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1. METHODIC, METHODOLOGICAL, PHILOSOPHICAL, SOCIOLOGICAL ASPECTS, AS WELL AS ASPECTS OF LAW THEORY CONCERNING THIS PROBLEM

1. 1. METHODIC AND METHODOLOGICAL ASPECTS

The worsening of the current global problems of mankind such as the maintenance of peace or underdevelopment, pollution of the environment and the shortage of raw materials, together with the demand of the developing countries for the establishment of a new and just international economic order, as well as the increasing importance of the non-legal and results in the international process of the creation of norms and the formation of wills raise decisive questions for the creation of norms as a theory.

These problems are characterized by a high degree of *complexity* because they show political, economic, philosophical, sociological, psychological and legal aspects. Therefore a comprehensive method of testing is necessary, one which has to be based on the latest results of research work in several sciences, especally in philosophy, in the gradually emerging theory of international relations, in sociology, in the theory of law and, of course, in the science of international law. The problems mentioned include all continents and affect directly or indirectly the interests of all states. Through this they are characterized by globality. This therefore gives use to the urgent necessity of considering the interests of all states.

It is further necessary to know the relevant and representative documents from the most important groups of law and culture to overcome among other things the phenomenon of Eurocentrism that still can be met. At the same time the ability and readiness for a better understanding of the opinions is increasing presented by specialists of international law from the developing countries about international law and especially about the creation of norms[1]. Complexity and globality could be regarded as important principles of a *methodology of international law* that still has to be elaborated and has to meet the increaing requirements of the international relations of the present[2].

1. See more detailed P. Terz, Complexity, Globality and Universal-historical Approach as Methodological Principles of the Research in Social Sciences, in: Das Hochschulwesen, 5, Berlin 1981, p. 136 (German).

2. See an attempt made by me to do this: The Elaboration of a Methodology of

1. 2. PHILOSOPHICAL ASPECTS

The system of international relations existing in the objective reality is a complex of components among which we can find stable relations and dependences[3]. It concerns basically the relations between the different partners, state and non-state, of the international relations. Within the system of international relations there exists one system which includes the three subjects of international law (states, international state organisations and peoples fighting for their self-determination). The international inter-state system is included in it and is supported by the states as protagonists of the international relations and the main subjects of the international law[4]. Every system of the international relations depends on its operating.

Within the system of international relations the protagonists settle their relations and thus their conduct on different levels and in different fields. With this especially the sovereigh states start out from their own interests. But in view of the global problems they have to respect the general interests of the whole mankind considerably. Thus, it does not only refer to the special interests or the egoistic interests of individual states but rather to the relations between the sovereign states in the interest of the maintenance of peace.

The interests of the states have their roots in their own needs and are polydimensional and multisynthetical. They are influenced by inner-state determinants, by the social existence as the material conditions of life and existence (basis, productive forces, size and fertility of the territory, natural wealth, socially relevant geographical situation and climatic conditions, density of the population etc, further by their own superstructure) and by determinants in the international relations (international balance of power, obligation to one's allies, global problems of mankind, objectively caused interdependence, will of the peoples, international public opinion) as well as by sociopsychological factors (psychology of classes, instinct of self-preserva-

International Law - an Urgent Task of the Science of International Law, in: I. Wagner (ed.), Legal Theory and the methodological problems of legal science., Leipzig 1984, p. 221 (German).

3. See F. M. Burlatzki, Some Questions of the Theory of the international relations, in: Sowjetwissenschaft, 2,Berlin 1984, p. 123 and E.T. Rulko, Particularities of the Development of the System of International Law under the Present Conditions, in: Westnik Kiewskogo Universiteta, 15, Kiev 1982, p. 12 (Russian).

4. See also D. I. Feldman, The system of international law, Kasan 1983, pp. 53 (Russian). Other specialists of international law tend to the opinion to see the international law as a complex of norms. See G. Morelli, Nozioni di diritto internazionale, Padova 1963, p. 6 and T. Gihl, The legal character and Sources of international law, in: Scandinavian Studies in Law, vol I, Uppsala 1957, p. 51.

tion in view of a thermonuclear inferno and the climate of mutual confidence).

