Justice, Reports, Leyden, 1951, p. 12: "principles which are recognized by civilized nations as binding on States, even without any conventional obligation."

[52] This construction is not "monistic" as defined by Kelsen with regard to the subordination of one normative system to another (cf. *Das Problem der Souveränität*…., pp. 143ff.), but rather with regard to the subordination of both systems as subsystems to a universal "third" system.

policy)[53] than a consistent *system*. The integration of the norms of international law, which we have cited, into a general normative system is supported by a growing moral awareness of the international community, as documented in numerous resolutions of the United Nations General Assembly. This unification of the normative systems could lead to a better understanding between countries of the Third World on the one hand and the Western countries on the other. The normative analysis presented here may appear to be very philosophical and abstract; our concern has indeed been to outline an *ideal* construction that is to be understood in terms of legal theory and that hence does not confront tactical-political questions. However, the solution to the dualism of the normative systems of traditional international law and human rights seems to us a necessary precondition for a more rational discussion of the basic norms and rules of international relations. A normative reorganization—such as the one proposed here—which proves that the principles of effectiveness and sovereignty are not of a primary, but of a secondary, derived nature, is the only way to clarity the central role of international law for a world order of peace and justice among nations. In the words of Wilhelm Kaufmann, this central role lies in replacing the (national) "will to power" with the (transnational) "will to justice for all members of the human race."[54]

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[53] Cf. Wolfgang Friedmann, op. cit., p. 191.
[54] *Grundrechte und notwendige Völkergemeinschaft*. Ed. Johannes Müller. Basel, 1976, p. 39.