The interests have objective character independently of their representatives and objects of reference. Thus, safeguarding world peace is in accordance with the objective interests of all peoples and nations. But because the interests are a link between the material and the ideological (motives, intentions, wishes etc), and the latter influence the course of the activity in the sense of a realization of interests in a determined, mobilizing and organizing way, one can also speak of subjective interests[5]. Especially in the nuclear-cosmic era it is important to reach a *balance of interests* on the basis of mutual *compromises.*

The interests are the basis for the will and shape it. More than that, the will rests upon the legal consciousness and is converted into legal norms, that means it is formulated as the general potentiality of conduct and as the call, for conduct. Thus, the nature of the will in law is expressed by causing generally binding ways of acting. In doing so the term of will includes recognition, decision and action in their unity if one speaks in terms of the creation of norms[6].

But in international relations one cannot orient oneself according to the will of every single state. It just concerns the fact that the norms in consideration are the product of the will of several states[7].

If one observes the problem of will and interest the process of the creation of norms within a system of international relations can be explained relatively convincingly. But more than that, one also has to bear in mind ethics and moral, as well as especially justice. In view of the existence of states with different social order and different cultural groups there are big problems to be considered. According to my opinion it might be possible and should be necessary to elaborate criteria measuring what is regarded as moral and just in the nuclear-cosmic era. The criteria should be acceptable for all states within the meaning of a minimum consent independent of the social order, the cultural group and the international law in their interrelation are proposed as criteria in this document. According to it is moral and just under the conditions of the nuclear-cosmic era if it contributes to a gradual solution of the global, problems on the one hand and corresponds to international law

5. With regard to the relationship between the objective and the subjective side of the interests see G. Klaus-M. Buhr, Philosophisches Wörterbuch, vol. I, Leipzig 1974, p. 583.

6. See especially W. Grahn, The Law as a special reflection of society, in: Staat und Recht, 2, Berlin 1982, p. 165 (German).

7. See similarly also D. Touret, Le principe de l'égalité souveraine des états; fondement du droit internationale, in: Revue générale de droit international public, 1, Paris 1978, p. 184.

If international law is restricted to the associated field without considering the creation of norms and the implementation of norms there would not be any difference between international law and the new science "theory of international relations".

Anyway, there would be the danger of nihilism in international law. It would be useful for the indispendable elaboration of a *sociology of international law* (peace, disarmament, social orders, groups of states, alliances, interests of states) and especially the process of the creation of norms (interest in concreto, conduct, political and moral norms) to a greater extent. But in doing so, a "theory of international relations" would become nearly useless. The latter concentrates on such categories as balance of power and interest whereas international law mainly concentrates on the maintenance of world peace, on law and justice. As mentioned above, also in this context do the interests of mankind and of the states play an important role.

1. 4. ASPECTS OF A THEORY OF LAW

The differences between international law and internal law of state especially with regard to the sources of law, the legal subjects and the mechanisms of implementation are in no case able to eliminate the legal character of international law. Thus, the science of international law is mainly a science of law. The jurists of both law systems think in nearly the same categories and use the same legal instruments. By this there exists the great possibility of enrichment between the general theory of law and the theory of international law.

Especially in the field of the creation of norms the theory of international law, more exactly the theory of the creation of norms, can use the following basic and special insights from the general theory of law and uses them accordingly: The norm creation process is influenced by the objective reality through subjective perception, recognition and assessment; the subject of norm creation in its totality is embedded in the social conditions; the existence of a subject for the creation of norms as well as for its necessity, adequacy and possibility for standardization does not mean that there exist already adequate norms; the process of the creation of norms is muli-dimensional including many factors, such as material, ideal, objective, subjective, political, economic, ideological, cultural, ethic, religious etc.; the legal consciousness which belongs to the ideological and ideal determinants exists in form of opinions on law, demand from the point of view of law policy and reflects the need, ability and adequacy for standardizing the social conditions; the legal consciousness and the legal principles; the reflection in law is of partial, volitive and

axiological nature; law is a generally binding measure for all target groups for the norms. They are the main form to implement legal norms and refer to the rights and obligations of the legal subjects[10].

2. BASIC PROBLEMS OF THE PROCESS OF CREATING NORMS IN THE THEORY OF INTERNATIONAL LAW

2. 1. THE CONSENTUAL AND PROCESSUAL CHARACTER OF THE CREATION OF NORMS

Factors which have their roots in the states as well as in the international relations force the sovereign states to establish relations with one another and to make their conduct agree with each other. Within the limits of this process of dispute and cooperation they coordinate their interests and create general rules of conduct for all. The conditio sine qua non for this is the consensus (consent) of the states[11]. The consent of the states does not come into existence automatically and does not represent a unique action. It rather possesses a relatively high degree of becoming a process in the sense of a mechanism of provisions[12]. The consentual and dialectical character of the process of the

10. These findings wereelaborated mainly by the distinctive theoretician of law Ingo Wagner (compare especially his contribution pointing the way "Socialist Law and Legal Superstructure", Leipzig 1982); W. Grahn ("The Legal Norm - A Study, Leipzig 1979) and K. A. Molnau (Problems of a Theory for the Establishment of Law", Berlin 1982). See also, more detailed P. Terz, The Science of international law as a politico-legal science-academic ideas and positions about a science, in: I. Wagner (ed.) The marxist-leninist Science of international law aw a science-problems, perspectives, Leipzig 1986, p. 240 (German).

11. My theory of the creation of norms differs in many points from the theory of accordance by H. Triepels and that by G. Tunkin. It was presented mainly in the following publications and further developed: "For a modern theory of accordance in the international law. Theses. in: "Impact of International Organizations on Public Administration, Budapest 1982, p. 209;"The process of the creation of norms in the international relations and especially in international law", in: I. Wagner (ed.) Socialist Law and Legal Superstructure, Leipzig 1982, p. 282; "The theory of accordance in the international law. Theses for a discussion", in: Wissenschaftliche Zeitschrift der Karl-Marx-Universität, 3, Leipzig 1984, p. 328; "The problem of the transfer of technology in the viewpoint of a modern theory of the creation of norms in the international relations and especially in internatinal law", in W. Schoenrath "Economic and legal aspects of the transfer of technology to the developing countries", Leipzig 1984, p. 106; "The theory of the creation of norms (A study of philosophy, sociology and law theory according to international law" published as vol. XXXIV, fasc. 9 of the Acta Universitatis Szegediensis, Acta Juridica et Politica, Szeged 1985, p. 50; "Mechanisms of regulation in the system of rules of the international relations and especially in international law, in: I. Wagner (ed.), Object and method of hte legal regulation, Leipzig 1985, p. 193 (German).

12. Also P. M. Dupuy points to the processual character of the creation of norms, see his contribution "Sur la Spécifité de la norme..., ibid. p. 137.

creation of norms can be deducted from it —taking this as the basis, one can speak of a process of the formation of will in the international relations.

The consentual and dialectical process of the creation of norms and the formation of will starts with the fact —and this is the most general form of the presentation— that one or more states at the same time or at a different point of time recognize certain problems. First they realize that certain problems exist at all. Gradually a general consent (consensus generalis) comes into existence. Then some or several states see the importance of the problem. Gradually a consensus generalis is reached about this, too. The degree of importance depends to a great extent on the interest of the respective state. Through perception, recognition and assessment of the problems the necessity and adequacy of provisions or the necessity or adequacy of norms is recognized by the states. States which are interested get into contact with each other to find solutions for the problem through mutual compromises. Then the consent of the states extends over questions of procedure which have to be settled.

The next stage which is theoretically possible in the consentual process of the creation of norms refers to the settlement of the substantial questions. Interests, will, legal consciousness and sense of justice play an important role in this decisive stage. In the course of the negotiations the states try to reach a balance of interest. The degree of difficulty of the balance of interest depends on the field that is discussed and on the political point of view of the negotiating partners. In the process of the negotiations the participating states coordinate their interests and wills. The result of this process is the expression of their consent with regard to the content if one looks at it from the point of view of a high level of abstraction and it is embodied in bilateral and multilateral treaties, in resolutions of the UN General Assembly and of other international organisations, in the final acts of conferences, in declarations of intention, recommendations etc. They all can be characterized as rules of conduct. Thus, the consent of states refers to content and form of the international documents that are accepted.

But often nothing is said about the types of norms and about the character of the different concrete forms of result of the consentual process of the formation of will or there exist different opinions about them among the participants.

With regard to the character of the forms of result and the type of norms one has first to consider the fact that the states as political forms of organisation in the total system of international relations and thus of the unified international process of the creation of norms create political *rules of conduct,* i.e. *political norms.* As a rule they decide together (consensus) whether these

political norms have *legal* or *non-legal* character. Their intention (intentio) or their will (voluntas) are decisive in this process.

If it is a matter of intentions or will to establish rights of international law and to take upon obligations according to international law and to create *politico-legal* norms with it, then the terms *intentio iuris* (juridical intention) and in international treaties *intentio iuris generalis* (general juridical intention), *voluntas iuris* (legal will) and in international treaties *voluntas iuris generalis* (general legal will) are proposed. From the point of view of the theory of accordance —and inter— national law is a law of accordance —a coordination of wills takes place resulting in the conformity of wills in the form of concrete rights and obligations according to international law[13].

If the character of the form of result is already clear at the beginning of the negotiations, e.g. if it is a matter of the elaboration of a treaty, then one can speak of a politico-legal process of the creation of norms and the formation of wills (hence politico-legal forms of result, i.e. *politico-legal* norms and juridical normativity of the binding nature of law) and not of a standardized process of the creation of norms and the formation of wills.

But if it is a matter of intention or will to create *politico-non-legal* norms then e.g. the term *intentio politica* (political intention) is suitable and hence in intenational politico-non-legal documents *intentio politica generalis* (general political intentio) or *voluntas politica* (political will) and consequently in international documents of such character *voluntas politica generalis* (general political will). It is characteristic of politico-non-legal documents to express a general opinion (*opinio communis*) and a general political opinion (*opinio politica generalis*). They are further an expression of a relevant consensus generalis which cannot change anything in the fairly different motives and objectives of the states in question, especially if it is a matter of states with different social orders.

If it is clear at the beginning of the negotiations that the result will be of

13. See for this problem especially the Soviet specialist in international law G. Tunkin (Bases of a Theory of International Law, Moscow 1956 and "Questions of the theory of international Law, Moscow 1962, both in Russian; Law and Force in the International System, Moscow 1983) who is one of the founders of the socialist theory of agreement of international law. His concept regarding the theory of agreement does not find undivided agreement any longer among the specialists of international law in the socialist states. The theses of the "instant customary law" (see Bin Cheng in: The Indian Journal of International Law, Bombay 1965, p. 33), of the "diritto spontaneo" of the Italian doctrine of international law and of a "coutume révolutionaire" (see M. S. ad-Daqqaq, For an International Law of the Development of Preventatice Equality contrary to compensatory Inequality, in: Révue egyptienne de droit international, vol. 34, Le Caire 1978, p. 91 (Arab).

politico-non-legal, then one can speak without any doubt about a *politico-non-legal process* of the formation of wills and the creation of norms (hence politico-non-legal forms of result i.e. politico-non-legal norms and political moral normativity and binding nature of the law). If there exist only general objectives and programmes we would propose the term *punctationes.*

Because of the dialectical interrelation it is absolutely possible that non-legal norms include legal elements or can develop to legal norms under the condition that the voluntas iuris (with the norm of treaty law) or the opinio iuris (with the norm of custom law) exists.

In the further stage of the process of the creation of norms the consent of the state refers to the acceptance of a created norm of conduct as binding (juridical or politico-moral). Finally, the consent extends over the willingness of the states to act according to the accepted norms of conduct, i.e. the willingness to keep to them.

The norms of custom law of the nations belonging to the juridical forms of result of the process of the creation of norms show some particularities with regard to their origin and the gradual extension of the validity compared with other legal norms. Their acceptance and recognition is realized on the basis of consent.

The process of the creation of norms regarding this refers first of all to the existence of a habit (usage). Hereby it is a matter of the consent about the opinions about the existence of a habit (usage). The opinions are based on the same needs which form the basis for similar interests[14]. According to this the consent extends over the content of the usage. It is further a matter of the state consent whether this usage is of any importance at all. Having discussed this a consent can be reached about the fact that the usage has already the quality of a legal norm. This process is a dialectical one because it takes place gradually and implies two elements which are mutually dependent: a stable pattern of conduct (exercise, practice) of the respective states; the legal conviction (opinio iuris) expressing their will. The states behave in the same way[15], i.e. the consent comes into being through unanimous conduct[16].

According to the theory of the creation of norms some problems arise if

14. See partly similar also B. J. Theutenberg, Changes in the norm guiding the international system-history and contemporary trends, in: Nordisk Tidsskrift for international Ret, Acta Scandinavica juris gentim, 1-2, Kobenhavn 1981, p. 29.

15. See also L. A. Podesta-J. M. Ruda, Derecho International Publico, 1, Buenos Aires 1979, p. 15.

16. See similarly A. J. P. Tammes, Soft Law, in: Essays on international and comparative law in honour of judge Erades, The Hague 1983, p. 194.

one norm of the international custom law already exists and shall be extended. It is very seldom that the states realize such a norm expressis verbis. They rather express their accordance by a certain conduct. In such a case the state conduct is reached on an individual basis, i.e. it is consented with the result of the consent of the states which have created the possible norm. With the norms of the international sustom law the problems of the coordination or conformity of wills does not arise. In concreto, it means that the nature of the norms of the international custom law cannot be understood with the usual theory of accordance[17].

2. 2. THE NON-LEGAL NORMS AS A FORM OF RESULT OF THE PROCESS OF THE CREATION OF NORMS

If one wants to create a hierarchy of the non-legal norms the peace principle has to be the most important. The position of all the other non-legal norms in the hierarchy should follow according to their contribution to the maintenance of peace. If this premise is the starting point then one could name the political principle of disarmament —here we can find that legal elements emerge gradually— and the principle of the military-strategic balance. These principles are connected to the principles of equality and equal security. Concrete norms of conduct, as agreed upon in political agreements such as the Final Act of the Conference on Security and Co-operation in Europe (Helsinki) of 1975 must be deducted from these political principles which are especially important. The same is valid for such international documents as the Declaration of Stockholm on Confidence-bulding Measures and Disarmament of September 1986. These political documents bear politically normative character and can sometimes reflect the aims of the states more comprehensively than treaties according to international law. Compared with these international documents the international discussion of specialists on the character of resolutions of the UN General Assembly took a completely different direction. Especially in connection with the numerous resolutions about the New International Economic Order some enigmatic but not

17. G. I. Tunkin is aware of this problem if he writes, "The nature of the process of the development of a habitual norm of international law does not consist in negotiations but in the development of agreement between all states ...". See The International Law of the present, Berlin 1963, p. 136, (German). "Agreement" is a fixed term in law which in my opinion cannot be used for concentual processes without negotiations without any further ceremony.

necessarily convincing terms were coined, such as "soft law"[18], "green law", "instant law", "pré-droit" (pre-law)[19], "para-droit" (nearly law), "droit déclaratoire" (declaratory law), "droit recommendaire" (recommendative law), "droit pogrammatoire" (programmatic law)[20], "droit directif" (directive law)[21], "droit incitatif" (incentive law), "soft obligation" etc. These terms were rejected in the meantime by some specialists of international law. P. Weil is one of them who attacked them most[22].

The terms mentioned above in a short way are connected with resolutions of the UN General Assembly by content. According to my opinion they belong to the most important non-legal forms of result of the international process of the creation of norms. We know from the reality of the international relations that it is very seldom that a *consensus omnium* exists relating to a resolution. The result of the negotiations of the UN General Assembly which find their expression in such resolutions can only be a *consensus generalis.* The consensus omnium and with that the *opinio communis* is, however, not excluded in subject-matters which are not so problematic.

Although they are non-legal by nature resolutions of the UN General Assembly possess great importance in the international relations: They reflect the caracter of the relations between different states and at the same time they point to the latest and most important problems in the international life; they are able to influence the conduct of the states considerably; they are often the expression of the legal consciousness and the sense of justice of the states; in the bounds of a standardized process of the creation of norms they can be the starting point for the establishment of standardized legal norms[23]; on the basis of a resolution can international custom law emerge as well, if the opinio iuris

18. See especially J. P. A. Tammes, Soft Law, ibid. He enumerates the posibilities of "soft law". For the idea of "soft law" in treaties of economic character see more detailed J. Gold, Strengthening the soft international law of exchange arrangements, in: The American Journal of International Law, 3, Washington 1983, pp. 443-456.

19. This thesis is represented by some French specialists of international law, such as C.-A. Colliard, Institutions des relations internationales, Paris 1974, p. 276.

20. See e.g. R. J. Duruy, Droit déclaratoire et droit programmatoire: De la coutume sauvage à la "soft law", in: L'élaboration du droit international public, Paris 1975, p. 132.

21. See e.g. I. F. Prevost, Observation sur la nature juridique de l'Acte Finale de la conférence sur la sécurité et la cooperation en Europe, in: Annuaire Francais de Droit International, Paris 1975, p. 142.

22. See P. Weil Vers une normativé relative en droit international? in: Revue générale de droit international public, 1, Paris 1982, p. 142. At the same time he defends sucessfully the normative character with regard to international law.

23. In this sense they can already be regarded as "sources for inspiration". See O. B. Rivero, New Economic Order and International Development Law, Oxford 1980, p. 122.

exists imperative for it[24].

Finally the main features of the theory of the creation of norms in the nuclear-cosmic era presented in this paper should be summarized. It is possible that the difference to the theory of agreement by Tunkin will become more evident:

1. The peaceful coexistence is the dialectical unity of peaceful international cooperation and dispute in civilized forms. It means the side-by-side existence in the interest of the maintenance of peace.

2. Peace is the highest possession of mankind; the peace principle is therefore the most important political principle of our time.

3. The maintenance of peace is the main function of international law which therfore is peace law.

4. In view of the global problems of mankind the humanistic nature of international law is strengthened.

5. Everything that serves the solution of the global problems of mankind is moral and just. This modern understanding of justice is based on a minimum consent.

6. In the nuclear-cosmic era can states with different social systems express absolutely concurrent and common in the international relations and especially in agreements of all kinds. Mutual compromises are indispensable to reach them.

8. The interests of manking which exist without any doubt or the interests of peace possess absolute priority as regards the interests of the states.

9. Not the single state but the close-meshed system of relations between states is in the centre of attention of the international relations.

10. A global system of international relations exists at present. Its main parts are the relations between the states. In this system is the conduct of the states regulated by corresponding norms.

11. The norms of conduct are the result of the coordination of wills (process) and finally of the conformity of wills (result).

12. The creation of norms in the international relations is a consentual and dialectical process. Basically the process of the creation of norms is the same wherever it is done. But it can lead to different forms os result (norms) (legal and non-legal). Therefore one must differentiate between legal and

24. See also G. R. Moncayo for the relationship between resolutions and international custom law (G. R. Moncayo-R. E. Vinuesa-H.D.T. Gutierrez Posse, Dereche International Publico, vol. I, Buenos Aires 1981, p. 90 and G. Arangio-Ruiz, The normative role of the General Assembly of principles of friendly relations, in: Recueil de Cours, Academie de droit international, III, 137, Den Haag 1972, p. 478-479.

political norms and the norms of moral.

13. Therefore one can also differentiate between legal, and political norms obligation.

14. The norms of the international custom law are also the result of the consentual process of the creation of norms and not of a concrete agreement.

15. On the basis of UN resolutions custom law can come into being if there exists the opinio iuris.